FEDERAL REGISTER

Vol. 89 Tuesday,
No. 89 May 7, 2024

Pages 37965–38836

OFFICE OF THE FEDERAL REGISTER

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS–SC–21–0089]

Almonds Grown in California; Amendments to the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rulemaking amends Marketing Order No. 981, which regulates the handling of almonds grown in California. This final rule modifies the definition of almonds and shelled almonds, establishes a definition for ''almond biomass,'' and changes dates when the Almond Board of California (Board) conducts elections to coincide with assessment collections and when the Board submits volume regulation recommendations to USDA. The amendments modify certain marketing order provisions to facilitate orderly administration of the program. Additionally, the amendments modernize, simplify, or align language with current industry practices and definitions.

DATES: This rule is effective June 6, 2024.

FOR FURTHER INFORMATION CONTACT: Thomas Nalepa, 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, Fax: (202) 720–8938, or Email: *Thomas.Nalepa@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 final rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (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 Board locally administers the Order and is comprised of growers and handlers of almonds operating within the area of production.

The Agricultural Marketing Service (AMS) is issuing this final 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 final 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 final 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 final rule has also been reviewed under Executive Order 12988, Civil Justice Reform. This rule shall not be deemed to preclude, preempt, or supersede any State program covering almonds grown in California.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608c(15)(A)), any handler subject to an order may file with 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 section 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 section 8c(17) of the Act and the supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders depending upon the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments in this final rule are not unduly complex, and the nature of the amendments is appropriate for utilizing the informal rulemaking process to amend the Order. This final rule encompasses changes that are primarily administrative or modernizing in nature. Following are the amendments voted on and the results for each:

- Amendment 1—''Modifying the definitions for ''Almonds'' and ''Shelled

almonds,'' adding a definition for ''Almond biomass,'' changing the term ''Control Board'' to ''Board,'' and replacing listed approved outlets for inedible kernels with the term ''accepted users.'' This amendment was favored by 86.61 percent of voting almond producers, representing 94.99 percent of the production volume voted in the referendum.

- Amendment 2—''Changing the date from December 31 to March 31 for determining handler weighted votes in the nomination process for handler positions on the Board.'' This amendment was favored by 85.63 percent of voting almond producers, representing 94.28 percent of the production volume voted in the referendum.
- Amendment 3—''Changing from August 1 to September 1 the date the Board is required to submit volume regulation estimates/recommendations to the Secretary of Agriculture.'' This amendment was favored by 86.61 percent of voting almond producers, representing 93.02 percent of the production volume voted in the referendum.
- Amendment 4—''Removing language that requires separate accounting of certain excess funds and sets the reserve fund limit at approximately six months' ''expenses'' instead of six months' ''budget.'' This amendment was favored by 84.59 percent of voting almond producers, representing 80.65 percent of the production volume voted in the referendum.
- Amendment 5—''Adding authority for the Board to accept advanced assessments from handlers or borrow funds from commercial lenders.'' This amendment was favored by 63.59 percent of voting almond producers, representing 56.15 percent of the production volume voted in the referendum.

These changes simplify, clarify, or align Order language with current industry practices and definitions. A discussion of the potential regulatory and economic impacts on affected entities is discussed later in the ''Final Regulatory Flexibility Analysis'' section of this final rule. The amendments apply equally to all producers and handlers, regardless of size. The amendments also have no additional impact on the reporting, record-keeping, or compliance costs of small businesses.

The Board unanimously recommended seven proposed Order amendments following deliberations at a public meeting held on August 11, 2020. The Board submitted its formal recommendation to amend the Order through the informal rulemaking process on August 9, 2021. This final rule will amend the Order by modifying the definition of almonds and shelled almonds, establishing a definition for ''almond biomass,'' and changing dates when the Almond Board of California (Board) conducts elections to coincide with assessment collections and when the Board submits volume regulation recommendations to USDA.

A proposed rule soliciting public comments on the proposed amendments published in the **Federal Register** on April 27, 2023 (88 FR 25559). AMS received one comment in support of the proposed rule. After reviewing the comment, AMS republished the proposed rule without substantive change along with the referendum order in the **Federal Register** on October 4, 2023 (88 FR 68500). For the purposes of the referendum ballots, AMS combined Proposals 1, 3, and 4 of the republished proposed rule and referendum order. These were combined into Amendment 1 because they each simplify and modernize language to align the Order with current industry practice. Therefore, the seven amendments in the originally proposed rule yielded five amendments on the referendum ballot. The proposed rule and referendum order directed that a referendum among California almond growers be conducted from October 30, 2023, through November 20, 2023, to determine whether they favor the proposals. To become effective, the amendments had to be approved by either two-thirds of the producers voting in the referendum or by those representing at least two-thirds of the volume of almonds grown by those voting in the referendum.

During the referendum, producers showed overwhelming support for Amendments 1, 2, 3, and 4, referenced above, which were related to definitions and timeframes. Amendment 5, which would have added authority for the Board to accept advanced assessments from handlers or borrow funds from commercial lenders, failed to achieve two-thirds support from producers by vote or volume voting.

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 7,600 almond growers in the production area and approximately 100 handlers subject to regulation under the Order. In the previous proposed rule published in the **Federal Register** on April 27, 2023 (88 FR 25559), the small agricultural almond producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $3,250,000, and small agricultural service firms are defined as those having annual receipts of less than $30,000,000 (13 CFR 121.201). Since that publication, the SBA updated the definition of small businesses to those having annual receipts of less than $3,750,000 for producers (Tree Nut Farming, North American Industry Classification System code 111335), and $34,000,000 for handlers (Postharvest Crop Activities, North American Industry Classification System code 115114) (13 CFR 121.201). Thus, AMS changed the thresholds to reflect the new SBA thresholds in this final rule. The changes do not impact AMS's ultimate determination regarding the impact of the rule on small entities.

The National Agricultural Statistics Service (NASS) reported in its 2022 Census of Agriculture (Census) that there were 7,596 almond farms with bearing acres in the production area. Additionally, the Census indicates that out of the 7,596 California farms with bearing acres of almonds, 4,805 (63 percent) have fewer than 100 bearing acres.

In its annual *Noncitrus Fruits and Nuts* publication, NASS reported a 2022 crop year average yield of 1,900 pounds per acre (shelled basis) and a season average grower price of $1.40 per pound. Therefore, a 100-acre farm with an average yield of 1,900 pounds per acre would produce about 190,000 pounds of almonds (1,900 pounds times 100 acres equals 190,000 pounds). At $1.40 per pound, that farm's production would be valued at $266,000 (190,000 pounds times $1.40 per pound equals $266,000). Since the Census indicated that 63 percent of California's almond farms are less than 100 acres, it could be concluded that the majority of California almond growers had annual receipts from the sale of almonds of less than $266,000 for the 2022 crop year, which is below the SBA threshold of $3,750,000 for small producers. Therefore, the majority of growers may be classified as small businesses.

To estimate the proportion of almond handlers that would be considered small or large businesses, it was assumed that the unit value per pound of almonds exported in a particular year could serve as a representative almond price at the handler level. A unit value for a commodity is the value of exports divided by the quantity exported. Data from the Global Agricultural Trade System (GATS) database of USDA's Foreign Agricultural Service showed that the value of almond exports from August 2022 to July 2023 (shelled equivalent, combining shelled and inshell) was $4.117 billion. The quantity of almond exports over that time-period was 1.784 billion pounds. Dividing the export value by the quantity yields a unit value of $2.31 per shelled pound ($4.117 billion divided by 1.784 billion pounds equals $2.31).

NASS estimated that the California almond industry produced 2.511 billion pounds of almonds in 2022. Applying the $2.31 derived representative handler price per pound to total industry production results in an estimated total revenue at the handler level of $5.80 billion (2.511 billion pounds times $2.31 per pound). With an estimated 100 handlers in the California almond industry, average revenue per handler would be approximately $58.0 million ($5.80 billion divided by 100). Assuming a normal distribution of revenues, most almond handlers shipped almonds valued at more than $34,000,000 during the 2022 crop year. Therefore, the majority of handlers may be classified as large businesses.

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

The amendments to the Order are modernizing in nature and align Order provisions with current industry definitions and practices. They define commonly used industry terminology and simplify language to more broadly identify disposition outlets of almonds.

Additionally, the amendments are necessary to adjust or align dates to allow for the inclusion of more available data when determining weighting of handler votes for Board nominations and providing volume regulation recommendations to the Secretary. These changes do not impact how volume is calculated for handler vote weighting, materially affect crop estimates, or adversely impact Board activities.

Finally, these amendments remove language that distinguishes between funds for administrative-research and funds for marketing promotion activities in the accounting of excess funds. It also sets the reserve fund limit at approximately six-months' expenses instead of the current six-months' budget. This is an administrative adjustment that provides technical clarification on the accounting of assessments and reserves. It does not impact the percentage of assessments available for refund, nor does it materially impact reserves.

The Board considered the benefits and costs of maintaining the status quo as an alternative to this action. However, AMS believes the amendments are beneficial in either clarifying or updating the language of the Order for industry or improving the Board's continuity of operations at no additional costs to industry.

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. 0581–0178, Vegetable and Specialty Crops. No changes in those requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule does not impose additional reporting or recordkeeping requirements on either small or large almond 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 Board's meetings are widely publicized throughout the California almond production area. All interested persons are invited to attend the meeting and encouraged to participate in Board deliberations on all issues. Like all Board meetings, the meetings held on December 9, 2019, August 11, 2020, and December 7, 2020, were public, and all entities, both large and small, were encouraged to express their views on the proposals.

A proposed rule concerning this action published in the **Federal Register** on April 27, 2023 (88 FR 25559). A copy of the rule was sent via email to the Board staff for distribution to all Board members and California almond 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 June 26, 2023, was provided to allow interested persons to respond to the proposals. AMS received one comment during the comment period. The comment supported the proposed amendments. Based on all the information available to AMS at this time, including the comments received in response to the proposed rule, no substantive changes will be made to the amendments as proposed.

A second proposed rule and referendum order was then published on October 4, 2023 (88 FR 68500). That document directed that a referendum among California almond growers be conducted from October 30, 2023, through November 20, 2023, to determine whether they favor the proposals. To become effective, the amendments had to be approved by either two-thirds of the producers voting in the referendum or by those representing at least two-thirds of the volume of almonds grown by those voting in the referendum. The referendum results show producers supported four amendments related to definitions and time frames by an average of 85.9 percent of producers voting, who represented 90.7 percent of the volume of almonds produced by those voting. Results also show that producers did not support by two-thirds voting or volume voting, the amendment to add authority for the Board to accept advanced assessments from handlers or borrow funds from commercial lenders.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Order Amending the Order Regulating the Handling of Almonds Grown in California

Findings and Determinations [1]

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

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 981; 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 981, as amended, and as hereby amended, and all the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

2. Marketing Order 981, as amended, and as hereby further amended, regulates the handling of almonds grown in California and is applicable only to persons in the respective classes of commercial and industrial activity specified in the Order;

3. Marketing Order 981 as amended, and as hereby further amended, is limited in application to the smallest regional production area, which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several marketing orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. Marketing Order 981, as amended, and as hereby 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 almonds produced or packed in the production area; and

5. All handling of almonds grown or handled in the production area, as defined in Marketing Order 981, is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects such commerce.

(b) Determinations

It is hereby determined that:

1. The issuance of this amendatory Order, amending the aforesaid Order, is favored or approved by producers representing at least two-thirds of the volume of almonds produced by those voting in a referendum on the question of approval and who, during the period of August 1, 2022, through July 31, 2023, were engaged within the production area in the production of such almonds.

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

[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.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of almonds grown in California 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 amending the Order contained in the proposed rule and referendum issued by the Administrator and published in the **Federal Register** (88 FR 68500) on October 4, 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 981

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 981 as follows:

PART 981—ALMONDS GROWN IN CALIFORNIA

■ 1. The authority citation for part 981 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Revise § 981.4 to read as follows:

§ 981.4 Almonds and almond biomass.

(a) *Almonds* means (unless otherwise specified) all varieties of almonds (except bitter almonds), either shelled or unshelled, grown in the State of California, and, for the purposes of research includes almond biomass.

(b) *Almond biomass* means the hulls, shells, and skins of harvested almonds and woody biomass derived from almond trees (*e.g.,* tree limbs, bark, prunings).

■ 4. Revise the first sentence of § 981.6 to read as follows:

§ 981.6 Shelled almonds.

Shelled almonds mean almonds after the shells are removed and includes any form those almonds might take. * * *

■ 5. Revise § 981.32(b)(2) to read as follows:

§ 981.32 Nominations.

* * * * *

(b) * * *

(2) Each handler may vote for a nominee for each position representing the group to which the handler belongs. Each handler vote shall be weighted by the quantity of almonds (kernel weight basis computed to the nearest whole ton) handled for the handler's own account through March 31 of the crop year in which nominations are made. The nominee for each position shall be the person receiving the highest weighted vote for the position.

* * * * *

§ 981.41 [Amended]

■ 6. Amend § 981.41(b) by removing the word ''Control''.

§ 981.42 [Amended]

■ 7. Amend the second sentence of § 981.42(a) by removing the words ''accepted crushers, feed manufacturers, or feeders'' and adding, in their place, ''approved accepted users.''

§ 981.49 [Amended]

■ 8. Amend § 981.49 introductory text by removing the word ''August'' and adding in its place the word ''September''.

§ 981.59 [Amended]

■ 9. Amend § 981.59(a) by removing the word ''Control''.

■ 10. Amend § 981.81 by:

■ a. Revising the third and fourth sentences in paragraph (b); and

■ b. Revising the first sentence in paragraph (c).

The revisions read as follows:

§ 981.81 Assessment.

* * * * *

(b) * * * Any amounts, not credited pursuant to § 981.41 for a crop year may be used by the Board for its marketing promotion expenses of the succeeding crop year, and any unexpended portion of those amounts at the end of that crop year shall be retained in the operating reserve fund. Any funds of the operating reserve fund in excess of the level authorized pursuant to paragraph (c) of this section shall be refunded to handlers or used to reduce the assessment rate of the subsequent crop year, as the Board may determine. * * *

(c) *Reserves.* The Board may maintain an operating reserve fund which shall not exceed approximately six-months' expenses or such lower amount as the Board may establish with the approval of the Secretary: *Provided,* That this limitation shall not restrict the temporary retention of excess funds for

the purpose of stabilizing or reducing the assessment rate of a crop year. * * *

* * * * *

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–09553 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 29

[Docket No. FAA–2021–1143; Special Conditions No. 29–055–SC]

Special Conditions: Airbus Helicopters Model H160–B Helicopter; Extended Duration of Flight After Loss of Main Gearbox Lubrication

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Airbus Helicopters (Airbus) Model H160–B helicopter. This helicopter has a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for helicopters. This design feature is the extended duration of continued safe flight and landing beyond 30 minutes after indication to the flightcrew of the loss of main gearbox lubrication. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Effective June 6, 2024.

FOR FURTHER INFORMATION CONTACT: Kamron Dowlatabadi, Mechanical Systems, AIR–623, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5219; email *Kamron.M.Dowlatabadi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On July 10, 2023, Airbus applied for an amendment to Type Certificate No. R00009RD for the Model H160–B helicopter to include continued safe flight and landing beyond 30 minutes after indication to the flightcrew of the loss of main gearbox lubrication.

The Airbus Model H160–B helicopter is a transport-category, twin-turboshaft-engine helicopter certificated under 14 CFR part 29. This helicopter has a maximum takeoff weight of 13,436 lbs. with seating for 12 passengers and 2 flightcrew members. The Airbus Model H160–B helicopter is also characterized by the integration of composite materials in its airframe, five main rotor blades (Blue Edge technology), a Fenestron tail rotor, and a Helionix avionics suite.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Airbus must show that the Model H160–B helicopter meets the applicable provisions of the regulations listed in Type Certificate No. R00009RD, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 29) do not contain adequate or appropriate safety standards for the Airbus Model H160–B helicopter because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model H160–B helicopter must comply with the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model H160–B helicopter will incorporate the following novel or unusual design feature:

Extended duration of continued safe flight and landing beyond 30 minutes after indication to the flightcrew of the loss of main gearbox lubrication.

Discussion

Current regulations do not prescribe a duration for continued safe flight and landing to be specifically called out in the rotorcraft flight manual when a loss of main gearbox lubrication is indicated to the flightcrew. Although § 29.927(c)(1) requires a 30-minute test to show that the rotor drive system, which is defined in § 29.917(a) and includes the main gearbox, is operational for 30 minutes following the indication to the flightcrew of a loss of lubrication, the associated bench test conditions may not be representative of aircraft flight conditions because a 30-minute bench test of the main gearbox may not translate to 30 minutes of continued safe flight and landing.

The novel or unusual design feature of the Airbus Model H160–B helicopter is intended to enable the helicopter to continue safe flight and landing, for a minimum of 30 minutes, to the intended destination or to a safe landing location after the indication to the flightcrew of a loss of main gearbox lubrication. To meet this minimum 30 minutes of continued safe flight and landing, the Airbus Model H160–B helicopter main gearbox is designed with a redundant lubrication system. This main gearbox redundant lubrication system would allow continued safe operation after the failure of a single lubrication system. Current regulations do not address a redundant lubrication system that allows operation after the failure of a single lubrication system because at the time the existing regulations were issued, the agency did not envision that a flight duration of more than 30 minutes after the indication to the flightcrew of the loss of main gearbox lubrication was needed. Accordingly, these special conditions provide testing criteria to ensure the reliability of the redundant lubrication system to provide an extended period for safe flight and landing beyond 30 minutes after indication to the flightcrew of the loss of the main gearbox lubrication.

These special conditions add new requirements in lieu of the existing airworthiness standards in §§ 29.917(a) and 29.927(c) and add a requirement to § 29.1585.

At the time of the issuance of the existing regulations, the FAA did not envision the evolving operations for these types of aircraft and the regulations did not include the main gearbox lubrication system components in the required design assessment of the rotor drive system. Accordingly, these special conditions include requirements for addressing ''any associated lubrication system components including oil coolers'' in the design assessment required by § 29.917(b).

These special conditions add a safety margin over the current 30-minute rotor drive system test specified in § 29.927(c)(1) by requiring a test duration of more than 30 minutes to

ensure that the rotor drive gearbox system has an in-flight operational endurance capability of at least 30 minutes following a failure of any one pressurized, normal-use lubrication system. The 30-minute test interval starts when the lubrication-failure indication to the flightcrew is triggered and the engine is at maximum continuous power. These special conditions require a bench test of the rotor drive system main gearbox for a minimum of 30 minutes to establish a maximum period of in-flight operation following loss of main gearbox lubrication, and to ensure that the main gearbox continues to operate safely for at least 30 minutes after an indication to the flightcrew of a loss of lubrication.

The term ''confidence'' specified in Category A and B in these special conditions necessitates the applicant provide supporting data with respect to the mechanical behavior of the main gearbox and must reflect the applicant's confidence in the repeatability of the certification test data. Test loading, in the context of these special conditions, refers to the engine, main gearbox, clutch system, and rotors (or similar test apparatus) interconnected and operating in unison, as this combination of mechanical elements pertains to power input transmitted to the main gearbox and subsequent reaction torques simulating operating conditions.

These special conditions add a requirement that the maximum duration of operation after a failure, which results in a loss of main gearbox lubrication and an associated indication to the flightcrew, must be furnished in the rotorcraft flight manual, and the duration must not exceed the maximum period of in-flight operational endurance capability substantiated.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Discussion of Comments

The FAA issued Notice of Proposed Special Conditions No. 29–21–01–SC for the Airbus Model H160–B helicopter, which was published in the **Federal Register** on May 12, 2023 (88 FR 30680). The FAA received several comments from Leonardo Helicopters regarding the proposed special conditions.

Leonardo Helicopters requested the FAA generally maintain harmonization and alignment with the EASA certification specifications (CS) 29 requirements by implementing the same changes to part 29 that were introduced by EASA rulemaking task RMT.0608, following notice of proposed amendment (NPA) 2017–07, *Rotorcraft gearbox loss of lubrication,* through Amendment 5.

This request relating to the pursuit of future rulemaking for part 29 is beyond the scope of these special conditions. No change was made to these special conditions as a result of this comment.

Leonardo Helicopters stated that EASA's CS–29 requirements and acceptable means of compliance (AMC) clearly define how to establish the operational endurance capability through the application of reduction factors. However, the correlation between 30 and 60 minutes, and the criteria for defining this correlation, is not clear in the proposed special conditions. Leonardo Helicopters requested the FAA revise the proposed special conditions to define the proposed reduction factors and allow the public to comment. The FAA infers that Leonardo Helicopters is also requesting clarification regarding the correlation between 30 and 60 minutes for the bench test.

The FAA disagrees with the commenter's request to include reduction factors and related material in these special conditions. The FAA considers the details referenced by Leonardo Helicopters, including the correlation between the test duration and substantiated safe operation duration, to be related to the means of compliance for these special conditions. Means of compliance for these special conditions are defined separately between the FAA and the applicant via the FAA issue paper process, which is outside the scope of these special conditions. However, to address the Leonardo Helicopters comment, the FAA has clarified language in the discussion section. Specifically, the FAA removed the previous reference in these special conditions to a 60-minute bench test scenario, since it is not a requirement under 29.927(c), but rather an example to illustrate how applicants translate the time duration of a bench test into 30 minutes of substantiated operation for continued safe flight and landing. In addition, the term ''reduction factor'' has been removed from the discussion section and replaced with language to define the term ''confidence'' used in these special conditions.

Additionally, Leonardo Helicopters stated that EASA CS–29 does not have a similar requirement for a test duration of at least 60 minutes, and therefore the special conditions are not harmonized with the EASA requirements. The FAA infers Leonardo Helicopters is requesting that the FAA revise the proposed special conditions to address an alleged contradiction and lack of harmonization with the related EASA CS–29 requirements.

The FAA does not agree to revise the proposed special conditions to address a possible contradiction because the FAA does not find that a contradiction exists. The commenter suggests that these special conditions contain a 60-minute testing requirement. There is no specific requirement in these special conditions for a 60-minute test. However, in the preamble of the proposed special conditions, the FAA discussed a scenario where it may be necessary for an applicant to perform a 60-minute test, depending on reduction factors. As explained previously, this language has been removed to address the related public comment and replaced with language to describe the context of the word ''confidence'' used in these special conditions. The details related to the test duration and maximum period of in-flight operation following loss of main gearbox lubrication are associated with the means of compliance for these special conditions. As previously explained, the means of compliance are established between the FAA and applicant through the FAA issue paper process and the FAA's acceptance of a specific means of compliance is beyond the scope of these special conditions. No changes were made to these special conditions as a result of this comment. However, the FAA has made minor editorial changes to these special conditions to ensure consistency in the language of the requirements.

Applicability

As discussed above, these special conditions are applicable to the Airbus Helicopters Model H160–B helicopter. Should Airbus Helicopters apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only a certain novel or unusual design feature on one model of helicopter. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 29

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Airbus Helicopters Model H160–B helicopter. Unless stated otherwise, all requirements in §§ 29.917, 29.927, and 29.1585 still apply.

In lieu of § 29.917(a), the following special condition applies:

(a) *Design: General.* The rotor drive system includes any part necessary to transmit power from the engines to the rotor hubs. This includes gearboxes, shafting, universal joints, couplings, rotor brake assemblies, clutches, supporting bearings for shafting, any attendant accessory pads or drives, any cooling fans, and any associated lubrication-system components including oil coolers that are a part of, attached to, or mounted on the rotor drive gearbox system.

In lieu of § 29.927(c), the following special condition applies:

(c) Lubrication system failure. For rotor drive gearbox systems featuring a pressurized, normal-use lubrication system, the following requirements for continued safe flight and landing apply:

(1) Category A. Confidence must be established that the rotor drive gearbox system has an in-flight operational endurance capability of at least 30 minutes following a failure of any one pressurized, normal-use lubrication system.

(i) For each rotor drive gearbox system necessary for continued safe flight or safe landing, the applicant must conduct a test that simulates the effect of the most severe failure mode of the pressurized, normal-use lubrication system, as determined by the failure analysis required by § 29.917(b). The duration of the test must be dependent on the number of tests and the component condition after each test.

(ii) The test must begin when the indication to the flightcrew shows a lubrication failure has occurred, and its loading must be consistent with 1 minute at maximum continuous power, followed by the minimum power needed for continued flight at the rotorcraft maximum gross weight.

(iii) The test must end with a 45-second out-of-ground-effect (OGE) hover to simulate a landing phase. Test results must substantiate the maximum period of operation following a loss of lubrication by means of an extended test duration or multiple test specimens, or another approach prescribed by the applicant and accepted by the FAA.

(2) *Category B.* Confidence must be established that the rotor drive gearbox system has an in-flight operational endurance capability to complete an autorotation descent and landing following a failure of any one pressurized, normal-use lubrication system.

(i) For each rotor drive gearbox system necessary for safe autorotation descent or safe landing, the applicant must conduct a test of at least 16 minutes and 15 seconds, following the most severe failure mode of the pressurized, normal-use lubrication system, as determined by the failure analysis required by § 29.917(b).

(ii) The test must begin when the indication to the flightcrew shows that a lubrication failure has occurred, and its loading must be consistent with 1 minute at maximum continuous power. Thereafter, the input torque should be reduced to simulate autorotation for a minimum of 15 minutes.

(iii) The test must be conducted using an input torque to simulate a minimum power landing for approximately 15 seconds.

In addition to § 29.1585, the following special condition applies:

(h) *Power Plant limitations.* The maximum duration of operation after a failure, resulting in any loss of lubrication of a rotor-drive-system gearbox and an associated oil-pressure warning, must be furnished in the rotorcraft flight manual, and must not exceed the maximum period substantiated in accordance with § 29.927(c) of these special conditions.

Issued in Kansas City, Missouri, on April 29, 2024.

Patrick R. Mullen,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2024–09825 Filed 5–6–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 34

[Docket No. FAA–2023–2434; Amdt. No. 34–7A]

RIN 2120–AL83

Control of Non-Volatile Particulate Matter From Aircraft Engines: Emission Standards and Test Procedures; Correction

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

ACTION: Final rule; request for comments; correction.

SUMMARY: The FAA is correcting a final rule published on April 24, 2024. In that document the FAA adopts standards for measuring non-volatile particulate matter (nvPM) exhaust emissions from aircraft engines. With this rulemaking, the FAA implements the nvPM emissions standards adopted by the Environmental Protection Agency (EPA), allowing manufacturers to certificate engines to the new nvPM emissions standards in the United States and fulfilling the statutory obligations of the FAA under the Clean Air Act. This document corrects errors in the preamble and regulatory text of that document.

DATES: Effective May 24, 2024.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Ralph Iovinelli, Office of Environment and Energy (AEE–300), Federal Aviation Administration, 800 Independence Ave. SW, Washington, DC 20591; telephone (202) 267–3566; email *Ralph.Iovinelli@faa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

A copy of the Control of Non-Volatile Particulate Matter From Aircraft Engines: Emission Standards and Test Procedures final rule may be viewed online at *www.regulations.gov* using the docket number listed above. A copy of this correction will be placed in the same docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.govinfo.gov.* A copy may also be found at the FAA's Regulations and

Policies website at *www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or amendment number of this rulemaking.

All documents the FAA considered in developing this correction, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

Background

On April 24, 2024, the FAA published a final rule titled ''Control of Non-Volatile Particulate Matter From Aircraft Engines: Emission Standards and Test Procedures'' (89 FR 31078). That document adopts standards for measuring non-volatile particulate matter nvPM exhaust emissions from aircraft engines. With this rulemaking, the FAA implements the nvPM emissions standards adopted by the EPA, allowing manufacturers to certificate engines to the new nvPM emissions standards in the United States and fulfilling the statutory obligations of the FAA under the Clean Air Act. After publishing the final rule, the FAA became aware that certain information in the preamble and regulatory text sections regarding compliance, were inadvertently omitted. This document corrects errors in the preamble and regulatory text of that document.

Correction

In FR Doc. 2024–08453, beginning on page 31078, in the **Federal Register** of April 24, 2024, make the following correction(s):

■ 1. On page 31081, in the first column, at the end of the second paragraph of section B, add the sentence ''To allow manufacturers with aircraft type certificated between January 1, 2023, and the effective date of this rule to demonstrate compliance with the requirements of part 34 without interruption to their manufacturing or delivery process, manufacturers will have 90 days to comply with this rule after the rule becomes effective.'' after the sentence ''This date is consistent with the effective date of the EPA final rule that adopted these standards.''

■ 2. On page 31088, in the first column, in amendatory instruction 11 for § 34.25, add paragraph (d) to read as follows:

§ 34.25 [Corrected]

* * * * *

(d) For engines type certificated after January 1, 2023 and prior to May 24, 2024, compliance with this part must be demonstrated no later than August 22, 2024.

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44703 in Washington, DC.

Brandon Roberts,

Executive Director, Office of Rulemaking.

[FR Doc. 2024–09904 Filed 5–2–24; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

International Trade Administration

15 CFR Part 326

[Docket No. 240226–0059]

RIN 0625–AB24

The U.S. and Foreign Commercial Service Pilot Fellowship Program

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce, International Trade Administration (ITA), Global Markets is issuing regulations implementing the U.S. and Foreign Commercial Service Pilot Fellowship Program to increase the level of knowledge and awareness of, and interest in employment with the United States and Foreign Commercial Service (US&FCS) among students, including students from underserved communities. This Program is intended to recruit graduate students interested in building a career with the U.S. Foreign Commercial Service. The Notice of Funding Opportunity (NOFO) on *www.grants.gov* shall provide more details regarding U.S. and Foreign Commercial Service Pilot Fellowship Program eligibility guidelines, application instructions, and program requirements.

DATES: This rule is effective on May 6.

FOR FURTHER INFORMATION CONTACT: Wendy Thompson at *wendy.thompson@trade.gov* or 202–754–4075.

SUPPLEMENTARY INFORMATION: The U.S. and Foreign Commercial Service Pilot Fellowship Program establishes a graduate student fellowship program to increase the level of knowledge and awareness of, and interest in employment with the U.S. & Foreign Commercial Service among students, including students from underserved communities. The Consolidated Appropriations Act, 2023, Public Law 117–328, Division B, Title I, under the appropriation for the International Trade Administration, authorizes funds ''for the purpose of carrying out a pilot fellowship program of the United States Commercial Service under which the Secretary of Commerce may make competitive grants to appropriate institutions of higher education or students to increase the level of knowledge and awareness of, and interest in employment with, that Service among minority students.'' The Act also states that, ''any grants awarded under such program shall be made pursuant to regulations to be prescribed by the Secretary, which shall require as a condition of the initial receipt of grant funds, a commitment by prospective grantees to accept full-time employment in the Global Markets unit of the International Trade Administration upon the completion of participation in the program.''

In the Memorandum on *Guidance on Promoting Internships and other Student and Early Career Programs in the Federal Government,* dated January 19, 2023, the U.S. Office of Personnel Management (OPM) and the Office of Management and Budget (OMB) released guidance on increasing opportunities for internships, fellowships, apprenticeships, and other student and early career programs in the Federal Government, including paid internship programs. This guidance advances the goals of the ''Strengthening and Empowering the Federal Workforce'' priority in the President's Management Agenda (PMA) and was issued pursuant to Executive Order 14035, Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce (the DEIA Executive Order).

The purpose of the U.S. and Foreign Commercial Service Pilot Fellowship Program is to educate and train graduate students in International Relations, Economics, Business, Trade or Public Policy, and International Studies to build a pool of candidates eligible for the future U.S. and Foreign Commercial Service workforce and ITA Pathways Program opportunities. ITA will conduct broad outreach to raise awareness of the Fellowship program, including to Minority Serving Institutions such as Historically Black Colleges and Universities, Hispanic Serving Institutions, Indian Tribally Controlled Colleges and Universities, Alaska Native-Serving Institutions, and Native Hawaiian-Serving Institutions to increase the level of knowledge and awareness of, and interest in employment with, the U.S. Foreign

Commercial Service among students from underserved communities.

While in school, Fellows participate in one overseas enrichment program within the U.S. Department of Commerce and several mentoring sessions throughout the end of the student's current graduate education program. After completing their current academic graduate degree programs, and successfully passing the Foreign Service entry requirements, Fellows may choose to apply for employment with the U.S. Department of Commerce Foreign Service as Foreign Commercial Service Officers or candidates for the ITA Pathways Program. Consideration for the Fellowship is given to all qualified applicants who demonstrate outstanding leadership skills and academic achievement. The number of fellowships awarded is determined by available funding. ITA will publish a Notice of Funding Opportunity (NOFO) on *www.grants.gov* that will provide more details regarding U.S. and Foreign Commercial Service Pilot Fellowship Program eligibility guidelines, application instructions, and program requirements.

This final rule implements the base parameters of the U.S. and Foreign Commercial Service Pilot Fellowship Program. The regulations are consistent with the information provided in the NOFO. Section 326.1 provides a description of the program consistent with the above description in this preamble. Section 326.2 addresses administration, noting that the eligibility criteria and the amount of funding will be determined and announced annually and publicized nationwide. Section 326.2 also provides the core eligibility requirements, including U.S. citizenship and employment criteria and requirements for Fellows upon the successful completion of their graduate degree program. Section 326.3 provides that grants are awarded directly to students to be Fellows. Section 326.4 provides that the Office of Global Talent Management within the International Trade Administration administers this program for the Department.

Classification

Pursuant to 5 U.S.C. 553(a)(2), the provisions of the Administrative Procedure Act requiring notice of proposed rulemaking and the 30-day delay in effective date for substantive rules are inapplicable because this rule pertains to personnel and grants.

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

This regulation is exempt from the notice and comment provisions of the APA. Therefore, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, no Regulatory Flexibility Analysis is required, and none has been prepared.

This rule does not have any collection of information requirements under the Paperwork Reduction Act.

List of Subjects in 15 CFR Part 326

Education, Educational study programs, Federal aid programs, Grant programs, Scholarships and fellowships, and Students.

■ For the reasons discussed in the preamble, the U.S. Department of Commerce, International Trade Administration amends 15 CFR chapter III by adding Part 326 to read as follows:

PART 326—U.S. AND FOREIGN COMMERCIAL SERVICE PILOT FELLOWSHIP PROGRAM

Sec.

326.1 What is the Fellowship Program?
326.2 How is the Fellowship Program administered?
326.3 Who can receive a grant?
326.4 Who administers the Program?

Authority: Consolidated Appropriations Act, 2023, Pub. L. 117–328, Division B, Title I.

§ 326.1 What is the Fellowship Program?

The U.S. and Foreign Commercial Service Pilot Fellowship Program targets graduate students interested in increasing the level of knowledge and awareness of and employment with the Foreign Service, consistent with 22 U.S.C. 3905. The Program develops a source of trained individuals, from academic disciplines representing the skill needs of the Department, who are dedicated to representing the United States' commercial interests abroad.

§ 326.2 How is the Fellowship Program administered?

(a) *Eligibility.* Eligibility criteria will be determined by the Department of Commerce and publicized nationwide. Fellows must be United States citizens.

(b) *Provisions.* The amount awarded to each individual student shall not exceed $35,000.00 for the total amount of time the student is in the Program. Continued eligibility for participation is contingent upon the Fellow's ability to meet the educational requirements set forth below.

(c) *Program requirements.* (1) Participation in the Program is conditional upon successful completion of pre-employment processing specified by the Department of Commerce, including background investigation, medical examination, and drug testing.

(2) As a condition of participation, fellows are required to complete prescribed coursework.

(3) As a condition of participation, foreign travel is required for all Fellows.

(4) Fellows are required to accept employment, if offered, with the Department of Commerce U.S. and Foreign Commercial Service upon successful completion of the Program and, if applicable, Foreign Service entry requirements.

(5) If offered employment, Fellows must commit to a two-year service agreement.

(6) Additional Program requirements may be determined annually by the Department of Commerce and publicized nationwide.

§ 326.3 Who can receive a grant?

(a) *Grants to students.* The Department of Commerce may award a competitive grant directly to a student for the purpose of increasing the level of knowledge and awareness of and interest in employment with the U.S. and Foreign Commercial Service, consistent with 22 U.S.C. 3905 and employment through ITA Pathways Programs consistent with the Executive Order No. 13562.

(b) *Grants to Institutions of Higher Education.* The Department of Commerce may award a competitive grant to an institution of higher education as defined in 20 U.S.C. 1001 to administer a program to award grants to students for the purpose of increasing the level of knowledge and awareness of and interest in employment with the U.S. and Foreign Commercial Service, consistent with 22 U.S.C. 3905.

§ 326.4 Who administers the Program?

The Department of Commerce, International Trade Administration, Global Markets, Office of Global Talent Management is responsible for administering the U.S. and Foreign Commercial Service Pilot Fellowship Program and grants to students and may be contacted for more detailed information.

Dated: April 29, 2024.

Diane Farrell,

Deputy Under Secretary, International Trade Administration (ITA), Department of Commerce.

[FR Doc. 2024–09863 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0854]

RIN 1625–AA09

Drawbridge Operation Regulation; Reynolds Channel, Atlantic Beach, NY

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is altering the operating schedule that governs the Atlantic Beach Bridge across the Reynolds Channel, mile 0.4, at Atlantic Beach, NY. The bridge owner, Nassau County Bridge Authority, submitted a request on September 22, 2022 to modify the regulation to decrease the amount of openings on signal from October through May. On November 16, 2023 Nassau County Bridge Authority sent an additional request to add a bridge tower call number and remove outdated language. It is expected that this change to the regulations will better serve the needs of the community while continuing to meet the reasonable needs of navigation.

DATES: This rule is effective June 6, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2022–0854) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking
SNPRM Supplemental Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On August 25, 2023, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) with a request for comments, entitled ''Drawbridge Operation Regulation; Reynolds Channel, Atlantic Beach, NY'' in the **Federal Register** (88 FR 58176), to seek your comments on whether the Coast Guard should consider modifying the current operating schedule to the Atlantic Beach Bridge. No comments were received.

On February 21, 2024, the Coast Guard published a Supplemental Notice of Proposed Rulemaking (SNPRM) with a request for comments, under the same title as the NPRM in the **Federal Register** (89 FR 13013), There we stated why we issued the SNPRM, and invited comments on our proposed regulatory action related to this regulatory change. During the comment period that ended March 22, 2024, we received three comments and those comments are addressed in Section IV of this Final Rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The Atlantic Beach Bridge at mile 0.4, across Reynolds Channel, Atlantic Beach, NY, has a vertical clearance of 25 feet at mean high water and a horizontal clearance of 125 feet. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.799(e). Under the current regulation, the bridge shall open on signal from October 1 through May 14. Nassau County is requesting the bridge shall open on signal from 8 a.m. to midnight October 1 through May 14; and from midnight to 8 a.m. year-round the draw shall open on signal if at least eight hours advance notice is given.

The Reynolds Channel is transited by recreational vessels and commercial vessels. In recent years, a significant amount of industrial and commercial business has closed along the waterfront. This change has caused a decrease in the number of bridge opening requests from midnight to 8 a.m.

Nassau County Bridge Authority held two public meetings on August 18, 2022 and August 25, 2022. No one from the public attended.

IV. Discussion of Comments, Changes, and the Final Rule

Coast Guard provided a comment period of 30 days and three comments were received. All three comments were positive and in favor of the rule change.

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, it has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability of vessels to still transit the bridge given advanced notice.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 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 rule. 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.

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section V. A. above, this rule will not have a significant economic impact on any vessel owner or operator.

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 contact 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 calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

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 Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has 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 promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1. Revision No. 01.3

■ 2. Amend § 117.799 by revising paragraph (e) to read as follows:

§ 117.799 Long Island, New York Inland Waterway from East Rockaway Inlet to Shinnecock Canal

* * * * *

(e) The draw of the Atlantic Beach Bridge across Reynolds Channel, mile 0.4, shall operate as follows:

(1) From October 1 through May 14 the draw shall open on signal from 8 a.m. to midnight.

(2) From midnight to 8 a.m. year-round, the draw shall open on signal if at least eight (8) hours of notice is given by calling the Bridge Tower at 516–239–1821.

(3) From May 15 through September 30, the bridge will open on signal except from 4 p.m. to 7 p.m. on weekdays, and from 11 a.m. to 9 p.m. on Saturdays, Sundays, Memorial Day, Independence Day, and Labor Day, when the bridge will open on the hour and half-hour.

* * * * *

Dated: April 27, 2024.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2024–09922 Filed 5–6–24; 8:45 am]

BILLING CODE 9110–04–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 300–3, 302–6, and 302–17

[FTR Case 2022–02; Docket No. GSA–FTR–2022–0012, Sequence No. 2]

RIN 3090–AK63

Federal Travel Regulation (FTR); Relocation Allowance—Temporary Quarters Subsistence Expenses (TQSE)

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The United States (U.S.) General Services Administration (GSA) is issuing a final rule amending the Federal Travel Regulation (FTR) with respect to temporary quarters subsistence expenses (TQSE) allowances. Changes include implementing a third TQSE methodology, redefining the current TQSE methods, lowering the percentage multipliers for calculating TQSE maximum daily amounts, and prohibiting adjustments to TQSE percentage multipliers for househunting days. The final rule also exempts temporary quarters (TQ) located in Presidentially-Declared Disaster areas from the ''reasonable proximity'' requirement and allows agencies to authorize TQSE at the applicable locality per diem allowance or authorize actual expenses on an individual basis. This rule establishes an exception to authorizing actual expenses on an individual basis by which agencies can issue a blanket actual expense authorization for employees authorized to occupy TQ in Presidentially-Declared Disaster areas. The final rule will also update and clarify some TQSE sections and rearrange them into a more sequential order.

DATES: Effective June 6, 2024.

Applicability Date: This rule is applicable for relocations authorized after June 30, 2024.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Rodney (Rick) Miller, Program Analyst, Office of Government-wide Policy, at 202–501–3822 or *travelpolicy@gsa.gov.* For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FTR Case 2022–02.

SUPPLEMENTARY INFORMATION:

I. Background

GSA published a proposed rule at 88 FR 33067 on May 23, 2023, which proposed changes to the FTR with respect to TQSE allowances. This rule finalizes those proposed changes as summarized above, and as set forth in greater detail below.

Pursuant to 5 United States Code (U.S.C.) 5738, the Administrator of General Services is authorized to prescribe regulations necessary to implement laws regarding Federal employees when assigned a temporary change of station (TCS) or when otherwise transferred in the interest of the Government. The overall implementing authority is the FTR, codified in title 41 of the Code of Federal Regulations, chapters 300 through 304.

GSA's Office of Government-wide Policy (OGP) continually reviews and adjusts policies and regulations under its purview to address current Government relocation needs and incorporate best practices, where appropriate, as a part of its ongoing mission to provide policies for travel by Federal civilian employees and others authorized to travel at Government expense.

Each year, the Federal Government spends more than $1.2 billion on relocation allowances to reimburse an average of 28,800 employees for their related expenses. Federal agencies can offer relocation allowances as an incentive to assist with defraying some of the costs for relocating individuals. The FTR provides regulatory procedures for certain mandatory and discretionary relocation allowances depending on the individual's type of movement.

Pursuant to 5 U.S.C. 5724a(c) and 5737(a)(5), an employee transferred in the interest of the Government may be authorized a TQSE allowance to reimburse the employee and the employee's immediate family members for subsistence expenses incurred when it is necessary to occupy TQ. TQSE may be authorized for the following transfers: between official duty stations within the U.S.; from a foreign area to an official duty station in the U.S.; or assignment to a temporary official station and/or permanently assigned to a temporary official station within the U.S.

Agencies may offer two existing methods of TQSE: TQSE-actual expense (TQSE–AE) or TQSE-lump sum (TQSE–LS). From fiscal years 2018 to 2022, Federal agencies have approved about 12,000 TQSE claims annually for employees who relocated, with agencies identifying TQSE–AE as the more utilized reimbursement method.

Under the TQSE–AE method, the employee is reimbursed the cost of their actual subsistence expenses not to exceed the authorized maximum allowable amount. The TQSE–AE method uses the standard continental United States (CONUS) per diem rate or the outside the continental United States (OCONUS) non-foreign area per diem rate as the applicable per diem rate based on the TQ location. The employee and each of the employee's immediate family members receives a percentage of that rate. The rate is applied to the first 30-day increment of occupying TQ and a reduced rate is applied after 30 days. Occupancy of TQ may extend up to the statutory maximum of 120 consecutive days. The employee documents their incurred daily allowable expenses, which may include: TQ lodging, including taxes; meals and/or groceries; fees and tips incident to meals and TQ lodging; and laundry/dry cleaning of clothes. The employee provides TQ lodging receipt(s) and a receipt for every expense over $75, for each 30-day period of TQ occupancy.

In 2005, the Governmentwide Relocation Advisory Board (GRAB), which included representatives from Government agencies, private-sector corporate relocation departments, relocation industry associations, and/or relocation industry service providers, mentioned in its ''Findings and Recommendations'' that the TQSE–AE method is administratively burdensome and time-consuming for employees, travel examiners, and certifying officials.

Since 1966, Title 5 of the U.S. Code has provided authority for agencies to reimburse TQSE in connection with an employee transferred in the interest of the Government. At that time, only one per diem rate was used within CONUS—the standard CONUS rate. Since that time, however, GSA began establishing CONUS non-standard area (NSA) per diem rates for areas where the standard CONUS rate was insufficient. Currently, Federal agencies have employees assigned to offices and military bases in CONUS NSAs where the standard CONUS rate is insufficient for obtaining TQ lodging and meals under the TQSE–AE method. This is particularly true for single employees. Accordingly, for TQSE–AE and all TQSE methods, the final rule will allow for CONUS NSA per diem rates to be used as an applicable per diem rate to calculate TQSE, depending upon where TQ will be occupied.

This final rule will also clarify that there is no requirement to separate maximum amounts for TQ lodging and M&IE in calculating TQSE–AE reimbursement. Accordingly, the separate allowances for TQ lodging and M&IE may be combined to produce a single maximum daily amount (which will allow some of the M&IE rate to offset the TQ lodging cost). Agencies can still ensure that an employee is not overcompensated by using the single maximum daily amount while also accounting for the rate change after 30 days in TQ.

Under the TQSE–LS method, agencies may offer a lump sum amount based on the standard CONUS, CONUS NSA, or OCONUS non-foreign area per diem rates, as appropriate, depending on the locality of the old and/or new official stations and wherever TQ will be occupied. Under this reimbursement method, a percentage of the maximum applicable per diem rate is paid to the employee and the employee's immediate family members for a maximum of 30 days of TQSE. Under TQSE–LS, there is no requirement to document and itemize expenses; however, the employee must certify that they occupied TQ.

To improve employees' relocation experience and assist agencies in processing relocation expenses reimbursement, GSA is implementing a third method of TQSE titled ''temporary quarters subsistence expenses-lodgings plus'' (TQSE–LP). This third method will be the preferred TQSE reimbursement method for agencies to offer to employees; however, agencies may continue to offer TQSE–AE and/or TQSE–LS as an alternative. In accordance with 5 U.S.C. 5724a(h), TQSE–LP must follow the limitations prescribed for payments of subsistence expenses under 5 U.S.C. 5702. TQSE–LP is in line with 5 U.S.C. 5702 which entitles an employee who performs official business away from their official station, a per diem allowance, reimbursement for actual and necessary expenses, or a combination of both. The FTR implements the ''combination of both'' statutory language by utilizing the temporary duty (TDY) ''lodgings-plus per diem'' methodology, which entitles an employee to reimbursement of actual lodging expenses up to a maximum amount by locality area, as supported by receipts, and a meals and incidental expense (M&IE) allowance, which may be reimbursed without itemization or receipts. Accordingly, the new TQSE–LP method will follow similar principles as the TDY travel ''lodgings-plus'' method of per diem for

reimbursement of TQSE under Chapter 302.

A difference between TDY lodgings-plus and TQSE–LP is that the TDY per diem allowance excludes lodging taxes and laundry/dry cleaning expenses from the per diem rates in CONUS and allows the traveler to claim them as a separate TDY miscellaneous expense under part 301–12. However, part 302–6 does not contain or adopt by reference the provisions of Chapter 301 permitting recovery of these types of miscellaneous expenses, nor are lodging taxes and laundry/dry cleaning expenses included in part 302–16. The final rule clarifies that laundry/dry cleaning expenses are included in the TQSE daily allowable M&IE expenses and TQ lodging taxes are separately reimbursable TQSE miscellaneous expenses.

The new TQSE–LP method follows TQSE–LS and TQSE–AE by calculating reimbursement using the applicable per diem rate for the locality of the old and/or new official stations wherever TQ lodging will be occupied in the U.S. As with TQSE–AE, the new TQSE–LP method permits occupancy of TQ beyond the initial authorization of 30 days (up to a maximum of 120 consecutive days), and reduces the maximum daily amount of TQSE after the initial 30-day period of TQ occupancy. Unlike TQSE–AE, however, the TQSE–LP method will require that TQ lodging and M&IE remain as separate maximum amounts for purposes of calculating the maximum daily amount of TQSE for the employee and the employee's immediate family members.

When compared with TQSE–AE, the new TQSE–LP method results in a more efficient process for the traveler, travel examiner, and certifying official and significantly reduces the administrative burden of maintaining, submitting, and reviewing all subsistence expenses receipts and claims, other than the required lodging receipt. The reduced administrative burden should increase employee satisfaction with the relocation process, which is important for employee recruitment and retention purposes.

The final rule also, in some cases, reduces the percentage multipliers used to calculate the TQSE–AE and TQSE–LP maximum daily amount for each 30-day increment of TQSE. Because GSA is also authorizing the use of CONUS NSA rates instead of requiring use of the CONUS standard rate when applicable, GSA has determined that lowering the percentage multipliers will still provide reasonable and equitable reimbursement to employees and their immediate family members for TQSE–AE and TQSE–LP.

Pursuant to 5 U.S.C. 5724a(b), an agency may authorize an employee and/or spouse who is transferring between official stations located within the United States to take one househunting trip (HHT) to seek permanent residence quarters at a new official station. The purpose of the HHT is to lower the overall TQ cost. Accordingly, agencies may reduce the number of days of TQSE if HHT is authorized. The agency also has the discretion to authorize full HHT (5 U.S.C. 5724a(b)) and subsequent TQSE (5 U.S.C. 5724a(c)), as the two are separate entitlements.

This final rule clarifies the effect on TQSE when an employee performs an HHT prior to relocating to the new official station. Specifically, agencies may reduce the number of overall TQSE days by the HHT days, but are not permitted to use HHT days to reduce the percentage multiplier for calculating TQSE.

Further, the final rule eliminates the need for GSA to issue an FTR bulletin waiving FTR 302–6.9, which currently requires that TQ be in reasonable proximity to the old and/or new official stations, and FTR 302–6.102, which currently limits the applicable per diem allowance for TQSE–AE to the standard CONUS rate for TQ located in CONUS. Instead, the final rule lists TQ located in a Presidentially-Declared Disaster area as an exception to the ''reasonable proximity'' requirement, removes the limitation at 302–6.102, and allows agencies to authorize TQSE at the applicable locality per diem allowance or to authorize actual expenses (not to exceed the 300% ceiling) on an individual basis for TQ located in a Presidentially-Declared Disaster area. This rule establishes an exception to issuing individual actual expense authorizations by which agencies may issue a blanket actual expense authorization for employees authorized to occupy TQ in an area subject to a Presidentially-Declared Disaster. These changes should result in quicker notification to agencies and employees of their TQSE during a Presidentially-Declared Disaster rather than waiting for GSA to issue an FTR bulletin waiving such provisions.

Finally, the final rule will also modify some FTR sections regarding TQSE and rearrange them into a more sequential order.

II. Discussion of the Final Rule

A. Summary of Significant Changes

GSA has not made any significant changes to the regulatory language from the proposed to final rule, only minor technical edits and edits that clarify the intent of the rule.

B. Analysis of Public Comments

No public comments were received in response to the proposed rule.

C. Expected Cost Impact to the Public

GSA performed an economic analysis on the final rule. GSA used the Business Travel and Relocation Dashboard to calculate an average of 28,800 domestic and international relocations per year based on figures from across the Federal Government for fiscal years 2018 to 2022, with Federal agencies authorizing approximately 12,000 employees to receive TQSE annually. TQSE is a discretionary relocation entitlement that the agency may authorize. The agency chooses which TQSE methods are available to the employee and the number of days authorized for reimbursement. GSA notes that Federal agencies are only required to track specific relocation data appearing on the Business Travel and Relocation Dashboard, but are not required to specify the method of TQSE authorized (actual expense or lump sum), if TQSE is for an employee only or an employee with immediate family members, locations where TQ were occupied, or the total number of days of TQ for each claim within the U.S. GSA used the FY23 CONUS per diem rates to anticipate how TQSE–LP compares to existing policy in terms of cost for those relocating to high cost areas.

The standard CONUS per diem rate for FY23 was $157 ($98 Lodging + $59 M&IE). In FY23, there were 316 non-standard areas (NSAs) where GSA established per diem rates that were higher than the standard CONUS rate. Approximately half of the NSAs had seasonal rates. Adjustments to the TQSE percentage multipliers under the final rule, and their cost impact, are analyzed below: for the employee's (and/or unaccompanied spouse or domestic partner's) portion, the lodging and M&IE rates use the same percentage for the initial 30-days of TQ (currently 100%) and the second 30-day increment (currently 75%). However, the final rule reduces the percentage for the last 60 days of TQ from the current rate of 75% to 55%. The immediate family members' portion (currently 75% for accompanied spouses or domestic partners and immediate family members aged 12 and over; and 50% for immediate family members under 12) will be reduced for the first 30 days of TQ to 50% and 40% respectively, and further reduced for each 30 day increment (45% and 35% for the second

30-day increment, respectively; 40% and 30% for the last 60 days, respectively). There are 209 NSAs where the average (across seasons) per diem rate reduced to 75% would be less than the standard CONUS rate of $157. The average across all 316 NSAs of the average per diem rate reduced to 75% is $156, $1 less than the standard CONUS rate.

The final rule implements the TQSE–LP method which is similar to the Department of State foreign transfer allowance (FTA), ''Pre-Departure Subsistence Allowance and Home Service Allowance—Partial Flat Rate'' reimbursement methods used for Foreign Service Officers relocating to and from foreign assignments and occupying temporary quarters in the U.S. The reduction of TQSE percentage multipliers under this rule is similar to the way that temporary quarters subsistence allowance (TQSA) is structured for Foreign Service Officers and other Federal employees who relocate and occupy temporary quarters in a foreign country.

Use of the new TQSE–LP reimbursement method could result in an increase in overall cost; however, such increased costs are likely to be offset by anticipated cost savings from streamlining the administrative process for the traveler, agency travel examiners, and certifying officials. Notably, cost avoidance for employees electing TQSE–LP over TQSE–AE is difficult to measure in full as the calculations do not take into account time saved by travelers for retaining and recording each individual lodging, meal and laundry expense for all family members. TQSE–LP will increase employee satisfaction with the relocation process and significantly reduce the agency and employee administrative burden of maintaining, submitting and reviewing all subsistence expenses receipts and claims. Accordingly, TQSE–LP could maintain a budget neutral or possible cost reduction due to lower anticipated administrative costs.

III. Executive Orders 12866, 13563, and 14094

Executive Order (E.O.s) 12866 (*Regulatory Planning and Review*) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 (*Improving Regulation and Regulatory Review*) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 14094 (*Modernizing Regulatory Review*) amends section 3(f) of E.O. 12866 and supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 and E.O. 13563. The Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) has determined that this rule is a significant regulatory action and, therefore, it was subject to review under section 6(b) of E.O. 12866.

IV. Congressional Review Act

OIRA has determined that this rule is not a ''major rule'' under 5 U.S.C. 804(2). Title II, Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (codified at 5 U.S.C. 801–808), also known as the Congressional Review Act or CRA, generally provides that before a rule may take effect, unless excepted, 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. This rule is excepted from CRA reporting requirements prescribed under 5 U.S.C. 801 as it relates to agency management or personnel under 5 U.S.C. 804(3)(B).

V. Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This final rule is also exempt from the Administrative Procedure Act pursuant to 5 U.S.C. 553(a)(2) because it applies to agency management or personnel. Therefore, an Initial Regulatory Flexibility Analysis was not performed.

VI. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

List of Subjects in 41 CFR Parts 300–3, 302–6, and 302–17

Government employees, Relocation, Travel and Transportation expenses.

Robin Carnahan,

Administrator of General Services.

For reasons set forth in the preamble, GSA amends 41 CFR parts 300–3, 302–6, and 302–17 as set forth below:

PART 300–3—GLOSSARY OF TERMS

■ 1. The authority for part 300–3 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); 49 U.S.C. 40118; 5 U.S.C. 5738; 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; E.O. 11609, as amended, 3 CFR, 1971–1975 Comp., p. 586, Office of Management and Budget Circular No. A–126, revised May 22, 1992.

§ 300–3.1 [Amended]

■ 2. Amend § 300–3.1 by—

■ a. Adding a note at the end of the definition ''Per diem allowance''; and

■ b. Adding in alphabetical order, the definition for ''Presidentially-Declared Disaster''.

The additions read as follows:

§ 300–3.1 What do the following terms mean?

* * * * *

Per diem allowance—* * *

Note 1 to definition of ''Per diem allowance''. For the purposes of chapter 302 of this subtitle, laundry/dry cleaning expenses are part of the incidental expenses portion of the per diem allowance for temporary quarters subsistence expenses (TQSE) and temporary quarters (TQ) lodging taxes are separately reimbursable TQSE miscellaneous expenses (see § 302–6.28 and part 302–16 of this subtitle).

* * * * *

Presidentially-Declared Disaster—A major disaster or emergency declared by the President of the United States pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 *et seq.*).

* * * * *

■ 3. Revise part 302–6 to read as follows:

PART 302–6—ALLOWANCE FOR TEMPORARY QUARTERS SUBSISTENCE EXPENSES

Subpart A—General Rules

Sec.

302–6.1 What are ''temporary quarters subsistence expenses (TQSE)''?
302–6.2 What is the purpose of the TQSE allowance?
302–6.3 What are ''temporary quarters''?
302–6.4 Am I eligible for a TQSE allowance?

302–6.5 Who is not eligible for a TQSE allowance?
302–6.6 Am I eligible for a TQSE allowance if I transfer to or from a foreign area?
302–6.7 Must my agency authorize payment of a TQSE allowance?
302–6.8 Under what circumstances will I receive a TQSE allowance?
302–6.9 Who may occupy temporary quarters at Government expense?
302–6.10 Where may I/we occupy temporary quarters at Government expense?
302–6.11 May my immediate family and I occupy temporary quarters at different locations?
302–6.12 How soon may I/we begin occupying temporary quarters at Government expense?
302–6.13 What is the latest period for which TQSE reimbursement may begin?
302–6.14 When does my authorized period for TQSE reimbursement end?
302–6.15 May I and/or my immediate family occupy temporary quarters longer than the period for which I am authorized to claim TQSE reimbursement?
302–6.16 May the period for which I am authorized to claim TQSE reimbursement for myself be different from that of my immediate family?
302–6.17 What effect do partial days of temporary quarters occupancy have on my authorized period for claiming TQSE reimbursement?
302–6.18 How is my TQSE allowance affected if my temporary quarters become my permanent residence quarters?
302–6.19 May I receive a TQSE allowance if I am receiving another subsistence expense allowance?
302–6.20 May I be reimbursed for transportation expenses incurred while I am occupying temporary quarters?
302–6.21 May I be reimbursed for TQSE while occupying my permanent residence quarters at my old official station?
302–6.22 What methods may my agency use to reimburse me for TQSE?
302–6.23 What is the ‘‘applicable per diem rate’’ under the TQSE reimbursement methods?
302–6.24 How may my TQSE reimbursement be affected if I relocate to, or currently occupy, temporary quarters in a Presidentially-Declared Disaster area?
302–6.25 Must I document my TQSE to receive reimbursement?
302–6.26 May I receive an advance of funds for TQSE?
302–6.27 Must I use a Government contractor-issued travel charge card for TQSE?
302–6.28 Are temporary quarters lodging taxes and laundry/dry cleaning expenses included in the TQSE amount?
302–6.29 How long may I be authorized to claim TQSE reimbursement?
302–6.30 May my agency reduce my authorized number of TQSE days if I am authorized a househunting trip?
302–6.31 What is a ‘‘compelling reason’’ warranting extension of my authorized period for claiming TQSE–LP or TQSE–AE reimbursement?
302–6.32 May I interrupt occupancy of temporary quarters?

Subpart B—TQSE Methods of Reimbursement

302–6.100 What am I paid under the TQSE–LP reimbursement method?
302–6.101 What am I paid under the TQSE–AE reimbursement method?
302–6.102 What am I paid under the TQSE–LS reimbursement method?
302–6.103 May my agency reduce my TQSE allowance below the ‘‘maximum allowable amount’’?

Subpart C—Agency Responsibilities

302–6.200 How should we administer the TQSE allowance?
302–6.201 What governing policies must we establish for the TQSE allowance?
302–6.202 Under what circumstances may we authorize the TQSE allowance?
302–6.203 What factors should we consider in determining whether the TQSE allowance is actually necessary?
302–6.204 What factors should we consider in determining what TQSE method(s) to offer an employee?
302–6.205 Must we require transferees to sign a statement that TQSE will be incurred?
302–6.206 When must we make the TQSE–LS payment to the transferee?
302–6.207 What factors should we consider in determining whether quarters are temporary?

Authority: 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 3 CFR, 1971–1975 Comp., p. 586.

Subpart A—General Rules

Note 1 to subpart A. Use of pronouns ‘‘I’’, ‘‘you’’, and their variants throughout this subpart refers to the employee, unless otherwise noted.

§ 302–6.1 What are ‘‘temporary quarters subsistence expenses (TQSE)’’?

Temporary quarters subsistence expenses or *TQSE* are subsistence expenses incurred by an employee and/or the employee's immediate family while occupying temporary quarters. TQSE does not include transportation expenses incurred during occupancy of temporary quarters (see § 302–6.20).

§ 302–6.2 What is the purpose of the TQSE allowance?

The TQSE allowance is intended to reimburse an employee reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters incident to an official relocation or temporary change of station.

§ 302–6.3 What are ‘‘temporary quarters’’?

The term ‘‘temporary quarters’’ refers to lodging obtained for the purpose of temporary occupancy from a private or commercial source incident to an official relocation or temporary change of station.

§ 302–6.4 Am I eligible for a TQSE allowance?

You are eligible for a TQSE allowance if you are an employee who is authorized to transfer to a new official station, including upon assignment to a temporary official station (see FTR 302–3.413(b)) and permanent assignment to a temporary official station (see FTR 302–3.427(e)); and

(a) Your new official station is located within the United States; and

(b) Your old and new official stations are at least 50 miles apart (as measured by map distance) via a usually traveled surface route; and

(c) Your new official station meets the 50-mile distance test (see § 302–2.6(a)).

§ 302–6.5 Who is not eligible for a TQSE allowance?

(a) New appointees;

(b) Employees assigned under the Government Employees Training Act (5 U.S.C. 4109);

(c) Senior Executive Service (SES) employees making their last move home for the purpose of separation from Government service;

(d) Employees returning from an overseas assignment for the purpose of separation from Government service; and

(e) Employees who were granted a waiver to the 50-mile distance test under § 302–2.6(b).

§ 302–6.6 Am I eligible for a TQSE allowance if I transfer to or from a foreign area?

(a) You may not receive a TQSE allowance under this part when you transfer to a foreign area. However, you may qualify for a comparable allowance under the Department of State Standardized Regulations (DSSR) (Government Civilians, Foreign Areas) (see § 302–3.101 of this chapter).

(b) You may receive a TQSE allowance under this part when you transfer from a foreign area and occupy temporary quarters in the United States. You may also be authorized a comparable allowance, prescribed by the Department of State, at the foreign area preceding final departure subsequent to the necessary vacating of residence quarters (see § 302–3.101 of this chapter).

§ 302–6.7 Must my agency authorize payment of a TQSE allowance?

No, TQSE is a discretionary allowance. Your agency determines whether it is in the Government's interest to pay TQSE.

§ 302–6.8 Under what circumstances will I receive a TQSE allowance?

You will receive a TQSE allowance if:

(a) Your agency authorizes it before you occupy the temporary quarters;

(b) Your relocation authorization specifies the TQSE method and the number of days allowed for you to receive TQSE;

(c) You have signed a service agreement; and

(d) You meet any additional conditions your agency has established.

§ 302–6.9 Who may occupy temporary quarters at Government expense?

Only you and/or your immediate family, as annotated on the relocation authorization, may occupy temporary quarters at Government expense.

§ 302–6.10 Where may I/we occupy temporary quarters at Government expense?

You and/or your immediate family may occupy temporary quarters in the United States at Government expense within reasonable proximity (approximately 50 miles) of the geographical area of your old and/or new official stations. Neither you nor your immediate family may be reimbursed for occupying temporary quarters at any other location, unless justified by special circumstances (*e.g.,* the temporary quarters location is subject to a Presidentially-Declared Disaster) that are reasonably related to your transfer.

§ 302–6.11 May my immediate family and I occupy temporary quarters at different locations?

Yes. Under various circumstances, you and your immediate family may need to occupy temporary quarters at different locations (*e.g.,* if you must report to the new official station while the immediate family delays the relocation to have family members complete the school year) (see § 302–6.16 regarding concurrent TQSE).

§ 302–6.12 How soon may I/we begin occupying temporary quarters at Government expense?

You may begin occupying temporary quarters at Government expense after your agency has authorized you to receive a TQSE allowance and you have signed a service agreement.

§ 302–6.13 What is the latest period for which TQSE reimbursement may begin?

The period must begin before the maximum time for completing all aspects of your relocation under § 302–2.9.

§ 302–6.14 When does my authorized period for TQSE reimbursement end?

The period for TQSE reimbursement ends at midnight on either the day before you and/or any member of your immediate family occupies permanent residence quarters (even if some, but not all household goods have been delivered such that the residence is suitable for permanent occupancy), or the day your authorized period for TQSE reimbursement expires, whichever occurs first. (See § 302–6.207 for details.)

§ 302–6.15 May I and/or my immediate family occupy temporary quarters longer than the period for which I am authorized to claim TQSE reimbursement?

Yes, but you will not be reimbursed for any of the expenses you incur during the unauthorized period.

§ 302–6.16 May the period for which I am authorized to claim TQSE reimbursement for myself be different from that of my immediate family?

No, the eligibility period for which you are authorized to claim TQSE reimbursement for yourself and for each member of your immediate family must run concurrently.

§ 302–6.17 What effect do partial days of temporary quarters occupancy have on my authorized period for claiming TQSE reimbursement?

Occupancy of temporary quarters is based on calendar days and partial days are counted as full days of TQSE. You may not receive reimbursement under both TQSE allowance and another subsistence expenses allowance within the same day, with one exception. If you claim TQSE reimbursement on the same day that official travel en route to your new official station ends, your per diem will be computed under applicable partial day rules, and you also may be reimbursed for actual TQSE you incur after 6 p.m. of that day.

§ 302–6.18 How is my TQSE allowance affected if my temporary quarters become my permanent residence quarters?

If your temporary quarters become your permanent residence quarters, you may receive a TQSE allowance only if you show in a manner satisfactory to your agency that you initially intended to occupy the quarters temporarily. You will not be entitled to TQSE once your agency determines that your temporary quarters are your permanent residence. (See § 302–6.207 for details.)

§ 302–6.19 May I receive a TQSE allowance if I am receiving another subsistence expenses allowance?

No, unless your immediate family is claiming TQSE and you are performing separate official TDY travel, or you receive a cost-of-living allowance payable under 5 U.S.C. 5941 in addition to a TQSE allowance. (See § 302–6.17 for partial days for en route travel days.)

§ 302–6.20 May I be reimbursed for transportation expenses incurred while I am occupying temporary quarters?

Transportation expenses incurred in the vicinity of the temporary quarters, such as rental car or mileage for commuting to/from work, parking, and bus or mass transit, etc., are not TQSE expenses, and therefore, there is no authority to pay such expenses under TQSE.

§ 302–6.21 May I be reimbursed for TQSE while occupying my permanent residence quarters at my old official station?

Your agency may authorize TQSE for a reasonable time when your residence at your old official station becomes temporary and no longer suitable for permanent residence (*e.g.,* household goods have been shipped and are unavailable to you and your immediate family).

§ 302–6.22 What methods may my agency use to reimburse me for TQSE?

(a) Your agency may use one of the following TQSE methods:

(1) TQSE—Lodgings-Plus (TQSE–LP);

(2) TQSE—Actual Expense (TQSE–AE); or

(3) TQSE—Lump Sum (TQSE–LS).

(b) Your agency will reimburse you for TQSE under the ''lodgings-plus'' method unless it offers you one or more of the alternate methods. If your agency makes multiple methods available to you, you may select the one you prefer; however, once your travel has begun, the authorized TQSE method may not be changed.

§ 302–6.23 What is the ''applicable per diem rate'' under the TQSE reimbursement methods?

The ''applicable per diem rate'' is the rate in effect for the locality at the old or new official station or combination thereof, wherever temporary quarters will be occupied. The applicable per diem rate could be the standard CONUS, CONUS non-standard area (NSA), or OCONUS non-foreign locality per diem rate as determined by GSA or the Department of Defense.

§ 302–6.24 How may my TQSE reimbursement be affected if I relocate to, or currently occupy, temporary quarters in a Presidentially-Declared Disaster area?

Your agency should consider delaying all non-essential relocations to Presidentially-Declared Disaster areas because the ability to secure temporary quarters lodgings in those areas may be

compromised. If relocation cannot be delayed, or if you are already occupying temporary quarters that have been affected by the disaster in a Presidentially-Declared Disaster area, for temporary quarters located within CONUS your agency may:

(a) Authorize you to occupy temporary quarters outside of the proximity requirements at § 302–6.10; and

(b) Authorize TQSE at the applicable locality per diem allowance under FTR §§ 301–11.100 through 301–11.102 of this subtitle or authorize actual expenses on an individual basis under FTR §§ 301–11.300 through 301–11.306 of this subtitle not to exceed 300 percent of the applicable per diem in accordance with § 301–11.303 of this subtitle; or

(c) Issue a blanket actual expense authorization for official relocation travel performed on or after the date of the Presidentially-Declared Disaster.

(d) The authorizations in paragraphs (a), (b), and (c) of this section must apply to a specific Presidential Disaster Declaration, and must end on the expiration date of the Declaration, or one year from the date the Declaration is issued, whichever is sooner. The maximum limit of 120 consecutive days that TQSE may be authorized is statutorily based and remains in effect in accordance with FTR § 302–6.29(a). A blanket authorization issued under this section shall not apply to any travel performed pursuant to chapter 301 of this subtitle and does not permit an agency to change the TQSE method authorized once the travel has begun. See § 302–6.22(b).

§ 302–6.25 Must I document my TQSE to receive reimbursement?

(a) *TQSE–LP method.* You must file a voucher and provide documentation for your temporary quarters lodging expenses, lodging taxes, and other subsistence expenses over $75. There is no requirement to document meals and incidental expenses.

(b) *TQSE–AE method.* You must file a voucher and document all temporary quarters lodging, lodging taxes, meals, and other subsistence expenses over $75.

(c) *TQSE–LS method.* You are not required to document your subsistence expenses or file a voucher. However, your agency will require you to sign a statement or other document, and provide proof that you actually occupied temporary quarters, even if not for the full length of time on which the lump sum calculation was based. In the absence of sufficient proof of temporary quarters occupancy, your agency may demand repayment of the TQSE–LS payment in accordance with § 302–6.205.

§ 302–6.26 May I receive an advance of funds for TQSE?

(a) *TQSE–LP and TQSE–AE methods.* You may receive an advance of funds if authorized in accordance with your agency policy and § 302–2.24 of this chapter. Your agency may advance the amount of funds necessary to cover your estimated TQSE expenses for up to 30 days. Your agency may subsequently advance additional funds for periods up to 30 days.

(b) *TQSE–LS method.* You will not receive an advance of funds as your agency will offer a one-time lump sum payment as close as is reasonably possible to the time you will begin occupancy of temporary quarters; no additional payments will be authorized. If your TQSE–LS payment is more than adequate to cover your actual TQSE expenses, any balance belongs to you (*e.g.,* your agency authorizes and you accept a lump sum payment for 15 days of TQSE and you vacate temporary quarters after 10 days, you would retain the remaining balance for the 5 days of TQSE not incurred).

§ 302–6.27 Must I use a Government contractor-issued travel charge card for TQSE?

Yes, you must use the Government contractor-issued travel charge card as the method of payment for all official relocation expenses, including TQSE, unless exempted under part 301–51 of this subtitle.

§ 302–6.28 Are temporary quarters lodging taxes and laundry/dry cleaning expenses included in the TQSE amount?

Temporary quarters lodging taxes are not included in your daily temporary quarters lodging rate and may be documented as a separate TQSE–LP or TQSE–AE miscellaneous expense. Lodging taxes for TQSE–LS are included in your overall lump sum amount. Laundry/dry cleaning expenses are included in your incidental portion of the daily M&IE allowance and are not separately reimbursed.

§ 302–6.29 How long may I be authorized to claim TQSE reimbursement?

(a) *TQSE–LP and TQSE–AE methods.* Your agency may initially authorize you to claim expenses in increments of 30 days or less, not to exceed 60 consecutive days. Your agency may authorize an extension of up to 60 additional consecutive days, for a maximum total of 120 consecutive days, if your agency determines that there is a compelling reason for you to continue occupying temporary quarters.

(b) *TQSE–LS method.* If your agency offers, and you select TQSE–LS, your agency may authorize a lump sum for each day authorized up to a maximum of 30 consecutive days of TQSE; no extensions are allowed under the lump sum payment method. You will not receive additional TQSE reimbursement if the lump sum payment is not adequate to cover your actual TQSE.

§ 302–6.30 May my agency reduce my authorized number of TQSE days if I am authorized a househunting trip?

Your agency may reduce the total number of days you are authorized for TQSE by the number of househunting days (*e.g.,* instead of authorizing 60 days of TQSE your agency can authorize 50 days to account for your 10-day househunting trip); however, the percentage multiplier used for calculating TQSE may not be reduced based on the number of days used for a househunting trip.

§ 302–6.31 What is a "compelling reason" warranting extension of my authorized period for claiming TQSE–LP or TQSE–AE reimbursement?

A ''compelling reason'' is an event that is beyond your control and is acceptable to your agency. Examples include, but are not limited to:

(a) Delivery of your household goods to your new residence is delayed due to availability of service providers, pandemics, strikes, customs clearance, hazardous weather, fires, floods or other acts of God, or similar events.

(b) You cannot occupy your new permanent residence because of unanticipated problems (*e.g.,* delay in settlement on the new residence, or short-term delay in construction of the residence).

(c) You are unable to locate a permanent residence that is adequate for your family's needs because of housing conditions at your new official station.

(d) Sudden illness, injury, your death or the death of your immediate family member.

§ 302–6.32 May I interrupt occupancy of temporary quarters?

Yes, your authorized period for claiming TQSE–LP and TQSE–AE reimbursement is measured on consecutive days, and once begun, normally continues to run whether or not you continue to occupy temporary quarters. However, you may interrupt your authorized period for claiming reimbursement in the following instances:

(a) For the time allowed for official travel en route between the old and new official stations;

(b) For circumstances attributable to official necessity such as an intervening temporary duty assignment or military duty; or

(c) For a non-official necessary interruption such as hospitalization, approved sick leave, or other reasons beyond your control and acceptable to your agency.

Subpart B—TQSE Methods of Reimbursement

§ 302–6.100 What am I paid under the TQSE–LP reimbursement method?

Your agency will pay your actual daily temporary quarters lodging cost and a daily M&IE allowance not to exceed the single maximum lodging amount and the single maximum M&IE amount for the applicable per diem rate (see § 302–6.23) for the locality at the old or new official station or combination thereof, wherever temporary quarters will be occupied. Your TQSE expenses must be reasonable and if expenses exceed the maximum allowable amount, you will not be reimbursed for more than the maximum allowable amount. The ''maximum allowable amount'' is the ''maximum daily amount'' multiplied by the number of days you actually incur TQSE not to exceed the number of days authorized, taking into account that the rates change after 30 days in temporary quarters. The ''maximum daily amount'' (see Note 1 to § 302–6.100) is determined by adding the rates for you and each member of your immediate family authorized to occupy temporary quarters:

(a) For the first 30 days of temporary quarters:

(1) You and/or your unaccompanied spouse or domestic partner (see Note 2 to § 302–6.100) may receive 100 percent of the temporary quarters lodging portion of the applicable per diem rate and 100 percent of the M&IE portion of the applicable per diem rate.

(2) Your accompanied spouse, domestic partner, or a member of your immediate family who is age 12 or older may receive 50 percent of the temporary quarters lodging portion of the applicable per diem rate and 50 percent of the M&IE portion of the applicable per diem rate.

(3) A member of your immediate family who is under age 12 may receive 40 percent of the temporary quarters lodging portion of the applicable per diem rate and 40 percent of the M&IE portion of the applicable per diem rate.

(b) For the second 30 days of temporary quarters:

(1) You and/or your unaccompanied spouse or domestic partner (see Note 2 to § 302–6.100) may receive 75 percent of the temporary quarters lodging portion of the applicable per diem rate and 75 percent of the M&IE portion of the applicable per diem rate.

(2) Your accompanied spouse, domestic partner, or a member of your immediate family who is age 12 or older may receive 45 percent of the temporary quarters lodging portion of the applicable per diem rate and 45 percent of the M&IE portion of the applicable per diem rate.

(3) A member of your immediate family who is under age 12 may receive 35 percent of the temporary quarters lodging portion of the applicable per diem rate and 35 percent of the M&IE portion of the applicable per diem rate.

(c) For any additional authorized days of temporary quarters:

(1) You and/or your unaccompanied spouse or domestic partner (see Note 2 to § 302–6.100) may receive 55 percent of the temporary quarters lodging portion of the applicable per diem rate and 55 percent of the M&IE portion of the applicable per diem rate.

(2) Your accompanied spouse, domestic partner, or a member of your immediate family who is age 12 or older may receive 40 percent of the temporary quarters lodging portion of the applicable per diem rate and 40 percent of the M&IE portion of the applicable per diem rate.

(3) A member of your immediate family who is under age 12 may receive 30 percent of the temporary quarters lodging portion of the applicable per diem rate and 30 percent of the M&IE portion of the applicable per diem rate.

Note 1 to § 302–6.100. Temporary quarters lodging and M&IE remain as separate maximum amounts for purposes of calculating TQSE–LP. Examples of TQSE calculations are published in an FTR bulletin at *https://gsa.gov/ftrbulletins.*

Note 2 to § 302–6.100. That is, when your spouse or domestic partner necessarily occupies temporary quarters in lieu of yourself or in a location separate from you.

§ 302–6.101 What am I paid under the TQSE–AE reimbursement method?

Your agency will pay your actual TQSE incurred, provided the expenses are reasonable and if expenses exceed the maximum allowable amount, you will not be reimbursed for more than the maximum allowable amount. The ''maximum allowable amount'' is the ''maximum daily amount'' multiplied by the number of days you actually incur TQSE not to exceed the number of days authorized, taking into account that the rates change after 30 days in temporary quarters. The ''maximum daily amount'' (see Note **1** to § 302–6.101) is determined by using the applicable per diem rate (see § 302–6.23) for the locality at the old or new official station or combination thereof, wherever temporary quarters will be occupied, and adding the rates for you and each member of your immediate family authorized to occupy temporary quarters:

(a) For the first 30 days of temporary quarters:

(1) You and/or your unaccompanied spouse or domestic partner (see Note 2 to § 302–6.101) may receive 100 percent of the applicable per diem rate.

(2) Your accompanied spouse, domestic partner, or a member of your immediate family who is age 12 or older may receive 50 percent of the applicable per diem rate.

(3) A member of your immediate family who is under age 12 may receive 40 percent of the applicable per diem rate.

(b) For the second 30 days of temporary quarters:

(1) You and/or your unaccompanied spouse or domestic partner (see Note 2 to § 302–6.101) may receive 75 percent of the applicable per diem rate.

(2) Your accompanied spouse, domestic partner, or a member of your immediate family who is age 12 or older may receive 45 percent of the applicable per diem rate.

(3) A member of your immediate family who is under age 12 may receive 35 percent of the applicable per diem rate.

(c) For any additional days of temporary quarters:

(1) You and/or your unaccompanied spouse or domestic partner (see Note 2 to § 302–6.101) may receive 55 percent of the applicable per diem rate.

(2) Your accompanied spouse, domestic partner, or a member of your immediate family who is age 12 or older may receive 40 percent of the applicable per diem rate.

(3) A member of your immediate family who is under age 12 may receive 30 percent of the applicable per diem rate.

Note 1 to § 302–6.101. Under TQSE–AE, separate amounts for temporary quarters lodging and M&IE may be combined to produce a single maximum daily amount to allow some of the M&IE rate to offset the lodging cost. Examples of TQSE calculations are published in an FTR bulletin at *https://gsa.gov/ftrbulletins.*

Note 2 to § 302–6.101. That is, when your spouse or domestic partner necessarily

occupies temporary quarters in lieu of yourself or in a location separate from you.

§ 302–6.102 What am I paid under the TQSE–LS reimbursement method?

(a) For you or your unaccompanied spouse or domestic partner (see Note 1 to § 302–6.102), if you are receiving a lump sum for TQSE, multiply the number of days (up to 30 days) your agency authorizes TQSE–LS by 75 percent of the applicable per diem rate (see § 302–6.23) for the locality at the old or new official station or combination thereof, wherever temporary quarters will be occupied.

(b) For each member of your immediate family (excluding your unaccompanied spouse or domestic partner), multiply the same number of days by 25 percent of the same per diem rate, as referenced in paragraph (a) of this section.

(c) Your lump sum payment will be the sum of the calculations in paragraphs (a) and (b) of this section.

Note 1 to § 302–6.102. That is, when your spouse or domestic partner necessarily occupies temporary quarters in lieu of yourself or in a location separate from you. Examples of TQSE calculations are published in an FTR bulletin at *https://gsa.gov/ftrbulletins.*

§ 302–6.103 May my agency reduce my TQSE allowance below the "maximum allowable amount"?

Yes, if the estimated daily amount of your TQSE is determined in advance to be lower than the maximum daily amount, your agency may reduce the maximum allowable amount to your expected expenses provided the new applicable amount is annotated on the relocation authorization before you occupy temporary quarters. However, see § 302–6.30 regarding househunting trips.

Subpart C—Agency Responsibilities

Note 1 to subpart C. Use of pronouns ''we'', ''you'', and their variants throughout this subpart refers to the agency.

§ 302–6.200 How should we administer the TQSE allowance?

Temporary quarters should be authorized only if, and only for as long as necessary until the employee and the employee's immediate family can move into permanent residence quarters. You must administer the TQSE allowance to minimize or avoid other relocation expenses.

§ 302–6.201 What governing policies must we establish for the TQSE allowance?

You must establish policies and procedures governing:

(a) When you will authorize temporary quarters for employees;

(b) Who will determine if temporary quarters is appropriate in each situation;

(c) What method of TQSE will be authorized;

(d) Who will determine the appropriate period of time for which TQSE reimbursement will be authorized, including approval of extensions and interruptions of temporary quarters occupancy;

(e) Who will determine whether quarters were indeed temporary; and

(f) Who will determine, and in what instances, to issue the authorizations at § 302–6.24, including a blanket authorization for actual expenses.

§ 302–6.202 Under what circumstances may we authorize the TQSE allowance?

You may authorize a TQSE allowance on an individual-case basis when use of temporary quarters is justified in connection with an employee's transfer to a new official station, including upon assignment to a temporary official station and permanent assignment to a temporary official station. You may not authorize a TQSE allowance for vacation purposes or other reasons unrelated to the transfer.

§ 302–6.203 What factors should we consider in determining whether the TQSE allowance is actually necessary?

The factors you should consider include:

(a) The length of time the employee should reasonably be expected to occupy their residence at the old official station before reporting for duty at the new official station. An employee and the employee's immediate family should continue to occupy the residence at the old official station for as long as practicable to avoid the necessity for temporary quarters.

(b) The existence of less expensive alternatives. If a less expensive alternative to the TQSE allowance exists that will enable the employee to find permanent quarters at the new official station, you should consider such an alternative. For example, authorize a househunting trip instead of temporary quarters if it would cost less overall.

(c) The existence of other opportunities to arrange for permanent quarters. Consider whether the employee had adequate opportunity to arrange for permanent quarters. For example, you should not authorize temporary quarters if the employee had adequate opportunity during an extended temporary duty assignment or long-term temporary change of station that became permanent, to arrange for permanent quarters.

§ 302–6.204 What factors should we consider in determining what TQSE method(s) to offer an employee?

When determining what TQSE method(s) to offer an employee the following factors should be considered:

(a) *Ease of administration.* You should consider the administrative requirements for each method of TQSE. Factors such as obtaining and reviewing receipts to verify validity, accuracy, and reasonableness of each expense carry an administrative burden to the employee, their immediate family, and you.

(b) *Cost consideration.* You should weigh the cost of each alternative. TQSE–LP and TQSE–AE reimbursement may extend up to 120 days, while the TQSE–LS payment is limited to a maximum of 30 days.

(c) *Treatment of employee.* The employee will be reimbursed for TQSE under the ''lodgings-plus'' method unless you offer one or more of the alternate methods. If you make all methods available to the employee, the employee is allowed to select any one of the methods. You should therefore consider employee morale and productivity against actual cost in determining which method(s) to offer.

§ 302–6.205 Must we require transferees to sign a statement that TQSE will be incurred?

(a) Transferees authorized TQSE–LP or TQSE–AE are not required to sign a statement asserting that they will occupy temporary quarters since they must document temporary quarters lodging expenses.

(b) Transferees electing the TQSE–LS payment option if offered by you, must sign a statement, which should be included as part of the service agreement, asserting that they will occupy temporary quarters and will incur TQSE. If a lump sum amount was paid, and if no TQSE are incurred, the transferee must return all monies received for the TQSE–LS payment to the agency.

§ 302–6.206 When must we make the TQSE–LS payment to the transferee?

You must pay the transferee the TQSE–LS payment before the occupancy of temporary quarters begins. You should make the TQSE–LS payment as close as is reasonably possible to the time that the transferee will begin occupancy of temporary quarters.

§ 302–6.207 What factors should we consider in determining whether quarters are temporary?

In determining whether quarters are ''temporary'', you should consider factors such as reasonable time when

the employee's residence at the old official station becomes temporary and no longer suitable for permanent residence (*e.g.,* household goods have been shipped and are unavailable to the employee and their immediate family), the duration of the lease, movement of household goods into the quarters, the type of quarters, the employee's expressions of intent, attempts to secure a permanent dwelling, and the length of time the employee occupies the quarters.

PART 302–17—TAXES ON RELOCATION EXPENSES

■ 4. The authority for part 302–17 continues to read as follows:

Authority: 5 U.S.C. 5724b; 5 U.S.C. 5738; E.O. 11609, as amended, 3 CFR, 1971–1975 Comp., p. 586.

§ 302–17.21 [Amended]

■ 5. Amend § 302–17.21(d) by removing ''actual expense or lump sum method'' in the second sentence and adding in its place ''lodgings-plus, actual expense, or lump sum method''.

[FR Doc. 2024–09485 Filed 5–6–24; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[RTID 0648–XD180]

Pacific Island Fisheries; Standardized Bycatch Reporting Methodologies

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

ACTION: Notice of Agency decision.

SUMMARY: NMFS announces the approval of Amendments to the five fishery ecosystem plans (FEP) for fisheries in the Pacific Islands Region. The FEPs are amended to update data collection mechanisms identified as standardized bycatch reporting methodologies (SBRM) and to revise descriptions of SBRM for consistency with current NMFS regulations. These Amendments ensure conformance with national guidance for compliance with the SBRM requirement in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: The Amendments were approved on May 2, 2024.

ADDRESSES: Electronic copies of the Amendments may be obtained via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and type NOAA–NMFS–2023–0151 in the Search box (*Note:* copying and pasting this Docket Number directly from this document may not yield search results). Documents can be found on the Council's website at *https://www.wpcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Brett Schumacher, Sustainable Fisheries Division, NMFS Pacific Islands Regional Office, 808–725–5176.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Stevens Act requires that each regional fishery management council submit any fishery management plan (FMP) amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary. 16 U.S.C. 1854(a). In lieu of FMPs, NMFS manages the fisheries in the Pacific Islands Region exclusive economic zone under five FEP: the American Samoa Archipelago FEP, the Hawaii Archipelago FEP, the Mariana Archipelago FEP, the Pacific Remote Island Areas (PRIA) FEP, and the Pelagic Fisheries of the Western Pacific Region FEP. The Western Pacific Fishery Management Council (Council) prepared these FEPs under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*

Regulations governing U.S. fisheries and implementation of the FEPs appear at 50 CFR parts 600 and 665. Section 303(a)(11) of the Magnuson-Stevens Act requires that any FEP establish a SBRM to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable, minimize bycatch and minimize the mortality of bycatch that cannot be avoided.

On January 19, 2017, NMFS published a final rule (82 FR 6317) establishing national guidance regulations at 50 CFR 600.1600 through 50 CFR 600.1610 for compliance with the Magnuson-Stevens Act SBRM requirement (SBRM regulations). The SBRM regulations define SBRM as a consistent procedure or procedures used to collect, record, and report bycatch data in a fishery managed under a FEP. The SBRM regulations require the Council to explain how each FEP's SBRM meets the purpose described in the national guidelines, based on an analysis of four considerations: (1) characteristics of bycatch in the fishery, (2) the feasibility of the reporting methodology, (3) the uncertainty of data resulting from the methodology, and (4) how the data will be used to assess the amount and type of bycatch occurring in the fishery. The Council undertook a review of its FEPs to ensure they met these requirements. That review resulted in the Amendments referenced in this notice. The Amendments update data collection mechanisms identified as SBRM as needed, and revise descriptions of SBRM in each FEP for consistency with the SBRM regulations. The Amendments are administrative in nature and would not change any fishery data collection, recording, or reporting methods or requirements, and would not implement any new regulations.

Further detail describing the Amendments was provided in the Notice of Availability (NOA) for this action and is not repeated here.

Procedural Aspects of the Amendments

The Council submitted the Amendments to the Secretary for review on February 1, 2024. On February 9, 2024, NMFS published a NOA for the Amendments, including background on the rationale for how the amendments proposed to satisfy the requirements of the SBRM regulations, and requested public review and comment (89 FR 9111). The public comment period for the subject Amendments ended on April 9, 2024. Two public comments were received pertaining to the omnibus amendment and are addressed below.

The Amendments do not add any new reporting requirements and do not change any regulatory requirements. Therefore, no proposed or final rule was prepared.

Comments and Responses

NMFS received two comments in support of the omnibus Amendment.

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

Dated: May 2, 2024.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2024–09956 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 240501–0123]

RIN 0648–BM65

Pacific Island Fisheries; Annual Catch Limits and Accountability Measures for Main Hawaiian Islands Kona Crab for Fishing Years 2024–2026

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

ACTION: Final rule.

SUMMARY: This final rule implements an annual catch limit (ACL), annual catch target (ACT), and accountability measures (AM) for main Hawaiian Islands (MHI) Kona crab for fishing years 2024, 2025, and 2026. NMFS will close Federal waters to Kona crab fishing for the remainder of the fishing year if NMFS projects the fishery will reach the ACT. NMFS will reduce the ACT and ACL in the subsequent fishing year by the overage amount if landings exceed the ACL in a fishing year. NMFS intends this final rule to support the long-term sustainability of MHI Kona crab.

DATES: This rule is effective June 6, 2024.

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

FOR FURTHER INFORMATION CONTACT: Savannah Lewis, NMFS Pacific Islands Regional Office (PIRO) Sustainable Fisheries, 808–725–5144.

SUPPLEMENTARY INFORMATION:

NMFS and the Council manage the Kona crab fishery in the U.S. Exclusive Economic Zone (Federal waters) around Hawaii under the Fishery Ecosystem Plan for the Hawaiian Archipelago (FEP), as authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (50 CFR part 665). The FEP contains a process for the Council and NMFS to specify ACLs, ACTs, and AMs (see 50 CFR 665.4). NMFS must specify ACLs and AMs for each stock and stock complex of each management unit species (MUS) in an FEP, as recommended by the Council, and must consider the best available scientific, commercial, and other information about the fishery. If a fishery exceeds an ACL, the regulations require the Council to take action (*e.g.,* an AM reducing the ACL for the subsequent fishing year by the amount of the overage). ACTs can be used as an additional management measure to help ensure catch does not exceed the ACL.

NMFS is implementing for the MHI Kona crab, an ACL of 30,802 pounds (lb; 13,972 kilograms (kg)) and an ACT of 25,491 lb (11,563 kg). The fishing year begins on January 1 and ends on December 31, and catch from both State (generally from the shoreline to three nautical miles, or 5.6 kilometers (km), offshore) and Federal waters are counted towards catch limits.

TABLE 1—ANNUAL CATCH LIMITS AND ANNUAL CATCH TARGETS FOR MAIN HAWAIIAN ISLANDS KONA CRAB

Fishing year	2024	2025	2026
ACL (lb)	30,802	30,802	30,802
ACT (lb)	25,491	25,491	25,491

The rule will not change the current AM for the MHI Kona crab fishery (50 CFR 665.253(b)). As an in-season AM, NMFS will close Federal waters to commercial and non-commercial fishing for Kona crab for the remainder of the fishing year if NMFS projects that the fishery will reach the ACT. If a closure occurs, NMFS will publish a document to that effect in the **Federal Register** at least 7 days in advance of the closure. We will also request the State of Hawaii notify Commercial Marine License holders of any changes in the fishery, including an in-season closure or a post-season correction. The State of Hawaii does not currently require closure of state waters when the federal ACT is reached. Catch from state waters will continue to be attributed to the ACT and ACL. As a post-season AM, NMFS will reduce the ACT and ACL in the subsequent fishing year by the overage amount if the landings exceed the ACL in a fishing year. If catch exceeds the ACT, but is below the ACL, NMFS will not apply a post-season correction.

This rule is consistent with recommendations made by the Council at its 195th meeting in June 2023, and the 2024–2026 catch limits are identical to those implemented in 2020 for fishing years 2020–2023.

Additional background information on this action is in the preamble to the proposed rule (89 FR 7658, February 04, 2024).

Comments and Responses

On February 04, 2024, NMFS published a proposed rule and request for public comments (89 FR 7658). The comment period ended March 05, 2024. NMFS received two comments from the interested public generally supporting the action. One of these comments also expressed concern for effects on local businesses that may result if NMFS implements the AMs and closes the fishery early. NMFS summarizes the comments and responds below.

Comment 1: I support the analysis and rationale of the proposed ACL and ACT.

Response: NMFS agrees, and we will continue to manage the Kona crab fishery in Federal waters to perpetuate sustainable fisheries resources for communities in Hawaii, consistent with the Magnuson-Stevens Act, the FEP and implementing regulations.

Comment 2: The effect of the proposed regulations on small island businesses cannot be overlooked. Cutting off the season prematurely may disproportionately affect the locals who rely upon the crabs for their livelihood. More investigation into these effects seems necessary.

Response: With respect to potential impacts to small businesses, NMFS quantitatively evaluated potential economic and social effects of all proposed management actions and determined this action would not cause significant social or economic effects. During the proposed rule stage, the Chief Counsel for Regulation of the

Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the rule will not have a significant economic impact on a substantial number of small business entities.

NMFS and the Council monitor the fishery in collaboration with the State of Hawaii based on monthly catch reports. This consistent data stream ensures that the fishery would not be closed prematurely, and would be closed only if necessary to prevent overfishing. NMFS does not anticipate the fishery will reach the ACT or ACL based on recent performance. Average catch of Kona crab over the last 3 years was 3,581 lb (1,624 kg), only 12 percent of the ACL and 14 percent of the ACT, and the fishery has not caught over 25,000 lb (11,340 kg) since 1998. Further, the Kona crab fishery has been managed under the same ACL, ACT and AM since 2020, and catch has not reached the ACT since in any year since 2020. Based on this information, we do not anticipate that we will need to apply the in-season AM to close the fishery in Federal waters. Should catch in the fishery reach the ACT and NMFS implement the AM to close the fishery in Federal waters, fishers could continue to operate in State waters, minimizing the potential socio-economic effects of the closure. Nevertheless, closing the fishery in Federal waters would provide enhanced protection of Kona crab stock in Federal waters to prevent overfishing of the stock and perpetuate the Kona crab fishery for communities in Hawaii. Therefore, NMFS does not anticipate the rule will result in significant environmental, social, or economic impacts.

Changes From the Proposed Rule

This final rule contains no changes from the proposed rule.

Classification

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

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

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

List of Subjects in 50 CFR Part 665

Accountability measures, Annual catch limits, Fisheries, Fishing, Hawaii, Kona crab, Pacific Islands.

Dated: May 1, 2024.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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

PART 665—FISHERIES IN THE WESTERN PACIFIC

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

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

■ 2. In § 665.253, revise paragraph (b)(1) to read as follows:

§ 665.253 Annual Catch Limits (ACL) and Annual Catch Targets (ACT).

* * * * *

(b) * * * (1) In accordance with § 665.4, the ACLs and ACTs for each fishing year are as follows:

TABLE 1 TO PARAGRAPH (b)(1)

Fishing year	2024	2025	2026
ACL (lb)	30,802	30,802	30,802
ACT (lb)	25,491	25,491	25,491

* * * * *

[FR Doc. 2024–09927 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 89
Tuesday, May 7, 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 ENERGY

10 CFR Part 430

[EERE–2020–BT–STD–0039]

RIN 1904–AF62

Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including miscellaneous refrigeration products (''MREFs''). In this notice of proposed rulemaking (''NOPR''), DOE proposes new energy conservation standards for MREFs identical to those set forth in a direct final rule published elsewhere in this issue of the **Federal Register**. If DOE receives adverse comment and determines that such comment may provide a reasonable basis for withdrawal of the direct final rule, DOE will publish a notice of withdrawal and will proceed with this proposed rule.

DATES: DOE will accept comments, data, and information regarding this NOPR no later than August 26, 2024. Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in the **ADDRESSES** section on or before June 6, 2024.

ADDRESSES: See section IV of this document, ''Public Participation,'' for details. If DOE withdraws the direct final rule published elsewhere in this issue of the **Federal Register**, DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2020–BT–STD–0039. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2020–BT–STD–0039, by any of the following methods:

(1) *Email: ApplianceStandardsQuestions@ee.doe.gov.* Include the docket number EERE–2020–BT–STD–0039 in the subject line of the message.

(2) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

(3) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 1000 Independence Avenue SW, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

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

The docket web page can be found at *www.regulations.gov/docket/EERE-020-BT-STD-0039.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section IV of this document for information on how to submit comments through *www.regulations.gov.*

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Division at *energy.standards@usdoj.gov* on or before the date specified in the **DATES** section. Please indicate in the ''Subject'' line of your email the title and Docket Number of this proposed rulemaking.

FOR FURTHER INFORMATION CONTACT:

Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5904 Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Mr. Matthew Schneider, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 597–6265. Email: *matthew.schneider@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Synopsis of the Proposed Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B of EPCA[2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include miscellaneous refrigeration products (''MREFs''), the subject of this proposed rulemaking.

Pursuant to EPCA, any new or amended energy conservation standard must, among other things, be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

In light of the above and under the authority provided by 42 U.S.C. 6295(p)(4), DOE is proposing this rule establishing and amending the energy conservation standards for miscellaneous refrigeration products and is concurrently issuing a direct final rule elsewhere in this **Federal Register**. DOE will proceed with this notice of proposed rulemaking only if it determines it must withdraw the direct final rule pursuant to the criteria provided in 42 U.S.C. 6295(p)(4). The amended standard levels in the proposed rule and the direct final rule were recommended in a letter submitted to DOE jointly by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility. This letter, titled ''Energy Efficiency Agreement of 2023'' (hereafter, the ''Joint Agreement''[3]), recommends specific energy conservation standards for miscellaneous refrigeration products that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o). DOE subsequently received letters of support from States including New York, California, and Massachusetts[4] and utilities including San Diego Gas and Electric and Southern California Edison[5] advocating for the adoption of the recommended standards. As discussed in more detail in the accompanying direct final rule and in accordance with the provisions at 42 U.S.C. 6295(p)(4), DOE has determined that the recommendations contained in the Joint Agreement comply with the requirements of 42 U.S.C. 6295(o).

In accordance with these and other statutory provisions discussed in this document, DOE proposes new and amended energy conservation standards for miscellaneous refrigeration products. The standards for miscellaneous refrigeration products are expressed in terms of integrated annual energy use (''AEU''), measured in kilowatt-hours per year (''kWh/year''), as measured according to DOE's current test procedure codified at title 10 of the Code of Federal Regulations (''CFR'') part 430, subpart B, appendix A (''appendix A'').

Table I.1 presents the proposed standards for MREFs. The proposed standards are the same as those recommended by the Joint Agreement. These standards would apply to all products listed in Table I.1 and manufactured in, or imported into the United States starting on January 31, 2029, as recommended in the Joint Agreement.

Table I.1 Energy Conservation Standards for Miscellaneous Refrigeration Products (Compliance Starting January 31, 2029)

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0034.*

[4] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0035.*

[5] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0036.*

Product Class ("PC")	Equations for maximum energy use (kWh/yr)
	Based on AV (ft^3)
1. Freestanding Compact Coolers (FCC)	5.52AV +109.1
2. Freestanding Coolers (FC)	5.52AV +109.1
3. Built-in Compact Coolers (BICC)	5.52AV +109.1
4. Built-in Coolers (BIC)	6.30AV + 124.6
C-3A. Cooler with all-refrigerator – automatic defrost	4.11AV + 117.4
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost	4.67AV + 133.0
C-5-BI. Built-in cooler with refrigerator-freezer – automatic defrost with bottom-mounted freezer	5.47AV + 196.2 +28I
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C-13A. Compact cooler with all-refrigerator – automatic defrost	4.74AV + 155.0
C-13A-BI. Built-in compact cooler with all-refrigerator – automatic defrost	5.22AV + 170.5

AV = Total adjusted volume, expressed in ft^3, as determined in appendices A and B of subpart B of 10 CFR part 430.
av = Total adjusted volume, expressed in Liters.
I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.

II. Introduction

The following section briefly discusses the statutory authority underlying this proposed rule, as well as some of the relevant historical background related to the establishment of standards for MREFs.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA [6] established the Energy Conservation Program for Consumer Products Other Than Automobiles, which, in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016 (the ''July 2016 Final Coverage Determination''). 81 FR 46768. MREFs are consumer refrigeration products other than refrigerators, refrigerator-freezers, or freezers, which include coolers and combination cooler refrigeration products. 10 CFR 430.2. MREFs include refrigeration products such as coolers (*e.g.,* wine chillers and other specialty products) and combination cooler refrigeration products (*e.g.,* wine chillers and other specialty compartments combined with a refrigerator, refrigerator-freezers, or freezers). EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) Not later than three years after issuance of a final determination not to amend standards, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B))

The energy conservation program under EPCA, consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of the EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6297(d))

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those

[6] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedure for MREFs appears at appendix A (*Uniform Test Method for Measuring the Energy Consumption of Refrigerators, Refrigerator-Freezers, and Miscellaneous Refrigeration Products*).

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including MREFs. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy (''Secretary'') determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3))

Moreover, DOE may not prescribe a standard (1) for certain products, including MREFs, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. A rule prescribing an energy conservation standard for a type (or class) of product must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE considers such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. (*Id.*) Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Additionally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, are required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedure for MREFs addresses standby mode and off mode energy use. The standards proposed in this NOPR incorporate standby and off mode energy use.

Finally, EISA 2007 amended EPCA, in relevant part, to grant DOE authority to issue a final rule (*i.e.,* a ''direct final rule'') establishing an energy conservation standard upon receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, that contains recommendations with respect to an energy or water conservation standard. (42 U.S.C. 6295(p)(4)) Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

A NOPR that proposes an identical energy efficiency standard must be published simultaneously with the direct final rule, and DOE must provide a public comment period of at least 110 days on this proposal. (42 U.S.C. 6295(p)(4)(A)–(B)) Based on the comments received during this period, the direct final rule will either become effective, or DOE will withdraw it not later than 120 days after its issuance if: (1) one or more adverse comments is received, and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(C)) Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. (*Id.*) After withdrawing a direct final rule, DOE must proceed with the NOPR published simultaneously with the direct final rule and publish in the **Federal Register** the reasons why the direct final rule was withdrawn. (*Id.*)

DOE has previously explained its interpretation of its direct final rule authority. In a final rule amending the Department's ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' at 10 CFR part 430, subpart C, appendix A, DOE noted that it may issue standards recommended by interested persons that are fairly representative of relative points of view as a direct final rule when the recommended standards are in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. 86 FR 70892, 70912 (Dec. 13, 2021). But the direct final rule provision in EPCA, under which this proposed rule is issued, does not impose additional requirements applicable to other standards rulemakings, which is consistent with the unique circumstances of rules issued as consensus agreements under DOE's direct final rule authority. *Id.* DOE's discretion remains bounded by its statutory mandate to adopt a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified—a requirement found in 42 U.S.C. 6295(o). *Id.* As such, DOE's review and analysis of the Joint Agreement is limited to whether the recommended standards satisfy the criteria in 42 U.S.C. 6295(o).

B. Background

1. Current Standards

In a direct final rule published on October 28, 2016 (''October 2016 Direct Final Rule''), DOE prescribed the current energy conservation standards for MREFs manufactured on and after October 28, 2019. 81 FR 75194. These standards are set forth in DOE's regulations at 10 CFR 430.32(a)(1)–(2). These standards are consistent with a negotiated term sheet submitted to DOE by interested parties representing manufacturers, energy and environmental advocates, and consumer groups.[7]

2. Current Test Procedures

On October 12, 2021, DOE published a test procedure final rule (''October 2021 TP Final Rule'') establishing test procedures for MREFs, at appendix A. 86 FR 56790. The test procedure amendments included adopting the latest version of the relevant industry standard published by the Association of Home Appliance Manufacturers (''AHAM''), updated in 2019, AHAM Standard HRF–1, ''Energy and Internal Volume of Refrigerating Appliances'' (''HRF–1–2019''). 10 CFR 430.3(i)(4). The standard levels adopted in this direct final rule are based on the annual energy use (''AEU'') metrics as measured according to appendix A.

3. History of Standards Rulemaking for MREFs

On April 1, 2015, DOE published a notice announcing its intention to establish a negotiated rulemaking working group under the Appliance Standards Rulemaking Advisory Committee (''ASRAC'') to negotiate energy conservation standards for refrigeration products such as wine chillers. 80 FR 17355. DOE then created a working group of interested parties to develop a series of recommended energy conservation standards for MREFs. On July 18, 2016, DOE published the July 2016 Final Coverage Determination that added MREFs as covered products. 81 FR 46768. In that determination, DOE noted that MREFs, on average, consume more than 150 kilowatt-hours per year (''kWh/yr'') and that the aggregate annual national energy use of these products exceeds 4.2 terawatt hours (''TWh''). 81 FR 46768, 46775. In addition to establishing coverage, the July 2016 Final Coverage Determination established definitions for ''miscellaneous refrigeration products,'' ''coolers,'' and ''combination cooler refrigeration products'' in 10 CFR 430.2. 81 FR 46768, 46791–46792.

On October 28, 2016, a negotiated term sheet containing a series of recommended standards and other related recommendations were submitted to ASRAC for approval and, subsequently, DOE published the October 2016 Direct Final Rule adopting energy conservation standards consistent with the recommendations contained in the term sheet. 81 FR 75194. Concurrent with the October 2016 Direct Final Rule, DOE published a NOPR in which it proposed and requested comments on the standards set forth in the direct final rule. 81 FR 74950. On May 26, 2017, DOE published a notice in the **Federal Register** in which it determined that the comments received in response to the October 2016 Direct Final Rule did not provide a reasonable basis for withdrawing the rule and, therefore, confirmed the adoption of the energy conservation standards established in that direct final rule. 82 FR 24214.

4. The Joint Agreement

On September 25, 2023, DOE received a joint statement of recommended standards (*i.e.,* the Joint Agreement) for various consumer products, including MREFs, submitted jointly by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility.[8] In addition to the recommended standards for MREFs, the Joint Agreement also included separate recommendations for several other covered products.[9] And, while acknowledging that DOE may implement these recommendations in separate rulemakings, the Joint Agreement also stated that the recommendations were recommended as a complete package, and each recommendation is contingent upon the other parts being implemented. DOE understands this to mean that the Joint Agreement is contingent upon DOE initiating rulemaking processes to adopt all of the recommended standards in the agreement. That is distinguished from an agreement where issuance of an amended energy conservation standard for a covered product is contingent on issuance of amended energy conservation standards for the other covered products. If the Joint Agreement were so construed, it would conflict with the anti-backsliding provision in 42 U.S.C. 6295(o)(1), because it would imply the possibility that, if DOE were unable to issue an amended standard for a certain product, it would have to withdraw a previously issued standard for one of the other products. The anti-backsliding provision, however, prevents DOE from withdrawing or amending an energy conservation standard to be less stringent. As a result, DOE will be proceeding with individual rulemakings that will evaluate each of the recommended standards separately

[7] The negotiated term sheets are available in docket ID EERE–2011–BT–STD–0043 on *www.regulations.gov.*

[8] The signatories to the Joint Agreement include AHAM, American Council for an Energy-Efficient Economy, Alliance for Water Efficiency, Appliance Standards Awareness Project, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, and Pacific Gas and Electric Company. Members of AHAM's Major Appliance Division that manufacture the affected products include: Alliance Laundry Systems, LLC; Asko Appliances AB; Beko US Inc.; Brown Stove Works, Inc.; BSH; Danby Products, Ltd.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber; Fotile America; GEA, a Haier Company; L'Atelier Paris Haute Design LLG; LGEUSA; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Appliances Refrigeration Systems (PAPRSA) Corporation of America; Perlick Corporation; Samsung; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; The Middleby Corporation; U-Line Corporation; Viking Range, LLC; and Whirlpool.

[9] The Joint Agreement contained recommendations for six covered products: refrigerators, refrigerator-freezers, and freezers; residential clothes washers; consumer clothes dryers; dishwashers; consumer conventional cooking products; and miscellaneous refrigeration products.

under the applicable statutory criteria. The Joint Agreement recommends amended standard levels for MREFs as presented in Table II.1. (Joint Agreement, No. 34 at p. 4) Details of the Joint Agreement recommendations for other products are provided in the Joint Agreement posted in the docket.[10]

Table II.1 Recommended Amended Energy Conservation Standards for Miscellaneous Refrigeration Products

BILLING CODE 6450–01–P

Product Class	Level (Based on AV (ft^3))	Compliance Date
1. Freestanding Compact Coolers (FCC)	5.52AV +109.1	January 31, 2029
2. Freestanding Coolers (FC)	5.52AV +109.1	January 31, 2029
3. Built-in Compact Coolers (BICC)	5.52AV +109.1	January 31, 2029
4. Built-in Coolers (BIC)	6.30AV + 124.6	January 31, 2029
C-3A. Cooler with all-refrigerator – automatic defrost	4.11AV + 117.4	January 31, 2029
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost	4.67AV + 133.0	January 31, 2029
C-5-BI. NEW PRODUCT CLASS: Built-in cooler with refrigerator-freezer – automatic defrost with bottom-mounted freezer	5.47AV + 196.2 +28I	January 31, 2029
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I	January 31, 2029
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I	January 31, 2029
C-13A. Compact cooler with all-refrigerator – automatic defrost	4.74AV + 155.0	January 31, 2029
C-13A-BI. Built-in compact cooler with all-refrigerator – automatic defrost	5.22AV + 170.5	January 31, 2029
AV = Total adjusted volume, expressed in ft3, as determined in appendices A and B of subpart B of 10 CFR part 430. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.		

DOE has evaluated the Joint Agreement and believes that it meets the EPCA requirements for issuance of a direct final rule. As a result, DOE published a direct final rule establishing energy conservation standards for MREFs elsewhere in this issue of the **Federal Register**. If DOE receives adverse comments that may provide a reasonable basis for withdrawal and withdraws the direct final rule, DOE will consider those comments and any other comments received in determining how to proceed with this proposed rule.

For further background information on these proposed standards and the supporting analyses, please see the direct final rule published elsewhere in this issue of the **Federal Register**. That document, and the accompanying technical support document (''TSD''). Those documents contain an in-depth discussion of the analyses conducted in evaluating the Joint Agreement, the methodologies DOE used in conducting those analyses, and the analytical results.

DOE also notes that it was conducting a rulemaking to consider amending the standards for MREFs when the Joint Agreement was submitted. As part of that process, DOE published a NOPR and announced a public meeting on March 31, 2023 (''March 2023 NOPR'') seeking comment on its proposed amended standards to inform its decision consistent with its obligations under EPCA and the Administrative Procedure Act (''APA''). 88 FR 19382. DOE held a public webinar on May 2, 2023, to discuss and receive comments on the March 2023 NOPR and NOPR TSD (''May 2, 2023, public meeting''). The NOPR TSD is available at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0026*. The March 2023 NOPR proposed amended standards defined in terms of the AEU metrics as measured according to appendix A. *Id.* at 88 FR 19383–19384.

III. Proposed Standards

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent

[10] The Joint Agreement is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0034.*

practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

DOE considered the impacts of proposed standards for MREFs at each trial standard level (''TSL''), beginning with the maximum technologically feasible (''max-tech'') level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically justified and economically justified and saves a significant amount of energy. DOE refers to this process as the ''walk-down'' analysis.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher-than-expected rate between current consumption and uncertain future energy cost savings.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forgo the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the manufacturer impact analysis (''MIA''). Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the direct final rule TSD [11] available in the docket for this rulemaking. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[12]

[11] The TSD is available in the docket for this rulemaking at *www.regulations.gov/document/EERE-2017-BT-STD-0003-0046/document.*

[12] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034–6527.00354.*

DOE continues to explore additional potential updates to the quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, and DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[12] DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

A. Benefits and Burdens of TSLs Considered for MREF Standards

Table III.1 and Table III.2 summarize the quantitative impacts estimated for each TSL for MREFs. The national impacts are measured over the lifetime of MREFs purchased in the 30-year period that begins in the anticipated year of compliance with amended standards (2029–2058). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle (''FFC'') results. DOE is presenting monetized benefits of greenhouse gas (''GHG'') emissions reductions in accordance with the applicable Executive orders and DOE would reach the same conclusion presented in this document in the absence of the social cost of GHGs, including the Interim Estimates presented by the Interagency Working Group. The efficiency levels contained in each TSL are described in section V.A of the direct final rule published elsewhere in this issue of the **Federal Register**.

Table III.1 Summary of Analytical Results for Miscellaneous Refrigeration Product TSLs: National Impacts for Products Shipped 2029–2058

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Cumulative FFC National Energy Savings					
Quads	0.10	0.20	0.22	0.32	0.55
Cumulative FFC Emissions Reduction					
CO_2 (*million metric tons*)	1.81	3.66	3.99	5.85	10.03
CH_4 (*thousand tons*)	15.02	30.44	33.15	48.64	83.41
N_2O (*thousand tons*)	0.02	0.04	0.04	0.06	0.10
NO_2 (*thousand tons*)	3.33	6.75	7.34	10.77	18.47
SO_X (*thousand tons*)	0.57	1.15	1.25	1.84	3.15
Hg (*tons*)	0.00	0.01	0.01	0.01	0.02
Present Value of Benefits and Costs (*3% discount rate, billion 2022$*)					
Consumer Operating Cost Savings	0.62	1.26	1.37	2.00	3.44
Climate Benefits*	0.10	0.20	0.22	0.32	0.55
Health Benefits**	0.19	0.39	0.42	0.62	1.06
Total Benefits†	0.91	1.85	2.01	2.94	5.04
Consumer Incremental Product Costs‡	0.13	0.54	0.50	1.23	5.12
Consumer Net Benefits	0.49	0.72	0.87	0.77	-1.68
Total Net Benefits	0.78	1.31	1.51	1.71	-0.07
Present Value of Benefits and Costs (*7% discount rate, billion 2022$*)					
Consumer Operating Cost Savings	0.27	0.54	0.59	0.86	1.47
Climate Benefits*	0.10	0.20	0.22	0.32	0.55
Health Benefits**	0.08	0.15	0.17	0.24	0.41
Total Benefits†	0.44	0.90	0.97	1.42	2.43
Consumer Incremental Product Costs‡	0.07	0.30	0.28	0.69	2.83
Consumer Net Benefits	0.19	0.24	0.31	0.17	-1.36
Total Net Benefits	0.37	0.60	0.69	0.73	-0.40

Note: This table presents the costs and benefits associated with MREFs shipped during the period 2029−2058. These results include benefits to consumers which accrue after 2058 from the products shipped in 2029−2058.

* Climate benefits are calculated using four different estimates of the SC-CO_2, SC-CH_4 and SC-N_2O. Together, these represent the global SC-GHG. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. For more details, see section IV.L of the direct final rule published elsewhere in this issue of the *Federal Register*.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs.

Table III.2 Summary of Analytical Results for MREFs TSLs: Manufacturer and Consumer Impacts

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Manufacturer Impacts					
Industry NPV (million 2022$) (No-new-standards case INPV = 807.7)	773.7 to 777.2	758.7 to 770.6	761.9 to 772.1	715.6 to 747.4	386.7 to 524.5
Industry NPV (% change)	(4.2) to (3.8)	(6.1) to (4.6)	(5.7) to (4.4)	(11.4) to (7.5)	(52.1) to (35.1)
Consumer Average LCC Savings (2022$)					
FCC	17.53	17.55	17.55	12.97	(58.75)
BICC	16.08	1.53	1.53	1.53	(97.38)
FC	21.06	21.06	45.59	26.22	(265.96)
BIC	18.99	19.27	53.56	53.56	(293.40)
C-3A	30.95	30.95	30.95	30.95	(242.46)
C-3A-BI	36.19	36.19	36.19	36.19	(249.95)
C-13A	24.36	37.86	37.86	10.60	(89.25)
Shipment-Weighted Average*	37.52	21.11	25.23	15.24	(99.49)
Consumer Simple PBP (years)					
FCC	2.0	5.0	5.0	6.8	13.0
BICC	2.4	8.1	8.1	8.1	15.4
FC	6.5	6.5	4.2	8.5	29.9
BIC	6.9	9.0	4.4	4.4	31.7
C-3A	1.7	1.7	1.7	1.7	45.4
C-3A-BI	1.6	1.6	1.6	1.6	42.0
C-13A	1.1	1.3	1.3	7.3	19.5
Shipment-Weighted Average*	2.6	4.7	4.3	7.1	17.1
Percent of Consumers that Experience a Net Cost					
FCC	1.9	30.6	30.6	46.8	81.6
BICC	0.9	15.1	15.1	15.1	23.7
FC	10.0	10.0	1.8	44.0	98.2
BIC	19.2	52.7	4.6	4.6	98.4
C-3A	0.0	0.0	0.0	0.0	99.6
C-3A-BI	0.0	0.0	0.0	0.0	99.3
C-13A	0.3	0.6	0.6	47.2	93.9
Shipment-Weighted Average*	3.1	22.9	20.3	43.7	84.5

Parentheses indicate negative (-) values.
* Weighted by shares of each product class in total projected shipments in 2029.

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DOE first considered TSL 5, which represents the max-tech efficiency levels. For coolers (*i.e.,* FCC, FC, BICC, and BIC), which account for approximately 82 percent of MREF shipments, DOE expects that products would require use of vacuum insulated panels (''VIPs''), variable speed compressors (''VSCs''), and triple-glazed doors at this TSL. DOE expects that VIPs would be used in the products' side walls. In addition, the products would use the best-available-efficiency variable-speed compressors, forced-convection heat exchangers with multi-speed brushless-DC (''BLDC'') fans, and increase in cabinet wall thickness as compared to most baseline products. TSL 5 would save an estimated 0.55 quadrillion British thermal units (''quads'') of energy, an amount which DOE considers significant. Under TSL 5, the net present value (''NPV'') of consumer benefit would be negative, *i.e.,* −$1.36 billion using a discount rate of 7 percent, and −$1.68 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 10.0 Mt of CO_2, 3.15 thousand tons of SO_2, 18.5 thousand tons of NO_X, 0.02 tons of Hg, 83.4 thousand tons of CH_4, and 0.10 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at

a 3-percent discount rate) at TSL 5 is $0.6 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 5 is $0.4 billion using a 7-percent discount rate and $1.1 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 5 is −$0.4 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 5 is −$0.07 billion. The estimated total monetized NPV is provided for additional information, however, consistent with the statutory factors and framework for along with appropriate consideration of its full range of statutory factors when determining whether a proposed standard level is economically justified, DOE considers a range of quantitative and qualitative benefits and burdens, including the costs and cost savings for consumers, impacts to consumer subgroups, energy savings, emission reductions, and impacts on manufacturers.

At TSL 5, for the product classes with the largest market share, which are FCC, FC, and C–13A and together account for approximately 92 percent of annual shipments, the life-cycle cost (''LCC'') savings are all negative (−$45.3, −$178.8, and −$73.4, respectively) and their payback periods are 13.0 years, 29.9 years, and 19.5 years, respectively, which are all longer than their corresponding average lifetimes. For these product classes, the fraction of consumers experiencing a net LCC cost is 81.6 percent, 98.2 percent, and 93.9 percent due to increases in first cost of $185.0, $420.5, and $167.5, respectively. Overall, a majority of MREF consumers (84.5 percent) would experience a net cost and the average LCC savings would be negative for all analyzed product classes.

At TSL 5, the projected change in industry net present value (''INPV'') ranges from a decrease of $421.0 million to a decrease of $283.2 million, which corresponds to decreases of 51.2 percent and 35.1 percent, respectively. DOE estimates that industry must invest $555.1 million to comply with standards set at TSL 5.

DOE estimates that approximately 2.9 percent of current MREF shipments meet the max-tech levels. For FCC, FC, and C–13A, which together account for approximately 92 percent of annual shipments, DOE estimates that zero shipments currently meet max-tech efficiencies.

At TSL 5, manufacturers would likely need to implement all the most efficient design options analyzed in the engineering analysis. Manufacturers that do not currently offer products that meet TSL 5 efficiencies would need to develop new product platforms, which would require significant investment. Conversion costs are driven by the need for changes to cabinet construction, such as increasing foam insulation thickness and/or incorporating VIP technology. Increasing insulation thickness could result in a loss of interior volume or an increase in exterior volume. If manufacturers chose to maintain exterior dimensions, increasing insulation thickness would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. Incorporating VIPs into MREF designs could also require redesign of the cabinet to maximize the efficiency benefit of this technology. In addition to insulation changes, manufacturers may need to implement triple-pane glass, which could require implementing reinforced hinges and redesigning the door structure.

At this level, DOE estimates a 13-percent drop in shipments in the year the standard takes effect compared to the no-new-standards case, as some consumers may forgo purchasing a new MREF due to the increased upfront cost of baseline models.

At TSL 5, the Secretary tentatively concludes that the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on many consumers, negative NPV of consumer benefits, and the impacts on manufacturers, including the significant potential reduction in INPV. A majority of MREF consumers (84.5 percent) would experience a net cost and the average LCC savings would be negative. Additionally, manufacturers would need to make significant upfront investments to update product platforms. The potential reduction in INPV could be as high as 52.1 percent. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered the Recommended TSL (*i.e.,* TSL 4) which represents efficiency level (''EL'') 3 for all analyzed product classes except for C–3A and C–3A–BI, for which this TSL corresponds to EL 1, and BIC, for which this TSL corresponds to EL 2. At the Recommended TSL, products of most classes would use high-efficiency single-speed compressors with forced-convection evaporators and condensers using brushless-DC fan motors. Doors would be double-glazed with low-conductivity gas fill (*e.g.,* argon) and a single low-emissivity glass layer. Products would not require use of VIPs, but the FC product class would require thicker walls than corresponding baseline products. The Recommended TSL would save an estimated 0.32 quads of energy, an amount DOE considers significant. Under the Recommended TSL, the NPV of consumer benefit would be $0.17 billion using a discount rate of 7 percent, and $0.77 billion using a discount rate of 3 percent.

The cumulative emissions reductions at the Recommended TSL are 5.9 Mt of CO_2, 1.8 thousand tons of SO_2, 10.8 thousand tons of NO_X, 0.01 tons of Hg, 48.6 thousand tons of CH_4, and 0.06 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at the Recommended TSL is $0.3 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at the Recommended TSL is $0.2 billion using a 7-percent discount rate and $0.6 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at the Recommended TSL is $0.7 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at the Recommended TSL is $1.7 billion. The estimated total monetized NPV is provided for additional information, however, consistent with the statutory factors and framework for determining whether a standard level is economically justified, DOE considers a range of quantitative and qualitative benefits and burdens, including the costs and cost savings for consumers, impacts to consumer subgroups, energy savings, emission reductions, and impacts on manufacturers.

At the Recommended TSL, for the product classes with the largest market share, which are FCC, FC, and C–13A, the LCC savings are $12.6, $28.0, and $12.0, respectively, and their payback periods are 6.8 years, 8.5 years, and 7.3 years, respectively, which are all shorter than their corresponding average lifetimes. For these product classes, the fraction of consumers experiencing a net

LCC cost is 46.8 percent, 44.0 percent, and 47.2 percent, and increases in first cost for these classes are $91.7, $360.9, and $124.3, respectively. Overall, the LCC savings would be positive for all MREF product classes, and, while 43.7 percent of MREF consumers would experience a net cost, slightly more than half of MREF consumers would experience a net benefit (52.9 percent).

At the Recommended TSL (*i.e.,* TSL 4), the projected change in INPV ranges from a decrease of $92.1 million to a decrease of $60.3 million, which correspond to decreases of 11.4 percent and 7.5 percent, respectively. DOE estimates that industry must invest $130.7 million to comply with standards set at Recommended TSL.

DOE estimates that approximately 3.9 percent of shipments currently meet the efficiencies required at the Recommended TSL. For most product classes (*i.e.,* FCC, BICC, BIC, C–13A, C–13A–BI, C–3A, C–3A–BI), DOE expects manufacturers could reach the required efficiencies with relatively straightforward component swaps, such as implementing incrementally more efficient compressors, rather than the full platform redesigns required at max-tech. DOE expects that FC manufacturers would need to increase foam insulation thickness and incorporate variable-speed compressor systems at this level. At the Recommended TSL, DOE estimates a 4-percent drop in shipments in the year the standard takes effect compared to the no-new-standards case, as some consumers may forgo purchasing a new MREF due to the increased upfront cost of baseline models.

After considering the analysis and weighing the benefits and burdens, the Secretary has tentatively concluded that a potential standard set at the Recommended TSL for MREFs would be economically justified. At this TSL, the average LCC savings are positive for all product classes for which an amended standard is considered, with a shipment-weighted average of $15.2 savings. The FFC national energy savings are significant and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. The standard levels at TSL 4 are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $0.3 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $0.6 billion (using a 3-percent discount rate) or $0.2 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which would be contrary to the statute. *See* 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the proposed energy conservation standards, DOE notes that the Recommended TSL represents the option with positive LCC savings ($15.2) for all product classes compared to TSL 5 (−$99.5). Further, when comparing the cumulative NPV of consumer benefit using a 7-percent discount rate, TSL 4 ($0.7 billion) has a higher benefit value than TSL 5 (−$0.4 billion), while for a 3-percent discount rate, TSL 4 ($1.7 billion) is also higher than TSL 5 (−$0.07 billion), which yields negative NPV in both cases. These additional savings and benefits at the Recommended TSL are significant. DOE considers the impacts to be, as a whole, economically justified at the Recommended TSL.

Although DOE considered amended standard levels for MREFs by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. TSL 4, the Recommended TSL and the one proposed here, includes an EL for BIC that is lower than the EL at TSL 2. That is because TSL 2 represents ENERGY STAR for all product classes for which an ENERGY STAR criterion exists, including EL 3 for BIC and EL2 for C–3A–BI. As such, DOE analyzed TSL 2 with a higher efficiency level for BIC than TSL 4 because of the ENERGY STAR criterion. TSL 4 also includes an EL for C–3A–BI, EL1, that is lower than another EL, EL2, considered but not discussed as part of DOE's consideration of TSL 5. DOE has considered standards at those ELs for those products and found them not to be economically justified. For all product classes, except for BIC and C–3A–BI, the amended standard level represents the maximum energy savings that does not result in negative LCC savings. For BIC and C–3A–BI, the standard level represents the maximum energy savings that is economically justified; for these classes, DOE examined higher ELs, which were not included in TSL 4 (EL3 and EL2, respectively). Although these ELs have positive LCC savings, they would result in a majority of purchasers experiencing a net cost (53 percent and 57 percent, respectively). Further, for BIC products, DOE expects some manufacturers would likely need to increase insulation thickness to meet efficiency levels above EL 2, which could require new cabinet designs and fixtures. Due to the high percentage of consumers with a net cost and the extensive redesigns that would be needed to support EL3 for BIC and EL2 for C–3A–BI, DOE has tentatively concluded that efficiency level 3 for BIC and efficiency level 2 for C–3A–BI is not economically justified. However, at the Recommended TSL (EL 2 for BIC), DOE expects manufacturers could likely meet the efficiency level required for BIC without significant redesign. The ELs at the proposed standard level result in positive LCC savings for all product classes and reduce the decrease in INPV and conversion costs to the point where DOE has tentatively concluded they are economically justified, as discussed for the Recommended TSL in the preceding paragraphs.

Therefore, based on the previous considerations, DOE proposes to adopt the energy conservation standards for MREFs at the Recommended TSL.

While DOE considered each potential TSL under the criteria laid out in 42 U.S.C. 6295(o) as discussed in the preceding paragraphs, DOE notes that the Recommended TSL for MREFs in this direct final rule is part of a multi-product Joint Agreement covering six rulemakings (refrigerators, refrigerator-freezers, and freezers (''RFs''); MREFs; conventional cooking products; residential clothes washers; consumer clothes dryers; and dishwashers). The signatories indicate that the Joint Agreement for the six rulemakings should be considered as a joint statement of recommended standards, to be adopted in its entirety. As discussed in section V.B.2.e of the direct final rule published elsewhere in this issue of the **Federal Register**, many MREF OEMs also manufacture RFs, conventional cooking products, residential clothes washers, consumer clothes dryers, and dishwashers. Rather than requiring compliance with five amended standards in a single year (2027),[13] the

[13] The refrigerators, refrigerator-freezers, and freezers rulemaking (88 FR 12452); consumer conventional cooking products rulemaking (88 FR 6818); residential clothes washers rulemaking (88 FR 13520); consumer clothes dryers rulemaking (87 FR 51734); and dishwashers rulemaking (88 FR 32514) utilized a 2027 compliance year for analysis at the proposed rule stage. The miscellaneous refrigeration products rulemaking (88 FR 12452) utilized a 2029 compliance year for the NOPR analysis.

negotiated multi-product Joint Agreement staggers the compliance dates for the five amended standards over a 4-year period (2027–2030). DOE understands that the compliance dates recommended in the Joint Agreement would help reduce cumulative regulatory burden. These compliance dates help relieve concern on the part of some manufacturers about their ability to allocate sufficient resources to comply with multiple concurrent amended standards, about the need to align compliance dates for products that are typically designed or sold as matched pairs, and about the ability of their suppliers to ramp up production of key components. The Joint Agreement also provides additional years of regulatory certainty for manufacturers and their suppliers while still achieving the maximum improvement in energy efficiency that is technologically feasible and economically justified.

The proposed energy conservation standards for MREFs, which are expressed in kWh/yr, are shown in Table III.3.

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Table III.3 Proposed Energy Conservation Standards for Miscellaneous Refrigeration Products (Compliance Starting January 31, 2029)

Product Class	Equations for maximum energy use (kWh/yr)
	Based on AV (ft^3)
1. Freestanding Compact Coolers (“FCC”)	5.52AV +109.1
2. Freestanding Coolers (“FC”)	5.52AV +109.1
3. Built-in Compact Coolers (“BICC”)	5.52AV +109.1
4. Built-in Coolers (“BIC”)	6.30AV + 124.6
C-3A. Cooler with all-refrigerator – automatic defrost	4.11AV + 117.4
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost	4.67AV + 133.0
C-5-BI. NEW PRODUCT CLASS: Built-in cooler with refrigerator-freezer – automatic defrost with bottom-mounted freezer	5.47AV + 196.2 +28I
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C-13A. Compact cooler with all-refrigerator – automatic defrost	4.74AV + 155.0
C-13A-BI. Built-in compact cooler with all-refrigerator – automatic defrost	5.22AV + 170.5
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost	4.67AV + 133.0
AV = Total adjusted volume, expressed in ft^3, as determined in appendices A and B of subpart B of 10 CFR part 430. av = Total adjusted volume, expressed in Liters. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.	

B. Annualized Benefits and Costs of the Proposed Standards

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2022$) of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits from emission reductions.

Table III.4 shows the annualized values for MREFs under the Recommended TSL, expressed in 2022$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the standards for MREFs is $72.7 million per year in increased product costs, while the estimated annual benefits are $90.6 million in reduced product operating costs, $18.3 million in climate benefits, and $25.6 million in health benefits. The net benefit amounts to $61.7 million per year. Using a 3-percent discount rate for all benefits and costs, the estimated cost of the proposed standards for MREFs is $70.8 million per year in increased equipment costs, while the estimated annual benefits are $115 million in reduced operating costs, $18.3 million in climate benefits, and $35.6 million in health benefits. The net benefit amounts to $98 million per year.

Table III.4 Annualized Benefits and Costs of Proposed Standards (TSL 4, the Recommended TSL) for Miscellaneous Refrigeration Products

	Million 2022$/year		
	Primary Estimate	**Low-Net-Benefits Estimate**	**High-Net-Benefits Estimate**
3% discount rate			
Consumer Operating Cost Savings	115.0	111.5	116.3
Climate Benefits*	18.3	17.7	18.5
Health Benefits**	35.6	34.5	36.0
Total Monetized Benefits †	168.9	163.7	170.7
Consumer Incremental Product Costs‡	70.8	74.9	68.7
Monetized Net Benefits	98.0	88.8	102.0
Change in Producer Cashflow (INPV‡‡)	(7.7) - (5.0)		
7% discount rate			
Consumer Operating Cost Savings	90.6	88.1	91.5
Climate Benefits* (3% discount rate)	18.3	17.7	18.5
Health Benefits**	25.6	24.9	25.8
Total Benefits†	134.4	130.7	135.7
Consumer Incremental Product Costs‡	72.7	75.8	70.9
Net Benefits	61.7	54.9	64.8
Change in Producer Cashflow (INPV‡‡)	(7.7) - (5.0)		

Note: This table presents the costs and benefits associated with MREFs shipped during the period 2029–2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped in 2029−2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low Net Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.H.3 of the direct final rule published elsewhere in this issue of the *Federal Register*. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the SC-CO_2, SC-CH_4 and SC-N_2O. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown, but DOE does not have a single central SC-GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue

to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of the direct final rule published elsewhere in this issue of the *Federal Register* for more details.
† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate.
‡ Costs include incremental equipment costs.
‡‡Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of the direct final rule published elsewhere in this issue of the *Federal Register*. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). *See* section IV.J of the direct final rule published elsewhere in this issue of the *Federal Register*. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 7.7 percent that is estimated in the manufacturer impact analysis (*see* chapter 12 of the direct final rule TSD for a complete description of the industry weighted average cost of capital). For MREFs, the annualized change in INPV ranges from -$7.7 million to -$5.0 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. *See* section V.C of the direct final rule published elsewhere in this issue of the *Federal Register*. DOE is presenting the range of impacts to the INPV under two manufacturer markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annual change in INPV in the above table, drawing on the MIA explained further in section IV.J of the direct final rule published elsewhere in this issue of the *Federal Register* to provide additional context for assessing the estimated impacts of this proposal to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this proposed rule, the annualized net benefits would range from $90.3 million to $93.0 million at 3-percent discount rate and would range from $54.0 million to $56.7 million at 7-percent discount rate. Parentheses indicate negative (-) values.

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IV. Public Participation

A. Submission of Comments

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

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

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

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

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

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

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (''faxes'') will be accepted.

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

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

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination. It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Public Meeting

As stated previously, if DOE withdraws the direct final rule published elsewhere in this issue of the **Federal Register** pursuant to 42 U.S.C. 6295(p)(4)(C), DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

V. Procedural Issues and Regulatory Review

The regulatory reviews conducted for this proposed rule are identical to those conducted for the direct final rule published elsewhere in this issue of the **Federal Register**. Please see the direct final rule for further details.

A. Review Under the Regulatory Flexibility Act

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

For manufacturers of MREFs, the Small Business Administration (''SBA'') has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. (*See* 13 CFR part 121.) The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support--table-size-standards.* Manufacturing of MREFs is classified under 335220: ''Major Household Appliance Manufacturing'' or NAICS code 333415: ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The SBA sets a threshold of 1,500 employees or fewer and 1,250 employees or fewer for an entity to be considered as a small business for NAICS codes 335220 and 333415, respectively. DOE used the higher (*i.e.,* more inclusive) threshold of 1,500 employees to identify small business manufacturers.

1. Description of Reasons Why Action Is Being Considered

DOE is proposing amended energy conservation standards for MREFs. EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles which, in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016. 81 FR 46768. EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1))

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

In light of the above and the requirements under 42 U.S.C. 6295(p)(4)(A)–(B), DOE is issuing this NOPR proposing energy conservation standards for MREFs. These standard levels were submitted jointly to DOE on September 25, 2023, by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility.[14] This letter, titled ''Energy Efficiency Agreement of 2023''

[14] The signatories to the Joint Agreement include AHAM, American Council for an Energy-Efficient Economy, Alliance for Water Efficiency, Appliance Standards Awareness Project, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, and Pacific Gas and Electric Company. Members of AHAM's Major Appliance Division that manufacture the affected products include: Alliance Laundry Systems, LLC; Asko Appliances AB; Beko US Inc.; Brown Stove Works, Inc.; BSH; Danby Products, Ltd.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber; Fotile America; GEA, a Haier Company; L'Atelier Paris Haute Design LLG; LGEUSA; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Appliances Refrigeration Systems (PAPRSA) Corporation of America; Perlick Corporation; Samsung; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; The Middleby Corporation; U-Line Corporation; Viking Range, LLC; and Whirlpool.

(hereafter, the ''Joint Agreement'' [15]), recommends specific energy conservation standards for MREFs that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o).

2. Objectives of, and Legal Basis for, Rule

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016 (the ''July 2016 Final Coverage Determination''). 81 FR 46768. MREFs are consumer refrigeration products other than refrigerators, refrigerator-freezers, or freezers, which include coolers and combination cooler refrigeration products. 10 CFR 430.2. MREFs include refrigeration products such as coolers (*e.g.,* wine chillers and other specialty products) and combination cooler refrigeration products (*e.g.,* wine chillers and other specialty compartments combined with a refrigerator, refrigerator-freezers, or freezers). EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)).

3. Description and Estimated Number of Small Entities Regulated

DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. 68 FR 7990. DOE conducted a market survey to identify potential small manufacturers of MREFs. DOE conducted a market survey to identify potential small manufacturers of MREFs. DOE reviewed DOE's Compliance Certification Database (''CCD''),[16] California Energy Commission's Modernized Appliance Efficiency Database System,[17] individual company websites, and prior MREF rulemakings to identify manufacturers of the covered product. DOE then consulted publicly available data, such as manufacturer websites, manufacturer specifications and product literature, import/export logs (*e.g.,* bills of lading from ImportYeti [18]), and basic model numbers to identify original equipment manufacturers (''OEMs'') of covered MREFs. DOE further relied on public data and subscription-based market research tools (*e.g.,* Dun & Bradstreet reports [19]) to determine company, location, headcount, and annual revenue. DOE also asked industry representatives if they were aware of any small manufacturers during manufacturer interviews conducted in advance of the March 2023 NOPR. 88 FR 19382. DOE screened out companies that do not offer products covered by this proposed rulemaking, do not meet the SBA's definition of a ''small business,'' or are foreign-owned and operated.

Through DOE's review of its product database and other public sources, DOE identified 49 OEMs that sell MREFs in the United States for this proposed rule. Of the 49 OEMs identified, DOE determined that one company qualifies as a small business and is not foreign-owned and operated.

4. Description and Estimate of Compliance Requirements Including Differences in Cost, if Any, for Different Groups of Small Entities

The small business identified has 14 MREF models certified in DOE's CCD. Of those 14 models, nine models are FCCs, two are built-in coolers, and three are C–13A combination coolers. None of the nine FCC models meet the Recommended TSL (*i.e.,* TSL 4) efficiencies. Of the two built-in coolers, one meets the efficiencies required at the Recommended TSL. However, based on a review of their product specifications, the two models have identical dimensions and share many components. Given the product similarities, DOE expects the manufacturer would likely discontinue the non-compliant model. None of the three C–13A models meet the Recommended TSL efficiencies. To meet the required efficiencies for their FCC models, DOE expects the manufacturer would likely need to incorporate incrementally more efficient compressors, along with other design options. DOE expects these updates to be relatively straight forward component replacements. Some product conversion costs would be necessary for sourcing, qualifying, and testing more efficient components. To meet the efficiencies required for their C–13A models, DOE expects the manufacturer would likely need to implement variable-speed compressors, along with other design options. Implementing variable-speed compressors could require more advanced controls and electronics and new test stations. DOE expects this manufacturer would incur minimal capital conversion costs as the design options analyzed do not require changes to insulation (*i.e.,* VIPs or increased wall insulation thickness). DOE estimated conversion costs for this small manufacturer by using product platform estimates to scale-down the industry conversion costs. DOE estimates that the small business would incur product conversion costs of approximately $1.41 million related to sourcing and testing more efficient components and variable-speed compressors to meet proposed standards. Based on subscription-based market research reports, the small business has an annual revenue of approximately $85.3 million.[20] The total conversion costs of $1.41 million are less than 1 percent of the estimated company revenue over the 5-year conversion period.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with this proposed rule.

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from DOE's proposed rule, represented by TSL 4 (*i.e.,* the Recommended TSL). In reviewing alternatives to the proposed rule, DOE examined energy conservation standards set at lower efficiency levels. While TSLs 3, 2, and 1 would reduce the impacts on small

[15] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0034.*

[16] U.S. Department of Energy's Compliance Certification Database. (Last accessed August 17, 2023.) *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A*.*

[17] *California Energy Commission's Modernized Appliance Efficiency Database System. (Last accessed* August 17, 2023.) *cacertappliances.energy.ca.gov/Pages/ApplianceSearch.aspx.*

[18] ImportYeti, LLC. ImportYeti. (Last accessed December 4, 2023) *www.importyeti.com/%20.*

[19] D&B Hoover. Company Profiles. Various companies. (Last accessed September 15, 2023.) *app.dnbhoovers.com.*

[20] D&B Hoover. Company Profiles. Various companies. (Last accessed November 29, 2023.) *app.dnbhoovers.com.*

business manufacturers, it would come at the expense of a reduction in energy savings. TSL 1 achieves 69 percent lower energy savings compared to the energy savings at TSL 4. TSL 2 achieves 38 percent lower energy savings compared to the energy savings at TSL 4. TSL 3 achieves 31 percent lower energy savings compared to the energy savings at TSL 4.

Based on the presented discussion, establishing standards at TSL 4 balances the benefits of the energy savings at TSL 4 with the potential burdens placed on MREF manufacturers, including small business manufacturers. Accordingly, DOE does not propose one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 17 of the direct final rule TSD.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

VI. Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on April 10, 2024, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 11, 2024.

Treena V. Garrett,

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

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.32 by revising paragraph (aa) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(aa) *Miscellaneous refrigeration products.* The energy standards as determined by the equations of the following table(s) shall be rounded off to the nearest kWh per year. If the equation calculation is halfway between the nearest two kWh per year values, the standard shall be rounded up to the higher of these values.

(1) *Coolers.* (i) Coolers manufactured on or after October 28, 2019, and before January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) Freestanding compact	7.88AV + 155.8
(B) Freestanding	7.88AV + 155.8
(C) Built-in compact	7.88AV + 155.8
(D) Built-in	7.88AV + 155.8

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.

(ii) Coolers manufactured on or after January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) Freestanding compact	5.52AV + 109.1
(B) Freestanding	5.52AV + 109.1
(C) Built-in compact	5.52AV + 109.1
(D) Built-in	6.30AV + 124.6

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.

(2) *Combination cooler refrigeration products.* (i) Combination cooler refrigeration products manufactured on or after October 28, 2019, and before January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) C–3A. Cooler with all-refrigerator—automatic defrost	4.57AV + 130.4
(B) C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	5.19AV + 147.8
(C) C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7
(D) C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8
(E) C–9I. Cooler with upright freezer with automatic defrost with an automatic icemaker	5.58AV + 231.7
(F) C–9I–BI. Built-in cooler with upright freezer with automatic defrost with an automatic icemaker	6.38AV + 252.8
(G) C–13A. Compact cooler with all-refrigerator—automatic defrost	5.93AV + 193.7
(H) C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	6.52AV + 213.1

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.

(ii) Combination cooler refrigeration products manufactured on or after January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) C–3A. Cooler with all-refrigerator—automatic defrost	4.11AV + 117.4
(B) C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	4.67AV + 133.0
(C) C–5–BI. Built-in cooler with refrigerator-freezer with automatic defrost with bottom-mounted freezer	5.47AV + 196.2 + 28I
(D) C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
(E) C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
(F) C–13A. Compact cooler with all-refrigerator—automatic defrost	4.74AV + 155.0
(G) C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	5.22AV + 170.5

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.
I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.

* * * * *

[FR Doc. 2024–08002 Filed 5–6–24; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2023–2412; Notice No. 25–23–06–SC]

Special Conditions: Airbus Model A321neo Extra-Long Range (XLR) Airplane; Cabin Evacuation—Protection From Fuel Tank Explosion Due to External Fuel-Fed Ground Fire

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Airbus Model A321neoXLR airplane. This airplane will have a novel or unusual design feature when compared to the technology envisaged by the airworthiness standards for transport category airplanes. This design feature is an integral rear center tank (RCT). The applicable airworthiness regulations do not contain adequate or appropriate safety standards for fire-safety performance of fuel-tank skin or structure in a post-crash external fuel-fed ground fire. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send comments on or before June 21, 2024.

ADDRESSES: Send comments identified by Docket No. FAA–2023–2412 using any of the following methods:

Federal eRegulations 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 (DOT), 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 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.

FOR FURTHER INFORMATION CONTACT: Douglas Bryant, Engine and Propulsion Section, AIR–625, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3166; email *douglas.n.bryant@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the proposed special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so without incurring delay. The FAA may change these special conditions based on the comments received.

Privacy

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to *www.regulations.gov,* including any personal information you provide. The FAA will also post a report

summarizing each substantive verbal contact received about these special conditions.

Confidential Business Information

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 these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, 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 the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to the individual listed in the For Further Information Contact section. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Background

On September 16, 2019, Airbus applied for an amendment to Type Certificate No. A28NM to include the new Model A321neo XLR series airplane. The Airbus Model A321neo XLR series airplane, which is a derivative of the Model A321neo Airbus Cabin Flex (ACF) currently approved under Type Certificate No. A28NM, is a twin-engine transport category aircraft that seats up to 244 passengers and has a maximum takeoff weight of 222,667 lbs.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Airbus must show that the Model A321neo XLR series airplane meets the applicable provisions of the regulations listed in Type Certificate No. A28NM, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*e.g.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A321neo XLR series airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A321neo XLR series airplane must comply with the fuel venting and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A321neo XLR series airplane will incorporate the following novel or unusual design feature:

An integral RCT.

Discussion

The proposed Airbus Model A321neo XLR series airplane incorporates an integral RCT. This tank is a ''center'' fuel tank, that would, if approved, be located in the airplane fuselage rather than in its wings. The tank is a ''rear'' tank, that would be located aft of the center wing fuel tank and behind the wheel bay; it would be in an area of the lower section of the fuselage, partially replacing the aft cargo compartment of the airplane from which this proposed model is derived. The top of the tank would be directly below the floor of the passenger cabin. The fuel tank would be ''integral'' to the airplane, in that its walls would be part of the airplane structure. The exterior skin of the airplane fuselage would constitute part of the walls of the fuel tank, and these areas are usually separate boundaries (not integral) on other fuselage fuel tanks. An integral fuel tank may be referred to as a conformal fuselage structural fuel tank since boundaries of the fuel tank ''conform'' with the airplane exterior. The integral RCT is installed in a location that may be exposed to the direct effects of post-crash ground, or pool, fuel-fed fires. An external fuel-fed ground fire or external fuel-fed pool fire is also referred to as 'external ground fire'.

The airworthiness standards applicable to the Model A321neo XLR do not contain specific standards for post-crash fire-safety performance of fuel-tank skin or structure. In addition, the integral RCT on the A321neo XLR was not envisaged by the FAA when promulgating requirements related to occupant protection when fuel tanks are exposed to external fuel-fed fires. The FAA considered fuel tank designs in widespread use on transport airplanes, including main fuel tanks and auxiliary fuel tanks when promulgating requirements related to occupant protection. Auxiliary fuel tanks are normally located in the center wing and within cargo holds, and in such cases are sometimes referred to as an auxiliary center tank (ACT).

Airplane manufacturers commonly incorporate a center wing fuel tank as an auxiliary fuel tank to make fuel available for increasing the flight range of the airplane. Continued expansion of range performance requirements has resulted in airplane designs using other areas of the airplane to carry fuel, such as incorporating fuel tanks in the empennage and fuselage. The Airbus model A321neo XLR airplane includes a center wing fuel tank, an integral RCT and the option for additional ACTs within the fuselage. Unlike an integral RCT, a center wing fuel tank and optional ACTs are not expected by the FAA or manufacturers to be exposed to the direct effects of post-crash ground fire because the fuel tank walls are not exterior airplane skin on the center fuel tank or ACT designs.

Due to its unusual configuration, the A321neo XLR's integral RCT will also not incorporate the insulation that usually lines the fuselage skin of a modern transport category airplane. Therefore the FAA has issued, after notice and comment, a set of special conditions that address that novel or unusual aspect of the A321neo XLR's integral RCT with regard to certain of the FAA's regulatory requirements for thermal/acoustic insulation installations, specifically 14 CFR 25.856(b). Those special conditions, No. 25–825–SC, require that the lower half of the fuselage spanning the longitudinal location of the RCT resist penetration from an external fuel-fed fire, in order to ensure that the design provides the same level of passenger protection from such fires as do the FAA's existing regulations for such insulation.[1] The special conditions

[1] Special Conditions: Airbus Model A321neoXLR Airplane; Passenger Protection from External Fire. 87 FR 74503 (Dec. 6, 2022).

proposed herein address a different flammability aspect of the A321neo XLR's integral RCT.

Pertinent to the fuel tank structure, post-crash-fire occupant survivability is dependent on the time available for occupant evacuation prior to fuel-tank breach or structural failure. Structural failure can be a result of degradation in load-carrying capability caused by a fuel-fed ground fire. Structural failure can also be a result of over-pressurization caused by ignition of fuel vapors inside the fuel tank.

Past experience indicates that occupant survivability following a post-crash fire is greatly influenced by the size and intensity of any fire that occurs. The ability of main fuel tanks, when they have aluminum wing surfaces wetted by fuel on their interior surface, to withstand post-crash-fire conditions, has been demonstrated by tests conducted at the FAA William J. Hughes Technical Center.[2] Results of these tests have verified adequate dissipation of heat across wetted aluminum fuel-tank surfaces so that localized hot spots do not occur, thus minimizing the threat of explosion. This inherent capability of aluminum to dissipate heat also allows the aircraft's lower surface, which is also the fuel tank boundary, to retain its load-carrying characteristics during a fuel-fed ground fire, and significantly delays structural collapse or burn-through for a time interval that usually exceeds evacuation times. In addition, as an aluminum fuel tank with significant quantities of fuel inside is heated, fuel vapor accumulates in the ullage space, exceeding the upper flammability limit relatively quickly and thus reducing the threat of a fuel-tank explosion prior to fuel-tank burn-through.

The center wing tank and optional ACTs are surrounded by fuselage structure and would not be directly exposed to a post-crash ground fire. This inherent separation is also expected to significantly delay structural collapse or burn-through and reduce the threat of explosion for a time interval that usually exceeds evacuation times. Service history of conventional aluminum airplanes has shown that fuel-tank explosions caused by ground fires have been rare on airplanes configured with flame arrestors in the fuel-tank vent lines. The Model A321neo XLR integral RCT may or may not have equivalent capability of past designs approved with existing regulations, due to the RCT design and location being integral with the fuselage.

There are several Part 25 requirements that address fire-safety performance of the fuel tanks and fuselage in the Model A321neo XLR certification basis. However, these requirements do not directly or adequately address standards for post-crash fire-safety performance of fuel-tank skin or structure. These standards address failure conditions or minimize the hazard to the occupants in the event ignition of flammable fluids or vapors occurs. For example, § 25.863 requires applicants to minimize the probability of ignition and resultant hazards if ignition occurs for flammable fluid systems on the airplane. Another example is § 25.981(a) which requires applicants to demonstrate no ignition source may be present at each point in the fuel tank or fuel tank system where catastrophic failure could occur due to ignition of fuel or vapors. Specifically, § 25.981(a)(1) requires ''determining the highest temperature allowing a safe margin below the lowest expected autoignition temperature of the fuel in the fuel tanks.'' Then § 25.981(a)(2) requires ''demonstrating that no temperature at each place inside each fuel tank where fuel ignition is possible will exceed the temperature determined under paragraph (a)(1) of this section. This must be verified under all probable operating, failure, and malfunction conditions of each component whose operation, failure, or malfunction could increase the temperature inside the tank.'' In addition, § 25.981(a)(3) requires ''except for ignition sources due to lightning addressed by § 25.954, demonstrating that an ignition source could not result from each single failure, from each single failure in combination with each latent failure condition not shown to be extremely remote, and from all combinations of failures not shown to be extremely improbable, taking into account the effects of manufacturing variability, aging, wear, corrosion, and likely damage.'' These airworthiness requirements address ignition sources and are part of the FAA's regulatory framework for preventing fires and explosions; however, taken together, they do not adequately address the potential for a post-crash external ground fire to affect the safety of airplane occupants.

The FAA therefore determined that the airworthiness standards applicable to the Model A321neo XLR airplane do not contain adequate standards for post-crash fire-safety performance of fuel-tank skin or structure. The FAA therefore proposes that special conditions are needed for the Model A321neo XLR airplane, because the integral RCT design, including location in the lower fuselage, is considered an unusual or novel design feature that could expose the RCT to an external ground fire. Factors influencing occupant survival time when a fuel tank is exposed to a ground-fed fire are the structural integrity of the tank; burn-through resistance; flammability of the tank; and the presence of auto-ignition threats during exposure to a fire. As previously discussed, the FAA issued Special Conditions No. 25–825–SC were issued to address the novel or unusual aspect of the A321neo XLR's integral RCT with regard to requirements for thermal/acoustic insulation installations. The FAA considers the occupant survival time related to the burn-through resistance of the integral RCT to be adequately accounted for in those special conditions.

These proposed special conditions address standards for post-crash fire-safety performance of fuel-tank skin or structure by proposing a requirement to prevent the ignition of fuel vapor during an external fuel-fed ground fire. These proposed special conditions include accounting for the potential for hot surface ignition created by the external fuel-fed fire. As described in FAA Advisory Circular 25.981–1D, ''Fuel Tank Ignition Source Prevention Guidelines,'' hot surfaces that can exceed the autoignition temperature of the flammable vapor under consideration are considered to be ignition sources. The FAA intends this proposed requirement to adequately protect the airplane occupants from the consequences of an integral RCT exposed to an external fuel-fed ground, or pool fire.

The intention of the proposed requirement for the design to prevent ignition is for the applicant to show that ignition sources do not occur, such as from a hot surface, due to the external heat applied to the integral RCT from an external fuel-fed ground fire. Where previously discussed, § 25.981(a) requires applicants to demonstrate that no ignition source may be present but does not specifically address ignition due to an external fuel-fed ground fire.

To provide the same level of safety as provided by the relevant regulations in this model's certification basis, Airbus must demonstrate that the Model A321neo XLR series airplane has sufficient post-crash fire-safety performance of fuel-tank skin or structure to enable occupants to safely evacuate in the event that the integral RCT is exposed to an external fuel-fed ground fire.

[2] Hill, R., and Johnson, G.R., ''Investigation of Aircraft Fuel Tank Explosions and Nitrogen Inerting Requirements During Ground Fires,'' FAA Report DOT/FAA/RD–75–119, October 1975. Available via the FAA Technical Center website for Fire Safety at *http://www.fire.tc.faa.gov/.*

The FAA assessed post-crash-survival time during the adoption of § 25.856 and revisions to appendix F to part 25 at Amendment 25–111 for fuselage burn-through protection. Studies conducted by and on behalf of the FAA indicated that following a survivable accident, prevention of fuselage burn-through for approximately 5 minutes can significantly enhance survivability.[3]

The FAA would consider Airbus showing the design prevents ignition of fuel tank vapors in the integral RCT during at least 5 minutes of exposure to an external fuel-fed ground fire as a sufficient time duration for the purposes of these special conditions. The time duration of 5 minutes is consistent with the aforementioned studies showing prevention of fuselage burn-through for approximately 5 minutes enhances occupant survivability. The requirements of the proposed special conditions and the time duration are consistent with the European Union Aviation Safety Agency Special Conditions No. SC–D25.863–01, Cabin Evacuation—Protection from Fuel Tank Explosion due to External Fuel Fed Ground Fire applicable to integral RCTs.[4]

Airbus may consider a flammability reduction system or ignition mitigation means that complies with § 25.981 when showing compliance with the proposed special conditions, provided the system's performance is demonstrated to meet the proposed special conditions. As discussed previously, showing compliance with only § 25.981(b) is insufficient to show post-crash fire-safety performance of fuel-tank skin or structure. Airbus must also meet the proposed special conditions.

The proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these proposed special conditions are applicable to the Airbus Model A321neo XLR series airplane for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would apply to the other model as well.

Conclusion

This action affects only certain novel or unusual design feature on A321neo XLR series airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, and 44704.

The Proposed Special Conditions

■ Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Airbus Model A321neo XLR series airplanes.

Cabin Evacuation—Protection from Fuel Tank Explosion Due to External Fuel-Fed Ground Fire.

The applicant must show the design prevents ignition of fuel tank vapors (due to hot surface) from occurring in the integral rear center tank during the time required for evacuation. The applicant's showing must also demonstrate that the design provides sufficient time for a safe evacuation of all occupants after the initiation of an external fuel-fed ground fire.

Issued in Kansas City, Missouri, on April 29, 2024.

Patrick R. Mullen,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2024–09660 Filed 5–6–24; 8:45 am]

BILLING CODE 4910–13–P

[3] Cherry, R. and Warren, K. ''Fuselage Burnthrough Protection for Increased Postcrash Occupant Survivability: Safety Benefit Analysis Based on Past Accidents, ''FAA Report DOT/FAA/AR–99/57, September 1999 and R G W Cherry & Associates Limited, ''A Benefit Analysis for Cabin Water Spray Systems and Enhanced Fuselage Burnthrough Protection,'' FAA Report DOT/FAA/AR–02/49, April 7, 2003.

[4] SC–D25.863–01, Issue 2, dated 24 October 2023 *https://www.easa.europa.eu/en/document-library/product-certification-consultations/final-special-condition-ref-sc-d25863-01-cabin.*

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 24–115; FCC 24–44; FR ID 216063]

Fostering Independent and Diverse Sources of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on the current state of the marketplace for diverse and independent programming and on the obstacles faced by independent programmers seeking carriage on multichannel video programming distributors (MVPDs) and online platforms. In order to alleviate such obstacles, the Commission proposes to prohibit two types of contractual provisions in program carriage agreements between independent programmers and MVPDs: most favored nation (MFN) provisions, and unreasonable alternative distribution method (ADM) provisions. The Commission also seeks comment on current program bundling practices.

DATES: Comments are due on or before June 6, 2024; reply comments are due on or before July 8, 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 MB Docket No. 24–115, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *https://apps.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, DA 20–304 (March 19, 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, electronic files, audio format), 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: For additional information, contact Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–7454.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM), FCC 24–44, adopted on April 17, 2024 and released on April 19, 2024. The full text of this document is available on the FCC website at *https://docs.fcc.gov/public/attachments/FCC-24-44A1.pdf.* This document will also be available via ECFS at *https://www.fcc.gov/cgb/ecfs/.*

Paperwork Reduction Act of 1995 Analysis: This document proposes new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Providing Accountability Through Transparency Act: Consistent with the Providing Accountability Through Transparency Act, Public Law 118–9, a summary of this document will be available on: *https://www.fcc.gov/proposed-rulemakings.*

Synopsis

1. Through this Notice of Proposed Rulemaking (NPRM), the Commission initiates a new proceeding to seek comment on the current state of the marketplace for diverse and independent programming. The Commission also seeks comment on the obstacles faced by independent video programmers seeking MVPD carriage and carriage on online platforms and how this impacts consumers. In order to alleviate marketplace obstacles that may hinder independent programmers from reaching consumers, the Commission proposes to prohibit two types of contractual provisions in program carriage agreements between independent programmers and MVPDs: (i) most favored nation (MFN) provisions, and (ii) unreasonable alternative distribution method (ADM) provisions. Additionally, the Commission seeks comment on current program bundling practices.

2. In 2016, the Commission launched a proceeding in MB Docket No. 16–41 to examine how certain contractual provisions in carriage agreements between programmers and distributors, such as most favored nation (MFN) and alternative distribution method (ADM) clauses, impact programming competition, innovation, and diversity. In general, an MFN provision entitles an MVPD to more favorable economic or non-economic contract terms that a video programming vendor has provided to another video programming distributor, whether an MVPD or an OVD. An ADM provision generally prohibits or restricts a video programming vendor from exhibiting its programming on OVDs, often for a specified period of time (sometimes referred to as a ''holdback period'' or ''window'') following the programming's original linear airing, or until certain conditions are met. In 2020, having not received any new comments in the proceeding in over two years, Commission staff terminated this proceeding under the dormant proceedings rule.

Current State of the Marketplace for Independent Programming

3. The Commission seeks comment on developments and changes in the marketplace for independent programming and the availability of such programming to consumers since the comment cycle in the MB Docket No. 16–41 proceeding closed in 2017. For example, what is the current state of the marketplace? Are independent programmers still experiencing the same obstacles to carriage that the record described in response to our inquiries in 2016? Has the availability of carriage on a variety of platforms, including OVDs and MVPDs, increased or decreased in the intervening years? Specifically, we seek information on how many independent programmers currently are carried exclusively by MVPDs, how many are carried exclusively by OVDs, and how many are carried by both MVPDs and OVDs. Has the number of independent programmers carried on each of these platforms increased or decreased since 2017? If it has decreased, what factor or factors have led to such decrease? Is there more or less independent and diverse programming available to consumers today than there was in 2017? Have changes in the marketplace exacerbated the difficulty of independent programmers in obtaining carriage? We note that in the *2022 Communications Marketplace Report,* NTCA asserts that a number of MVPDs have discontinued offering video service to its customers, and Rural Media Group contends that the vertical integration of MVPDs has restricted access to independent cable networks. Does the continued decrease in MVPD subscribers have any effect on the ability of independent programmers to obtain carriage?

4. In addition, the Commission seeks comment on whether it is more difficult for independent programmers to obtain carriage on certain types of MVPDs (*e.g.,* cable vs. non-cable MVPDs, or smaller vs. larger MVPDs). How does the level of competition among MVPDs impact the bargaining leverage of independent programmers in negotiations for carriage deals? To what extent does the ability of independent programmers to grow and thrive today depend on their ability to secure carriage on MVPDs? For each of these questions, the Commission requests that commenters support their responses with relevant information regarding specific independent program networks. The Commission also seeks comment on what, if any, difficulties independent programmers have experienced in gaining carriage on OVDs.

Marketplace Obstacles Faced by Independent Programmers

5. *Most Favored Nation Provisions.* MFN provisions generally authorize a contracting video programming distributor to modify a programming agreement to incorporate more favorable rates, contract terms, or conditions that the contracting programmer later agrees to with another distributor. The Commission seeks comment on the current usage of MFN provisions, both conditional and unconditional, in contracts for carriage of non-broadcast video programming. Has there been a notable change in the prevalence of MFNs provisions, particularly unconditional MFNs, since 2017? If unconditional MFN provisions are used less frequently today, what accounts for this change and is the downward trend in the use of such provisions expected to continue? Conversely, if unconditional MFN provisions are used more frequently today, what accounts

for this change and is the upward trend in the use of such provisions expected to continue? Are conditional and unconditional MFN provisions typically only included in carriage agreements between independent programmers and MVPDs or are they also included in agreements with OVDs? Do both cable and non-cable MVPDs require MFN provisions? Are MFN provisions in general, and unconditional MFNs in particular, more likely to be included in carriage contracts with independent programmers than in carriage contracts with vertically integrated programmers? Do certain types of MFN provisions restrain the ability of independent programmers to compete fairly and, if so, what types and how? To what extent does the size of the MVPD or the number of channels offered by an independent programmer impact whether MFN provisions are included in carriage contracts? Do MFN provisions in carriage agreements between MVPDs and independent programmers cover the terms of both other MVPD agreements and OVD agreements? If so, how often do such MFN provisions extend to OVD agreements?

6. Additionally, the Commission seeks comment on the current costs and benefits of both conditional and unconditional MFN provisions. What impact do conditional and unconditional MFNs have on the development and distribution of diverse and niche programming today? To what extent do MFN provisions limit the ability of independent programmers to experiment with new or unique distribution models or to tailor deals with smaller MVPDs or online distributors? Are there particular types of conditional MFN provisions that hinder the development and distribution of such programming and, if so, how do they have this effect? What impact do audits and other mechanisms used to enforce MFN provisions have on independent programmers' ability to compete in the marketplace? What benefits are associated with conditional and unconditional MFN provisions? Are there specific types of MFN provisions that are pro-competitive and enhance independent programmers' ability to gain MVPD carriage, making more diverse programming offerings available for consumers? How do MFN provisions ultimately affect consumers? What, if any, consideration, economic or non-economic, do independent programmers receive from MVPDs in exchange for agreeing to MFN provisions? To what extent do the benefits of MFN provisions, either conditional or unconditional, outweigh any harmful effects of such provisions?

7. The Commission proposes to adopt a rule prohibiting the inclusion of MFN provisions, either conditional or unconditional, in carriage agreements between MVPDs and independent programmers. The Commission proposes to define ''independent video programmer'' or ''independent programmer'' for purposes of this proceeding as ''a non-broadcast programmer that (1) is not vertically integrated with an MVPD and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses.'' The definition of ''affiliated'' set forth in 47 CFR 76.1300(a), which provides that ''entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities,'' would apply to the definition of ''independent programmers.'' For purposes of the prohibition on inclusion of MFN provisions in program carriage agreements, the Commission proposes to define ''most favored nation provision'' as ''a provision that entitles a multichannel video programming distributor to contractual rights or benefits that an independent video programming vendor has offered or granted to another multichannel video programming distributor or online video distributor, either conditionally or unconditionally.'' The Commission further proposes to define the terms (i) ''conditionally'' as ''subject to the multichannel video programming distributor's acceptance of terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor's agreement, and with which the multichannel video programming distributor can reasonably comply technologically and legally,'' and (ii) ''unconditionally'' as ''without obligating the multichannel video programming distributor to accept any such terms and conditions.'' The Commission seeks comment on this proposal and the proposed definitions of ''most favored nation provision,'' ''conditionally,'' and ''unconditionally.'' In particular, the Commission seeks comment on how the proposed prohibition would enhance the ability of independent programmers to obtain MVPD carriage and compete in the marketplace. The Commission also seeks comment on whether the proposed prohibition would benefit consumers by, for example, facilitating the development and distribution of more diverse and niche programming. Would the proposed prohibition result in other benefits to consumers? Are there particular types of MFN provisions that should be excluded or exempted from the proposed prohibition because they provide procompetitive benefits that outweigh any harmful effects? What are the costs and benefits of the proposed prohibition to MVPDs, particularly small entities?

8. The Commission seeks comment on whether it should preclude MVPDs on a going forward basis from enforcing all MFN provisions in existing contracts. If so, should parties be afforded some period of time to reform their existing contracts before the prohibition takes effect? How much time would be reasonable? Commenters should explain the rationale for any time period proposed. The Commission proposes that complaints alleging violations of the prohibition on MFN provisions would be addressed under the program carriage complaint procedures. The Commission seeks comment on any amendments to the program carriage complaint procedures that would be necessitated by adoption of proposed prohibition on MFN provisions. What remedies and penalties should be imposed on an MVPD that violates the proposed prohibition on MFN provisions? To what extent, if any, would costs or other concerns associated with pursuing a program carriage complaint affect the ability of independent programmers to obtain relief if an MVPD violates the proposed prohibition?

9. *Alternative Distribution Method Provisions.* ADM provisions generally bar or restrict a video programming vendor from exhibiting its programming on alternative video distribution platforms (such as online platforms), often for a specified window of time following the programming's original linear airing, or until certain conditions are met. The Commission seeks comment on the prevalence and scope of ADM provisions in contracts for carriage of non-broadcast video programming today. Has there been any change in the usage or scope of ADMs since 2017? If ADM provisions are less common today, what accounts for this change and is the downward trend in usage of these provisions expected to continue? If ADM provisions are used more frequently today, what accounts for this change and is the upward trend in such usage expected to continue? Are ADM provisions today generally included only in carriage agreements between independent programmers and MVPDs or are they also included in carriage agreements between independent programmers and OVDs?

Do both cable and non-cable MVPDs require such provisions? Are ADM provisions more likely to be included in carriage contracts with independent programmers than in carriage contracts with vertically integrated programmers? Do certain types of ADM provisions restrain independent programmers from competing fairly? If so, what types of ADM provisions have this effect and how do such provision restrain independent programmers from competing fairly? Is there currently an industry standard for the windowing restrictions included in ADM provisions (*i.e.,* is there a particular window of time that is typically required in agreements today)? Are certain windowing restrictions more harmful to independent programmers' ability to compete than other windowing restrictions, and if so, why, and how common are such restrictions?

10. The Commission also seeks comment on the current costs and benefits of ADM provisions. What effect do ADM provisions have on the video marketplace and the availability of independent programming today? Do ADM provisions thwart competition, diversity, or innovation? If so, how? Parties should describe in detail. To what extent are ADM provisions used to limit the ability of independent programmers to experiment with new or unique distribution models or to tailor deals with smaller MVPDs or OVDs, and how does that impact their ability to compete? For example, are certain types of ADM provisions aimed more at restricting new means of distribution than at facilitating efficient negotiations or protecting an MVPD's investment in programming? What benefits are associated with ADM provisions? Do independent programmers receive any consideration, economic or non-economic, from MVPDs in exchange for agreeing to ADM provisions? Do certain types of ADM provisions enhance independent programmers' ability to gain MVPD carriage and thereby increase the exposure of their programming by incentivizing MVPDs to carry new content? How are ADM provisions enforced? Are there particular enforcement mechanisms for ADM provisions that are more common to independent programmers than other enforcement mechanisms? Do certain types of enforcement mechanisms for ADM provisions have a uniquely harmful impact on independent programmers' ability to compete?

11. The Commission proposes to prohibit the inclusion of ''unreasonable'' ADM provisions in carriage agreements between MVPDs and independent programmers. The Commission further proposes to define ''alternative distribution method provision'' to mean ''a provision that prohibits or restricts a video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms (such as OVDs) for a specified period of time following the programming's original linear airing, or until certain conditions are met.'' Under the proposed prohibition on ''unreasonable'' ADM provisions, the issue of whether a particular ADM clause is ''unreasonable'' would be fact-specific and decided in the context of a program carriage complaint proceeding brought under section 616 of the Act. In determining whether a particular ADM provision is ''unreasonable,'' the Commission proposes to consider, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other alternative, non-traditional distributors, including OVDs. By prohibiting only those ADM provisions determined to be ''unreasonable,'' this proposal would recognize that some ADM provisions may serve the public interest by incentivizing MVPDs to invest in new or emerging programming sources, including independent or niche content, while other ADM provisions may have no pro-competitive justifications and hinder the provision of diverse programming to consumers.

12. The Commission seeks comment on the proposed prohibition on unreasonable ADM provisions. The Commission seeks comment on whether the proposed prohibition would enhance the ability of independent programmers, particularly small entities, to compete fairly in the marketplace for video programming. Alternatively, would prohibiting certain ADM provisions make it less likely that MVPDs would agree to carry independent programmers or incentivize MVPDs to seek exclusive programming arrangements with independent programmers (subject to the restrictions in 47 U.S.C. 536(a)(2)) that would limit rather than expand their carriage opportunities? Additionally, the Commission seeks comment on how the proposed prohibition would affect consumers. Would it be expected to result in a greater choice of programming sources or lower costs for consumers? How would the proposed prohibition on unreasonable ADM provisions likely affect MVPDs, including small MVPDs? What costs and benefits are associated with the proposed prohibition for each of the affected parties? Should the Commission provide additional guidance in this proceeding on what constitutes an ''unreasonable'' ADM provision or should we make such determinations on a case-by-case basis in the context of program carriage complaint proceedings as proposed above? In this regard, the Commission seeks comment on what factors should be considered in determining whether an ADM provision is ''unreasonable.'' Are there specific ADM provisions that should be deemed presumptively ''unreasonable''? Conversely, are there certain ADM provisions that should be considered to be presumptively reasonable?

13. The Commission seeks comment on whether it should preclude MVPDs on a going forward basis from enforcing existing contracts that contain unreasonable ADM provisions and, if so, whether it should afford the parties a specified period of time to revise their contracts to replace any unreasonable ADM provision with an ADM provision with reasonable terms before the prohibition takes effect. The Commission also seeks input on what, if any, amendments to the program carriage complaint procedures would be warranted if the proposed prohibition on unreasonable ADM provisions is adopted. In addition, the Commission seeks comment on what remedies and penalties should be imposed on an MVPD that violates the proposed prohibition on unreasonable ADM provisions. In such circumstances, would it be appropriate for the Media Bureau to simply order that an unreasonable ADM provision not be enforced or be replaced with an ADM provision with reasonable terms? Moreover, the Commission seeks comment on the extent to which costs or other concerns associated with pursuing a program carriage complaint would affect the ability of independent programmers to obtain relief if an MVPD violates the proposed ban on unreasonable ADM provisions.

14. *Program Bundling.* The Commission seeks comment on what the current program bundling practices are today and how such practices affect the ability of MVPDs to carry independent and diverse programming and competition in the video distribution market. For example, is forced bundling prevalent today? What impact, if any, does the carriage of bundled channels have on the ability of MVPDs to carry independent channels? Are there examples of independent programmers being dropped or not carried at all due to the constraints placed on MVPD systems by bundling

since 2017? To what extent does bundling have a greater impact on smaller MVPDs than it does on large MVPDs? How much has MVPD channel capacity (*i.e.,* the number of MVPD channels available for programming) increased or decreased among both large and smaller MVPDs since 2017? To the extent there have been increases, will this alleviate the constraints placed on MVPD systems by bundling? Are there any plans for large and small MVPDs to increase capacity in the future? Alternatively, is MVPD capacity increasingly being used for broadband today, and does this consequently leave fewer additional channels available for independent programming? Are there other factors, such as financial resources, that continue to constrain the ability of MVPDs to carry independent programming as a result of bundling notwithstanding increases in channel capacity? How does bundling affect consumer choice? Does bundling raise or lower costs for consumers? What are the costs and benefits associated with program bundling? Commenters should describe the extent to which bundling may impede the ability of MVPDs to carry independent programming and whether this is outweighed by any associated benefits of this practice.

15. *Other Marketplace Obstacles.* The Commission seeks comment on other practices that may impede entry into the market by or growth of independent programmers, thereby harming competition and/or consumer choice. For example, what impact do tier placement and penetration requirements (*i.e.,* requirements in some programming agreements that programming be placed on a particular tier or that specify a minimum percentage of subscribers who must receive the programming) have on independent programmers? Are such requirements more typically found in programming agreements with independent programmers than in agreements with vertically-integrated programmers? Are there negotiation practices that hinder independent programmers' entry into the market? If so, what are these practices and how do they impede independent programmers' entry into the market? Do independent programmers that reject certain provisions or requirements in programming agreements face retaliatory conduct that impacts their ability to compete fairly? Are there other marketplace practices that limit the ability of independent programmers to reach consumers? What are the costs of such practices? In particular, do such practices have an adverse effect on diversity, competition, or innovation? What, if any, benefits do such practices offer and do the benefits outweigh the harms?

Legal Authority To Address Marketplace Obstacles to Independent Programming

16. The Commission seeks comment on its legal authority to take action to curb practices that may adversely impact the ability of independent programmers to compete fairly. In particular, the Commission seeks comment on its authority under section 616 of the Act to adopt rules prohibiting the use of MFN provisions and unreasonable ADM provisions in program carriage agreements between MVPDs and independent programmers, as proposed above. Section 616(a) directs the Commission to ''establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors.'' The Commission seeks comment on whether the grant of authority under section 616(a) to adopt rules ''governing program carriage agreements and related practices between [MVPDs] and video programming vendors'' is sufficiently broad to permit us to ban the use of MFN or unreasonable ADM provisions. The Commission notes that the prohibitions on MFN provisions and unreasonable ADM provisions proposed above would apply to agreements between MVPDs and independent programmers, which are encompassed within the term ''video programming vendors.'' Congress's goal in enacting section 616 was ''to stem and reduce the potential for abusive or anticompetitive actions [by MVPDs] against programming entities.'' Consistent with this objective, the proposed prohibitions on MFN provisions and unreasonable ADM provisions discussed above are intended to enhance competition in the video marketplace and reflect Congress's belief that ''competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power'' and other MVPDs.

17. Moreover, the Commission tentatively concludes that Congress did not intend to limit the Commission's authority under section 616(a) to the specific practices listed in that section. The introductory language in section 616(a) grants the Commission broad authority to ''establish regulations governing program carriage agreements and related practices between cable operators and multichannel video programming distributors and video programming vendors,'' and nothing in the statute expressly precludes the Commission from establishing rules apart from those specifically listed. Further, sections 616(a)(1)–(a)(3)—the subsections relating to substantive requirements—are introduced by the verbs ''include'' or ''contain,'' which suggests that such requirements are not exhaustive. In instances where Congress intends to limit the Commission's rulemaking authority to specified areas, it has done so expressly. The Commission seeks comment on this analysis.

18. The Commission also seeks comment on whether section 616(a)(3) provides a basis for our proposed bans on MFN provisions and unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. Section 616(a)(3) directs the Commission to adopt rules ''designed to prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.'' The Commission seeks comment on whether this provision authorizes it to adopt rules that prohibit vertically integrated MVPDs from including MFN and unreasonable ADM clauses in carriage agreements with independent programmers, where such MVPDs do not include the same clauses in carriage agreements with affiliated programming networks. If so, would the application of such rules only to vertically integrated MVPDs adequately address the competition and diversity concerns raised by restrictive MFN and ADM clauses? Would such rules be effective given that an MVPD could enter into the same restrictive MFN and/or ADM clauses with both an affiliated programming network and an independent programmer but simply not exercise its rights with respect to the affiliated network?

19. The Commission further seeks comment on whether section 628 provides legal authority for adoption of our proposed rules. Similar to our proposed rules, the purpose of section 628 is to ''increase[e] competition and diversity in the [[MVPD] market . . . and to spur the development of communications technologies.'' Section 628(b) precludes a cable operator, a common carrier or its affiliate that provides video programming, and an Open Video System (OVS) operator, as

well as a satellite-delivered programmer affiliated with one of those entities, from engaging in ''unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any'' MVPD from providing programming to subscribers or consumers. Section 628(c)(1) directs the Commission to ''prescribe regulations to specify particular conduct that is prohibited by [section 628(b)]'' in order to ''increase[e] competition and diversity in the [MVPD] market and the continuing development of communications technologies.'' Considering that section 628(b) appears to target only methods, acts, and practices that adversely affect MVPDs, the Commission seeks comment on whether it could lawfully invoke this provision to proscribe, as an ''unfair'' method, act or practice, the use of certain MFN and ADM provisions in agreements between MVPDs and independent programmers. Given that direct broadcast satellite (DBS) carriers are not subject to the provisions of section 628, the Commission seeks comment on whether reliance on that provision to limit the use of MFN and ADM provisions would result in a disparity in regulatory treatment among MVPDs.

20. Finally, the Commission seeks comment on whether there are other provisions in the Act that afford the Commission the authority to alleviate marketplace obstacles to the distribution of independent and diverse programming, including obstacles posed by MFN provisions and unreasonable ADM provisions. For example, section 335(a) provides the Commission with authority to ''impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming.'' Does the Commission have authority under other provisions of Title III? The Commission also seeks comment on whether it has—and should exercise—ancillary authority under section 4(i) of the Act to address MFN and ADM provisions.

Digital Equity and Inclusion

21. The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the issues discussed herein. Specifically, we seek comment on how any Commission actions taken to address barriers to the distribution of independent and diverse programming may promote or inhibit advances in diversity, equity, inclusion, and accessibility.

Initial Regulatory Flexibility Act Analysis

22. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). 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 NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

23. One of the Commission's primary objectives with respect to multichannel video programming is to foster a diverse, robust, and competitive marketplace for the delivery of such programming. We recognize that competition among distributors of video programming continues to evolve and consumers today have a wealth of video programming platforms from which to choose. Nevertheless, stakeholders continue to raise concerns that certain marketplace practices by distributors may hinder independent video programmers from reaching consumers and deprive them of access to their choice of diverse programming—one of the benefits of enhanced competition in the video marketplace. Specifically, independent programmers contend that their ability to thrive in the marketplace and reach consumers today depends on their ability to negotiate and secure carriage on multichannel video programming distributors (MVPDs) or online video distributors (OVDs). Despite the changes in the way that consumers access video programming—including via the growing number of platforms available to video consumers and the protracted decline in MVPD subscribers—independent video programmers have consistently asserted over the past several years that certain practices by incumbent cable operators and other MVPDs, particularly most favored nation (MFN) and alternative distribution method (ADM) clauses in program carriage agreements, have impeded their ability to reach consumers across all video platforms, leading to less competition and fewer choices for those who watch.

24. The NPRM seeks comment on the state of the marketplace for independent and diverse programming and the availability of such programming to consumers today. The NPRM also seeks comment on the obstacles faced by independent programmers in reaching consumers and the actions the Commission can take to alleviate such obstacles. Specifically, the NPRM seeks comment on the current usage of MFN provisions, both conditional and unconditional, in contracts for carriage of non-broadcast video programming and on the costs and benefits of conditional and unconditional MFN provisions. Additionally, the NPRM requests comment on the prevalence and scope of ADM provisions in contracts for carriage of non-broadcast video programming today and on the current costs and benefits of ADM provisions. The NPRM seeks comment on what the current program bundling practices are today and how such practices affect the ability of MVPDs to carry independent and diverse programming. Further, the NPRM seeks comment on other practices that may impede entry into the market by or growth of independent programmers. Finally, the NPRM invites comment on the need for Commission action to address any obstacles to the distribution of independent and diverse programming, as well as the Commission's legal authority to take action to curb program carriage practices that may adversely impact the ability of independent programmers to compete fairly.

25. In order to alleviate marketplace obstacles that may hinder independent programmers from reaching consumers, the NPRM proposes to prohibit the use of MFN provisions, either conditional or unconditional, in carriage agreements between MVPDs and independent programmers. In addition, the NPRM proposes to bar unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. The NPRM proposes that the issue of whether a particular ADM clause is ''unreasonable'' would be fact-specific and decided in the context of a program carriage complaint proceeding brought under section 616 of the Act, taking into account, among other factors, the extent to which an ADM provision prohibits an independent

programmer from licensing content to other distributors, including OVDs. The NPRM also seeks comment on whether further guidance should be provided on the meaning of ''unreasonable'' in this context.

B. Legal Basis

26. The proposed action is authorized pursuant to sections 1, 4(i), 4(j),, 303, 307, 316, 335, 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303, 307, 316, 335, 536, and 548.

C. Description and Estimates of the Number of Small Entities To Which the Proposed Rules Will Apply

27. 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 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.

28. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.

29. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite). The SBA small business 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 licensees in this industry can be considered small.

30. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses. The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues exceed $3 million and did not exceed $15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues exceed $15 million and did not exceed $40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won 4 licenses, one bidder claiming the very small business status won three licenses and two bidders claiming entrepreneur status won six licenses. One of the winning bidders claiming a small business status classification in the BRS license auction has an active licenses as of December 2021.

31. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $20 million for the preceding five (5) years. 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 we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

32. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.,* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA small business size standard for this industry classifies firms with annual receipts less than $41.5 million as small. Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year. Of that number, 149 firms operated with revenue of less than $25 million a year and 44 firms operated with revenue of $25 million or more. Based on this data, the Commission estimates that a majority of firms in this industry are small.

33. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Based on industry data, there are about 420 cable companies in the U.S. Of these, only seven have more than 400,000 subscribers. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Based on industry data, there are about 4,139 cable systems (headends) in the U.S. Of these, about 639 have more than 15,000 subscribers. Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

34. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a ''small cable operator,'' which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all

subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator. Based on industry data, only six cable system operators have more than 498,000 subscribers. Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

35. *Competitive Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,230 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.

36. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS is included in the Wired Telecommunications Carriers industry which comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.

37. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service—DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation. DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

38. *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.

39. 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.

40. 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 we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

41. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the industry category of Wired Telecommunications Carriers. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for

2017 show that there were 3,054 firms that operated for the entire year. Of this total, 2,964 firms operated with fewer than 250 employees. Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

42. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

43. *Internet Publishing and Broadcasting and Web Search Portals.* This industry comprises establishments primarily engaged in (1) publishing and/or broadcasting content on the internet exclusively or (2) operating websites that use a search engine to generate and maintain extensive databases of internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the internet exclusively. Establishments known as web search portals often provide additional internet services, such as email, connections to other websites, auctions, news, and other limited content, and serve as a home base for internet users. The SBA small business size standard for this industry classifies firms having 1,000 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were firms that 5,117 operated for the entire year. Of this total, 5,002 firms operated with fewer than 250 employees. Thus, under this size standard the majority of firms in this industry can be considered small.

44. *Open Video Systems.* The open video system (OVS) framework was established in 1996 and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. OVS operators provide subscription services and therefore fall within the SBA small business size standard for the cable services industry, which is ''Wired Telecommunications Carriers.'' The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this total, 2,964 firms operated with fewer than 250 employees. Thus, under the SBA size standard the majority of firms in this industry can be considered small. Additionally, we note that the Commission has certified some OVS operators who are now providing service and broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information for the entities authorized to provide OVS however, the Commission believes some of the OVS operators may qualify as small entities.

45. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are included in the Wired Telecommunications Carriers' industry which includes wireline telecommunications businesses. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this total, 2,964 firms operated with fewer than 250 employees. Thus under the SBA size standard, the majority of firms in this industry can be considered small.

46. *Television Broadcasting.* This industry is comprised of ''establishments primarily engaged in broadcasting images together with sound.'' These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having $41.5 million or less in annual receipts as small. 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the entire year. Of that number, 657 firms had revenue of less than $25,000,000. Based on this data we estimate that the majority of television broadcasters are small entities under the SBA small business size standard.

47. As of September 30, 2023, there were 1,377 licensed commercial television stations. Of this total, 1,258 stations (or 91.4%) had revenues of $41.5 million or less in 2022, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on October 4, 2023, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of September 30, 2023, there were 383 licensed noncommercial educational (NCE) television stations, 380 Class A TV stations, 1,889 LPTV stations and 3,127 TV translator stations. The Commission, however, does not compile and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these television station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

48. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this

industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.

49. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services. Of these providers, the Commission estimates that 4,146 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.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

50. The rule changes proposed in the NPRM, if adopted, will impose compliance obligations on small, as well as other entities. Specifically, the NPRM proposes to prohibit MFN provisions, either conditional or unconditional, in carriage agreements between MVPDs and independent programmers. The NPRM also proposes to prohibit unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. The NPRM proposes that a determination of whether a particular ADM provision is ''unreasonable'' would be fact-specific and decided in the context of a program carriage complaint proceeding brought under section 616 of the Act.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

51. 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 and 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 small entities.

52. The proposals to prohibit MFN provisions and unreasonable ADM provisions, if adopted, would be expected to benefit small independent programmers by enhancing their ability to compete in the video marketplace and to create new, innovative program offerings. These proposals would also likely benefit small MVPDs and OVDs by removing barriers to mutually-beneficial carriage deals between these small entities and independent programmers. Nevertheless, the Commission seeks comment in the NPRM on how these proposals would affect small entities and expects to more fully consider the impact of these proposals and any alternatives on small entities, following review of the comments received in response to the NPRM.

53. The NPRM proposes to use the existing program carriage complaint procedures to address any complaints regarding violations of the proposed bans on MFN provisions and unreasonable ADM provisions. The NPRM seeks comment on whether costs or other concerns associated with pursuing a program carriage complaint would affect the ability of independent programmers, including small entities, to obtain relief if an MVPD violates the proposed ban on MFN provisions or unreasonable ADM provisions and asks whether any modifications to the program carriage complaint procedures are warranted.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

54. None.

Ordering Clauses

55. *It is ordered* that, pursuant to the authority found in sections 1, 4(i), 4(j), 303, 307, 316, 335, 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303, 307, 316, 335, 536 and 548, this Notice of Proposed Rulemaking *is adopted*.

56. *It is further ordered* that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket No. 24–115 on or before thirty (30) days after publication in the **Federal Register** and reply comments on or before sixty (60) days after publication in the **Federal Register**.

List of Subjects in 47 CFR Part 76

Television

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308. 309. 312, 315, 317, 325, 335, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Amend § 76.1300 by:

■ a. Redesignating paragraphs (b), (c), (d) and (e) as paragraphs (c), (d), (g) and (h); and

■ b. Adding new paragraphs (b), (e) and (f).

The additions read as follows:

§ 76.1300 Definitions.

* * * * *

(b) *Alternative distribution method provision.* The term ''alternative distribution method provision'' means a provision that prohibits or restricts an independent video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms (such as online video distributors) for a specified period of time following the programming's original linear airing, or until certain conditions are met. For purposes of this section, the term ''original linear airing'' refers to the initial prescheduled airing of the programming by the programmer.

* * * * *

(e) *Independent video programming vendor.* The term ''independent video programming vendor'' means ''a non-broadcast programmer that (1) is not vertically integrated with a multichannel video programming distributor and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses.''

(f) *Most favored nation provision.* The term ''most favored nation provision'' means ''a provision that entitles a

multichannel video programming distributor to contractual rights or benefits that an independent video programming vendor has offered or granted to another multichannel video programming distributor or online video distributor, either conditionally or unconditionally. The term ''conditionally'' means ''subject to the multichannel video programming distributor's acceptance of terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other multichannel video programming distributor's or online video distributor's agreement.'' The term ''unconditionally'' means ''without obligating the multichannel video programming distributor to accept any such terms or conditions.''

* * * * *

■ 3. Amend § 76.1301 by adding paragraphs (d) and (e) to read as follows:

§ 76.1301 Prohibited Practices.

* * * * *

(d) *Most favored nation provisions.* No multichannel video programming distributor shall enter into an agreement with an independent video programming vendor that contains a most favored nation provision.

(e) *Unreasonable alternative distribution method provisions.* No multichannel video programming distributor shall enter into an agreement with an independent video programming vendor that contains an unreasonable alternative distribution method provision.

[FR Doc. 2024–09701 Filed 5–6–24; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 89, No. 89

Tuesday, May 7, 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

Natural Resources Conservation Service

[Docket ID: NRCS–2024–0007]

Urban Agriculture and Innovative Production Advisory Committee

AGENCY: Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Notice to solicit nominees; correction.

SUMMARY: The Department of Agriculture's (USDA) Office of Urban Agriculture and Innovative Production (OUAIP) notice published in the **Federal Register** on May 1, 2024, concerning nominations for four new members to serve on the Urban Agriculture and Innovative Production Advisory Committee (UAIPAC). We are republishing the entire contents of the May 1, 2024, notice to correct the list of the four vacancies for which OUAIP is seeking nominations for individuals to serve on UAIPAC. The UAIPAC advises the Secretary of Agriculture on the development of policies and outreach relating to urban, indoor, and other emerging agricultural production practices. The 12 members appointed by the Secretary of Agriculture are expected to serve a 3-year term. The 2024 nomination period includes four vacancies, including one individual who is an agriculture producer or farmer using innovative technology; one individual from an institution of higher education or extension program; one individual with supply chain experience, which may include a food aggregator, wholesale food distributor, food hub, or an individual who has direct-to-consumer market experience; and one individual with related experience in urban, indoor, and other emerging agriculture production practices.

DATES: USDA will consider nominations received via email or postmarked by July 6, 2024.

ADDRESSES: Please send nominations via email to: *UrbanAgricultureFederalAdvisoryCommittee@usda.gov.* Email is the preferred method for sending nominations. Alternatively, nominations can be mailed to Brian Guse, Director of the Office of Urban Agriculture and Innovative Production, Department of Agriculture, 1400 Independence Avenue SW, Room 4083, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Markus Holliday, Coordinator, Office of Urban Agriculture and Innovative Production; telephone: (301) 974–1287; email: *UrbanAgricultureFederalAdvisoryCommitee@usda.gov.*

Individuals who require alternative means for communication may contact the USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Correction

The USDA OUAIP notice published in the **Federal Register** on May 1, 2024, (89 FR 35053—35054) concerning nominations for four new members to serve on the Urban Agriculture and Innovative Production Advisory Committee (UAIPAC). We are republishing the entire contents of the May 1, 2024, notice to correct the list of the four vacancies for which OUAIP is seeking nominations for individuals to serve on UAIPAC. The 2024 nomination period includes four vacancies, including one individual who is an agriculture producer or farmer using innovative technology; one individual from an institution of higher education or extension program; one individual with supply chain experience, which may include a food aggregator, wholesale food distributor, food hub, or an individual who has direct-to-consumer market experience; and one individual with related experience in urban, indoor, and other emerging agriculture production practices.

UAIPAC Overview and Membership

Section 222 of the Department of Agriculture Reorganization Act of 1994, as amended by section 12302 of the 2018 Farm Bill (7 U.S.C. 6923; Pub. L. 115–334), directed the Secretary of Agriculture to establish an ''Urban Agriculture and Innovative Production Advisory Committee'' to advise the Secretary on any aspect of section 222, including the development of policies and outreach relating to urban, indoor, and other emerging agricultural production practices as well as identify any barriers to urban agriculture. UAIPAC will host public meetings to deliberate on recommendations for the Secretary of Agriculture. These recommendations provide advice to the Secretary on supporting urban agriculture and innovative production through USDA's programs and services. For additional background and member information visit the UAIPAC website at *https://www.usda.gov/partnerships/federal-advisory-committee-urban-ag.*

The UAIPAC consists of 12 members including:

- 4 representatives who are agriculture producers including 2 individuals who are located in an urban area or urban cluster; and 2 individuals who are farmers that use innovative technology;
- 2 representatives from an institution of higher education or extension program;
- 1 representative from a nonprofit organization, which may include a public health, environmental, or community organization;
- 1 representative who represents business and economic development, which may include a business development entity, a chamber of commerce, a city government, or a planning organization;
- 1 expert with supply chain experience, which may include a food aggregator, wholesale food distributor, food hub, or an individual who has direct-to-consumer market experience;
- 1 representative from a financing entity; and
- 2 representatives with related experience or expertise in urban, indoor, and other emerging agriculture production practices, as determined by the Secretary.

Member Nominations

Nominations are open to the public. Any interested person or organization may nominate qualified individuals for membership, including self-nominations. Individuals who wish to be considered for membership must

submit a nomination package to include the following required items:

(1) A completed background disclosure form (Form AD–755) signed by the nominee (see *https://www.usda.gov/sites/default/files/documents/ad-755.pdf*);

(2) A brief summary explaining the nominee's interest in one or more open vacancies including any unique qualifications that address the membership composition and criteria described above; and

(3) A résumé providing the nominee's background, experience, and educational qualifications.

It will be helpful to include the following optional items in your nomination package:

(1) Recent publications by the nominee relative to extending support for urban agriculture or innovative production; and

(2) Letter(s) of endorsement.

Please send nominations via email to: *UrbanAgricultureFederalAdvisoryCommittee@usda.gov* as the preferred method. Alternatively, nominations can be mailed to Brian Guse, Director of the Office of Urban Agriculture and Innovative Production, Department of Agriculture, 1400 Independence Avenue SW, Room 4083, Washington, DC 20250.

The USDA OUAIP is seeking nominations for individuals to serve on UAIPAC. The nomination period includes the following four vacancies:

- One individual who is an agirculture producer or farmer using innovative technology;
- One individual from an institution of higher education or extension program;
- One individual with supply chain experience, which may include a food aggregator, wholesale food distributor, food hub, or an individual who has direct-to-consumer market experience; and
- One individual with related experience in urban, indoor, and other emerging agriculture production practices.

Ethics Statement

To maintain the highest levels of honesty, integrity, and ethical conduct, no committee or subcommittee member may participate in any ''specific party matters'' (for example, matters are narrowly focused and typically involve specific transactions between identified parties) such as a lease, license, permit, contract, claim, grant, agreement, or related litigation with USDA in which the committee or subcommittee member has a direct financial interest. This includes the requirement for committee or subcommittee members to immediately disclose to the Designated Federal Officer (DFO) (for discussion with USDA's Office of Ethics) any specific party matter in which the member's immediate family, relatives, business partners or employer would be directly seeking to financially benefit from the committee's recommendations.

All members will receive ethics training to identify and avoid any actions that would cause the public to question the integrity of the committee's advice and recommendations. Members who are appointed as ''Representatives'' are not subject to Federal ethics laws because the appointment allows them to represent the point(s) of view of a particular group, business sector or segment of the public.

Members appointed as ''Special Government Employees'' (SGEs) are considered intermittent Federal employees and are subject to Federal ethics laws. SGE's are appointed due to their personal knowledge, academic scholarship, background or expertise. No SGE may participate in any activity in which the member has a prohibited financial interest. Appointees who are SGEs are required to complete and submit a Confidential Financial Disclosure Report (OGE–450 form) via the FDonline e-filing database system. Upon request USDA will assist SGEs in preparing these financial reports. To ensure the highest level of compliance with applicable ethical standards USDA will provide ethics training to SGEs on an annual basis. The provisions of these paragraphs are not meant to exhaustively cover all Federal ethics laws and do not affect any other statutory or regulatory obligations to which advisory committee members are subject.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering 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 or 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.

Individuals 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 TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunicaions Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the FACA Committee: UAIPAC. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities. USDA is an equal opportunity provider, employer, and lender.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *OAC@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Dated: May 2, 2024.

Cikena Reid,

Committee Management Officer, USDA.

[FR Doc. 2024–09952 Filed 5–2–24; 4:15 pm]

BILLING CODE 3410–16–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Commonwealth of the Northern Mariana Islands Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules

and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Commonwealth of the Northern Mariana Islands Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom at 9:00 a.m. ChST on Wednesday, June 5, 2024 (7:00 p.m. ET on Tuesday, June 4, 2024). The purpose of this meeting is to collect further testimony related to and discuss the next steps for the Committee's project, *Access to Adequate Health Care for Incarcerated Individuals in the CNMI Judicial System.*

DATES: Wednesday, June 5, 2024, 9:00 a.m.–10:30 a.m. Chamorro Standard Time (Tuesday, June 4, 2024, 7:00 p.m.–8:30 p.m. Eastern Time)

ADDRESSES: The meeting will be held via Zoom Webinar. *Registration Link (Audio/Visual): https://www.zoomgov.com/webinar/register/WN_IZbKDXhVR_-CAb0FiW32ig.*

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 161 735 5327

FOR FURTHER INFORMATION CONTACT: Kayla Fajota, Designated Federal Officer, at *kfajota@usccr.gov* or (434) 515–2395.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Kayla Fajota at *kfajota@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Commonwealth of the Northern Mariana Islands Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Approval of Minutes
III. Panelist Presentations
IV. Committee Q&A
V. Discussion and Project Planning: Access to Health Care for incarcerated individuals within the CNMI Judicial System
VI. Public Comment
VII. Next Steps
VIII. Adjournment

Dated: May 2, 2024.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2024–09913 Filed 5–6–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

United States Travel and Tourism Advisory Board: Meeting of the United States Travel and Tourism Advisory Board

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The United States Travel and Tourism Advisory Board (Board or TTAB) will hold a meeting on Monday, June 3, 2024. The Board advises the Secretary of Commerce on matters relating to the U.S. travel and tourism industry. The main purpose of this meeting is for Board members to deliberate and potentially adopt three letters of recommendation and discuss priority issues related to travel and tourism. The final agenda will be posted on the Department of Commerce website for the Board at *https://www.trade.gov/ttab-meetings* at least two days prior to the meeting.

DATES: Monday, June 3, 2024, 2 p.m.–3 p.m. EDT. The deadline for members of the public to register for the meeting or to submit written comments for dissemination prior to the meeting is 5 p.m. EDT on Thursday, May 30, 2024.

ADDRESSES: The meeting will be held virtually. The access information will be provided by email to registrants. Requests to register (including to speak or for auxiliary aids) and any written comments should be submitted by email to *TTAB@trade.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Aguinaga, the United States Travel and Tourism Advisory Board, National Travel and Tourism Office, U.S. Department of Commerce; telephone: 202–482–2404; email: *TTAB@trade.gov.*

SUPPLEMENTARY INFORMATION:

Public Participation: The meeting will be open to the public and will be accessible to people with disabilities. Any member of the public requesting to join the meeting is asked to register in advance by the deadline identified under the **DATES** caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted but may not be possible to fill. There will be fifteen (15) minutes allotted for oral comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for public comments may be limited to three (3) minutes per person. Members of the public wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name and address of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks by 5 p.m. EDT on Thursday, May 30, 2024, for inclusion in the meeting records and for circulation to the members of the Board.

In addition, any member of the public may submit pertinent written comments concerning the Board's affairs at any time before or after the meeting. Comments may be submitted to Jennifer Aguinaga at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5 p.m. EDT on Thursday, May 30, 2024, to ensure transmission to the Board prior to the meeting. Comments received after that date and time will be transmitted to the Board but may not be considered during

the meeting. Copies of Board meeting minutes will be available within 90 days of the meeting.

This Notice is published pursuant to the Federal Advisory Committee Act, as amended (FACA), 5 U. S. C. app., section 10(a)(2). The Committee was established pursuant to section 607 of the Visit America Act, subtitle A of title VI of division BB of the Consolidated Appropriations Act, 2023, Public Law 117–328, and in accordance with the provisions of the FACA, 5 U.S.C. 1001 *et seq.*

Jennifer Aguinaga,

Designated Federal Officer, United States Travel and Tourism Advisory Board.

[FR Doc. 2024–09918 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–301–806]

Aluminum Extrusions From Colombia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that Aluminum Extrusions from Colombia are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Jose Rivera or Lingjun Wang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0842 or (202) 482–2316, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Colombia. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act. Constructed export prices have been calculated in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in a preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce calculated estimated weighted-average dumping margins for Aluminio Nacional S.A. (Alumina)[7] and Tecnoglass, S.A.S. (Tecnoglass) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a weighted average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[8]

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, "Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Colombia," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, "Preliminary Scope Decision Memorandum II," dated concurrently with this memorandum.

[7] Aluminio Nacional S.A. is currently operating under the legal name Aluminio Nacional S.A. en reorganizacion, as it is undergoing a debt reorganization process.

[8] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball*

Continued

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Aluminio Nacional S.A.[9]	34.47
Tecnoglass, S.A.S.; C.I. Energia Solar S.A.S. E.S. Windows; and C.I. E.S. Metals S.A.S.[10]	8.85
All Others	12.42

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[11] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[12] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[13]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[14] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the public, executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public, executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[15]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 FR 53661, 53662 (September 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1. As complete publicly ranged sales data were available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, *see* Memorandum, ''Preliminary Calculation of the All-Others Rate,'' dated concurrently with this notice.

[9] As noted above, Aluminio Nacional S.A. is currently operating under the legal name Aluminio Nacional S.A. en reorganizacion.

[10] For purposes of this preliminarily determination, we are collapsing Tecnoglass, S.A.S., C.I. Energía Solar S.A.S. E.S. Windows, and C.I. E.S. Metals S.A.S. and treating them as a single entity. *See* Preliminary Decision Memorandum.

[11] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[12] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[13] *See* 19 351.309(c)(2) and (d)(2).

[14] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[15] *See APO and Service Final Rule.*

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

Between April 17 and 24, 2024, pursuant to 19 CFR 351.210(e), the petitioners,[16] Alumina, and Tecnoglass each requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[17] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, wedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigation on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigation are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical

[16] The petitioners are U.S. Aluminum Extruders Coalition and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[17] *See* Petitioners' Letter, ''Request for Postponement of Final Determinations,'' dated April 17, 2024; *see also* Alumina's Letter, ''Request for Postponement of Final Determinations,'' dated April 18, 2024, and Tecnoglass' Letter, ''Tecnoglass' Request to Postpone Final Determination,'' dated April 24, 2024.

weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 $\mu\Omega$/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a

tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m² and no greater than 30 g/m², and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2024–09940 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–840]

Aluminum Extrusions From Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Indonesia are being sold, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Samuel Brummitt or Katherine Sliney, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7851 or (202) 482–2437, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Indonesia. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act. Constructed export prices have been calculated in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. In addition, pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences for Alupro Asia Tech (Alutech). For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. Pursuant to section 735(c)(5)(B) of the Act, if the estimated weighted-average dumping margins established for all exporters and producers individually examined are zero, *de minimis* or determined based entirely on facts otherwise available, Commerce may use any reasonable method to establish the estimated weighted-average dumping margin for all other producers and exporters.

In this investigation, Commerce calculated estimated weighted-average dumping margins that are above *de minimis* for the mandatory respondents, PT Alfo Citra Abadi (Alca) and PT Indal Aluminium Industry and its subsidiary PT Indal Reiwa Auto (collectively, Indal). Therefore, Commerce calculated the all-others rate by weight averaging the estimated weighted-average dumping margins that it calculated for the individually examined respondents. Commerce weight averaged these dumping margins using the publicly ranged total values of each respondent's sales of subject merchandise to the United States during the POI.[7]

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation Aluminum Extrusions from Indonesia'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

[7] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly ranged U.S. sale values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closer to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offset) (percent)
PT Alfo Citra Abadi	5.66	5.65
PT Indal Reiwa Auto and PT Indal Aluminium Industry	18.79	18.79
Alupro Asia Tech	* 112.21	* 112.21
All Others	9.18	9.17

* Rates based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. Accordingly, where Commerce preliminarily made an affirmative determination for countervailable export subsidies, Commerce has offset the estimated weighted-average dumping margin by the appropriate CVD rate. Any such adjusted cash deposit rate may be found in the ''Preliminary Determination'' section above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting estimated antidumping duty cash deposits unadjusted for countervailed export subsidies at the time that the provisional CVD measures expire. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[8] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[9] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[10]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[11] Further, we request that interested parties limit their public, executive summary of each issue to no more than 450 words, not including citations. We intend to use the public, executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public, executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[12]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and

(September 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

[8] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[9] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[10] *See* 19 351.309(c)(2) and (d)(2).

[11] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[12] *See APO and Service Final Rule.*

Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

Between April 17 and 19, 2024, pursuant to 19 CFR 351.210(e), the petitioners,[13] Alca, and Indal, respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[14] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements

[13] The petitioners are U.S. Aluminum Extruders Coalition and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[14] *See* Petitioner's Letter, ''Request for Postponement of Final Determinations,'' dated April 17, 2024; *see also* Alca's Letter, ''Alca Request to Postpone Final Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Indonesia (A–560–840),'' dated April 18, 2024; and Indal's Letter, ''Aluminum Extrusions from Indonesia,'' dated April 19, 2024.

and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigation are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of orders resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 $\mu\Omega$/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/

−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under Harmonized Tariff Schedule of the United States (HTSUS) 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under HTSUS subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment

V. Application of Facts Available and Use of Adverse Inference
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Adjustments to Cash Deposit Rates for Export Subsidies in the Companion Countervailing Duty Investigation
IX. Recommendation

[FR Doc. 2024–09925 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–158]

Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2023, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Luke Caruso or Jonathan Hill, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2081 or (202) 482–3518, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination in this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act and calculated constructed export prices in accordance with section 772(b) of the Act. Because China is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act. In addition, Commerce has applied partial facts available under section 776(a)(1) of the Act to the collapsed single entity that includes mandatory respondent Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd (SHMC) and applied adverse facts available under sections 776(a) and (b) of the Act to the China-wide entity. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[7] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[8]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, "Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the People's Republic of China," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 88 at FR 74423.

[6] *See* Memorandum, "Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II," dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

[7] *See Initiation Notice,* 88 FR at 74427.

[8] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries," (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *enforcement.trade.gov/policy/bull05-1.pdf.*

Producer	Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Hydro Aluminium (Suzhou) Co., Ltd.	Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd./Sanhua Intelligent Controls Co., Ltd./Zhejiang Sanhua Automotive Components Co., Ltd./Shaoxing Sanhua New Energy Automotive Components Co., Ltd./Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd./Sanhua Heat Exchanger (Zhengzhou) Co., Ltd./Sanhua International Singapore Pte. Ltd.[9]	4.91	0.00
Jiangsu Gongchang Precision Aluminum Co., Ltd.	Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd./Sanhua Intelligent Controls Co., Ltd./Zhejiang Sanhua Automotive Components Co., Ltd./Shaoxing Sanhua New Energy Automotive Components Co., Ltd./Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd./Sanhua Heat Exchanger (Zhengzhou) Co., Ltd./Sanhua International Singapore Pte. Ltd.	4.91	0.00
Gerald New Energy (Jiangsu) Co., Ltd.	Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd./Sanhua Intelligent Controls Co., Ltd./Zhejiang Sanhua Automotive Components Co., Ltd./Shaoxing Sanhua New Energy Automotive Components Co., Ltd./Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd./Sanhua Heat Exchanger (Zhengzhou) Co., Ltd./Sanhua International Singapore Pte. Ltd.	4.91	0.00
Shandong Hongyuan Metal Materials Co., Ltd.	Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd./Sanhua Intelligent Controls Co., Ltd./Zhejiang Sanhua Automotive Components Co., Ltd./Shaoxing Sanhua New Energy Automotive Components Co., Ltd./Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd./Sanhua Heat Exchanger (Zhengzhou) Co., Ltd./Sanhua International Singapore Pte. Ltd.	4.91	0.00
Yangzhou Resler Composite Metal Materials Co., Ltd.	Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd./Sanhua Intelligent Controls Co., Ltd./Zhejiang Sanhua Automotive Components Co., Ltd./Shaoxing Sanhua New Energy Automotive Components Co., Ltd./Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd./Sanhua Heat Exchanger (Zhengzhou) Co., Ltd./Sanhua International Singapore Pte. Ltd.	4.91	0.00
Shandong Wanchuang Metal Technology Co., Ltd.	Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd./Sanhua Intelligent Controls Co., Ltd./Zhejiang Sanhua Automotive Components Co., Ltd./Shaoxing Sanhua New Energy Automotive Components Co., Ltd./Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd./Sanhua Heat Exchanger (Zhengzhou) Co., Ltd./Sanhua International Singapore Pte. Ltd.	4.91	0.00
Wuxi Fengyun Aluminum Industry Co., Ltd.	ACP (Changzhou) Heat Exchanger Co., Ltd	4.91	0.00
Changzhou Xiangyun Aluminum Industry Co., Ltd.	ACP (Changzhou) Heat Exchanger Co., Ltd	4.91	0.00
Changshu Changsheng Aluminium Products Co., Ltd.	Changshu Changsheng Aluminium Products Co., Ltd	4.91	0.00
Changzhou Tenglong Auto Parts Co., Ltd.	Changzhou Tenglong Auto Parts Co., Ltd	4.91	0.00
Chongqing Chaoli Electric Appliance Co., Ltd.	Chongqing Chaoli Electric Appliance Co., Ltd	4.91	0.00
Danfoss (Jiaxing) Co., Ltd	Danfoss Micro Channel Heat Exchanger (Jiaxing) Co., Ltd	4.91	0.00
Liaocheng Wanhe Commercial and Trading Ltd.	Danfoss Micro Channel Heat Exchanger (Jiaxing) Co., Ltd	4.91	0.00
Shandong Wanchuang Metal Technology Co, Ltd.	Danfoss Micro Channel Heat Exchanger (Jiaxing) Co., Ltd	4.91	0.00
Hydro Precision Tubing (Suzhou) Co., Ltd.	Danfoss Micro Channel Heat Exchanger (Jiaxing) Co., Ltd	4.91	0.00
Foshan City Shunde District Rongcheng Stainless Steel Sanitary Wares Industrial Co., Ltd.	Foshan City Shunde District Rongcheng Stainless Steel Sanitary Wares Industrial Co., Ltd.	4.91	0.00
Guangdong Wireking Housewares & Hardware Co., Ltd.	Guangdong Wireking Housewares & Hardware Co., Ltd	4.91	0.00
Guangdong XinWei Aluminum Products Co., Ltd.	Guangdong XinWei Aluminum Products Co., Ltd	4.91	0.00
Guangdong Yongfeng Lihua Shading Technology Co., Ltd.	Guangdong Yongfeng Lihua Shading Technology Co., Ltd	4.91	0.00
Guangdong Haomei New Materials Co. Ltd.	Hao Mei Aluminium Products Company Limited	4.91	0.00
Jiangsu SV Precision Components Co., Ltd.	Jiangsu SV Precision Components Co., Ltd	4.91	0.00
Guangxi Tianheng Auto Component Manufacturing Co., Ltd.	Kromet International Inc	4.91	0.00

Producer	Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Wuxi Huaguang Automotive Technology Co., Ltd.	Mercury Marine Technology (Suzhou) Co., Ltd	4.91	0.00
Ningbo Jiada Specialty Metals Ltd.	Mercury Marine Technology (Suzhou) Co., Ltd	4.91	0.00
Wuxi Jiangyuan Aluminum Co., Ltd.	Modine Thermal System (Changzhou) Co., Ltd	4.91	0.00
Jiangsu Asia Pacific Aviation Technology.	Modine Thermal System (Changzhou) Co., Ltd	4.91	0.00
Ningbo Innopower Tengda Machinery Co., Ltd.	Ningbo Innopower Tengda Machinery Co., Ltd	4.91	0.00
JiangSu Daiweimu New Kinetic Technology Co., Ltd.	Scheco Mechanical and Electrical Co., Ltd	4.91	0.00
Jiangsu Lide Aluminum Industry Co., Ltd.	Scheco Mechanical and Electrical Co., Ltd	4.91	0.00
Wuxi Huaguang Automotive Technology Co., Ltd.	Wuxi Huaguang Automotive Technology Co., Ltd	4.91	0.00
Zhejiang Guoyao Aluminum Co., Ltd.	Zhejiang Guoyao Aluminum Co., Ltd	4.91	0.00
Zhejiang Xinlong Industry Co., Ltd.	Zhejiang Xinlong Industry Co., Ltd	4.91	0.00
	China-wide entity	*376.85	365.19

* Rate based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted average amount by which normal value exceeds U.S. price, as indicated in the table above as follows: (1) for the producer/exporter combinations listed in the table above, the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Chinese producers/exporters of merchandise under consideration that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the China-wide entity; and (3) for all third-county exporters of the merchandise under consideration not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Chinese producer/exporter combination or China-wide entity that supplied that third-country exporter.

To determine the cash deposit rate, Commerce normally adjusts the estimated weighted-average dumping margin by the amount of domestic subsidy pass-through and export subsidies determined in a companion countervailing duty (CVD) proceeding when CVD provisional measures are in effect. Accordingly, where Commerce has made a preliminary affirmative determination for domestic subsidy pass-through or export subsidies, Commerce has offset the calculated estimated weighted-average dumping margin by the appropriate rate(s). Any such adjusted rates may be found in the ''Preliminary Determination'' section's table of estimated weighted-average dumping margins above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting cash deposits at a rate equal to the estimated weighted-average dumping margins calculated in this preliminary determination unadjusted for the passed-through domestic subsidies or for export subsidies at the time that the CVD provisional measures expire.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations and analysis it performed in this preliminary determination within five days of public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the deadlines for scope comments. After the submission of scope comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

[9] Commerce has preliminarily determined that the mandatory respondent Sanhua (Hangzhou) Micro Channel Heat Exchanger Co., Ltd. is affiliated with the following companies and has treated these companies as a single entity: (1) Sanhua Intelligent Controls Co., Ltd.; (2) Zhejiang Sanhua Automotive Components Co., Ltd.; (3) Shaoxing Sanhua New Energy Automotive Components Co., Ltd.; (4) Shaoxing Sanhua Automotive Thermal Management Technology Co., Ltd.; (5) Sanhua Heat Exchanger (Zhengzhou) Co., Ltd.; and (6) Sanhua International Singapore Pte. Ltd. *See* Preliminary Decision Memorandum.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the final verification report is issued in this investigation.[10] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[11] Interested parties who submit case or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[12]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide, at the beginning of their briefs, a public, executive summary for each issue raised in their briefs.[13] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue.

Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests should contain (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On April 21, 2024, pursuant to 19 CFR 351.210(e), SHMC requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[15] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce's will make its final determination no later than 135 days after the date of publication of this notice of preliminary determination in the **Federal Register**.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied

[10] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[11] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[12] *See* 19 CFR 351.309(c)(2) and (d)(2).

[13] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[14] *See APO and Service Final Rule.*

[15] *See* SHMC's Letter, ''Aluminum Extrusions from China,'' dated April 22, 2024.

to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A "part or subassembly" is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series

designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as

parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2024–09941 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–860]

Aluminum Extrusions From Mexico: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Mexico are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Carolyn Adie or Fred Baker, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6250 and (202) 482–2924, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Mexico. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act. Constructed export prices have been calculated in accordance with section

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 88 FR at 33576.

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences for Merit Stamping and Tubos y Perfiles de Aluminio. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. In this investigation, Commerce preliminarily calculated estimated weighted-average dumping margins for Aluminio de Baja California, S.A. de C.V. (ABC) and Aluminio Texcoco S.A. de C.V. (ALUTEX) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a simple average of the estimated weighted-average dumping margins calculated for the examined respondents.[7]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offset(s)) (percent)
Aluminio de Baja California S.A. de C.V	18.07	17.40
Aluminio Texcoco, S.A. de C.V./NEO Aluminio, S.A. de C.V./Extrusiones Metálicas, S.A. de C.V./ Extrusiones Metálicas Expo[8]	9.18	9.18
Merit Stamping	* 82.03	82.03
Tubos y Perfiles de Aluminio	* 82.03	82.03
All Others	13.63	13.63

* Rates based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. Accordingly, where Commerce preliminarily made an affirmative determination for countervailable export subsidies, Commerce has offset the estimated weighted-average dumping margin by the appropriate CVD rate. Any such adjusted cash deposit rate may be found in the ‘‘Preliminary Determination’’ section above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting estimated antidumping duty cash deposits unadjusted for countervailed export subsidies at the time that the provisional CVD measures expire. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

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[7] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53662 (September 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1. However, because complete publicly ranged sales data are not available for both examined respondents, Commerce based the all-others rate on the simple average of the weighted-average dumping margins calculated for the mandatory respondents.

[8] Commerce preliminarily determines that these companies are a single entity. *See* Preliminary Decision Memorandum.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[9] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[10]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public executive summary for each issue raised in their briefs.[11] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[12]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On April 17 and 24, 2024, pursuant to 19 CFR 351.210(e), the petitioners,[13] ABC, and ALUTEX each requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[14] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow

[9] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[10] *See* 19 351.309(c)(2) and (d)(2)

[11] We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[12] *See APO and Service Final Rule.*

[13] The petitioners are the U.S. Aluminum Extruders Coalition and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[14] *See* Petitioners' Letter, "Request for Postponement of Final Determinations," dated April 17, 2024; *see also* ABC's Letter, "Postponement of Final Determination and Extension of Provisional Measures Period," dated April 17, 2024; and ALUTEX's Letter, "Request for Postponement of Final Determination and Provisional Measures Period," dated April 24, 2024.

profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of orders resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of this investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions

made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under Harmonized Tariff Schedule of the United States (HTSUS) 8418.99.8050, which is being included for convenience.

Also excluded from the scope of the investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under HTSUS subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000;

7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.00. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.00000

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment
V. Application of Facts Available and Use of Adverse Inference
VI. Determination Not to Select Merit as a Voluntary Respondent
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Adjustments to Cash Deposit Rates for Export Subsidies in the Companion Countervailing Duty Investigation
X. Recommendation

[FR Doc. 2024–09936 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–847]

Aluminum Extrusions From Thailand: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Thailand are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 01, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Jun Jack Zhao, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1396.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The product covered by this investigation are aluminum extrusions from Thailand. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act and constructed export prices in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Thailand,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. Where the rates for individually investigated companies are all zero or *de minimis,* or determined entirely using facts otherwise available, section 735(c)(5)(B) of the Act instructs Commerce to rely on ''any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted-average dumping margins determined for exporters and producers individually investigated.''

In this investigation, Commerce calculated estimated weighted-average dumping margins for Thai Metal Aluminum Co., Ltd. (Thai Metal) and for United Aluminum Industry Co., Ltd. (United) that are not zero, *de minimis,* or based entirely on facts otherwise available. As such, Commerce has preliminarily determined the dumping margin for all-others companies to be a simple average of Thai Metal's and United's calculated rates, pursuant to section 735(c)(5)(B) of the Act.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Weighted-average dumping margin (percent)
Thai Metal Aluminum Co., Ltd	2.02
United Aluminum Industry Co., Ltd	4.04
All Others	3.03

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce with direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation measures will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed in connection with this preliminary determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[7] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[8] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[9]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[10] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[11]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date of the hearing.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such

[7] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[8] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[9] *See* 19 351.309(c)(2) and (d)(2).

[10] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[11] *See APO and Service Final Rule.*

postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination may be accompanied by a request for extension of provisional measures from a four-month period to a period of not more than six months in duration.[12]

On April 17, 24, and 25, 2024, pursuant to 19 CFR 351.210(e), the petitioner, Thai Metal, and United requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[13] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of aluminum extrusions from Thailand are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

[12] *See* 19 CRF 351.210(e)(2).

[13] *See* Petitioner's Letter, "Request for Postponement of Final Determinations," dated April 17, 2024; Thai Metal's Letter, "Request to Postpone the Deadline for Final Determinations," dated April 24, 2024; United's Letter, "Request to Postpone the Deadline for Final Determinations," dated April 25, 2024.

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, wedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigation on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigation are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is

a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator

shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under Harmonized Tariff Schedule of the United States (HTSUS) 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under HTSUS subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

[FR Doc. 2024–09939 Filed 5–6–24; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–850]

Aluminum Extrusions From the Republic of Türkiye: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from the Republic of Türkiye (Türkiye) are being, or are likely to be, sold in the

United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Grossnickle or Taylor Hatley, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: 202–482–3818 or (202) 482–4886, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Türkiye. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act and constructed export prices in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences for certain companies. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that, in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce calculated estimated weighted-average dumping margins for Erdoganlar Aluminyum San. ve Tic. A.S. (Erdoganlar) and Sistem Aluminyum Sanayi ve Ticaret A.S. (Sistem) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a weighted average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[7]

We received timely Q&V responses from the following companies in addition to the mandatory respondents, Erdoganlar and System: ASAS Aluminyum Sanayi ve Ticaret A.S. (ASAS); Cansan Aluminyum Profil San Tic AS (Cansan); Cuhadaroglu Metal Sanayi ve Pazarlama A.S. (Cuhadaroglu); HAS Aluminyum San. Ve Tic. A.S (HAS Aluminyum);[8] Kurtoglu Bakir Kursun Sanayi A.S. (Kurtoglu); and Saray Dokum ve Madeni Aksam San. Tur. A.S. (Saray).[9] ASAS,

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Republic of Türkiye,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

[7] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53662 (September 1, 2010), and accompanying Issues and Decision Memorandum at Comment1. As complete publicly ranged sales data were available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, *see* the All-Others Rate Calculation Memorandum.

[8] While we did not issue a Q&V questionnaire to HAS Aluminyum; it submitted a timely Q&V response. *See* HAS Aluminyum's Letter, ''Q&V Questionnaire Response,'' dated November 7, 2023 (HAS Aluminyum's Q&V Response).

[9] *See* ASAS's Letter, ''Submission of Quantity and Value Questionnaire Response,'' dated November 7, 2023; Cansan's Letter, ''Submission of Quantity and Value Questionnaire Response,'' dated November 6, 2023; Cuhadaroglu Metal's Letter, ''Submission of Quantity and Value Questionnaire Response,'' dated November 7, 2023; Kurtoglu Aluminym's

Continued

Cansan, Cuhadaroglu, Kurtoglu and Saray: (1) were not selected as mandatory respondents; (2) responded to our Q&V questionnaire in a timely manner; and (3) were not otherwise collapsed with a mandatory respondent. Accordingly, these companies are subject to the all-others rate.

Commerce issued a Q&V questionnaire to Birgi Birlesik Giyim (Birgi) following the initiation of the investigation which was not delivered.[10] Therefore, Commerce preliminarily finds that Birgi is subject to the all-others rate. Additionally, HAS Aluminyum responded to our Q&V questionnaire in a timely manner and stated that it had no shipments during the POI;[11] therefore, Commerce preliminarily finds that it is subject to the all-others rate.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offset(s)) (percent)
Erdoganlar Aluminyum San. ve Tic. A.S	85.14	84.94
Sistem Aluminyum Sanayi ve Ticaret A.S	45.41	45.41
Alkor Aluminyum Enerji Insaat Sanayi ve Ticaret Anonim Sirketi	* 605.72	594.55
Astas Aluminyum San ve Tic A.S	* 605.72	594.55
Ayde Aluminyum LTD. STI	* 605.72	594.55
Burak Aluminyum San	* 605.72	594.55
P.M.S. Aluminyum Sanayi ve Ticaret A.S	* 605.72	594.55
Tuna Aluminium Ltd	* 605.72	594.55
Uluson Aluminum	* 605.72	594.55
All-Others Rate	73.43	73.23

* Rates based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margins or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. Accordingly, where Commerce preliminarily made an affirmative determination for countervailable export subsidies, Commerce has offset the estimated weighted-average dumping margin by the appropriate CVD rate. Any such adjusted cash deposit rate may be found in the ''Preliminary Determination'' section above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting estimated antidumping duty cash deposits unadjusted for countervailed export subsidies at the time that the provisional CVD measures expire. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose the calculations and analysis performed in connection with this preliminary determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[12] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[13] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[14]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged

Letter, ''Submission of Quantity and Value Questionnaire Response,'' dated November 7, 2023; and Saray Dokum's Letter, ''Submission of Quantity and Value Questionnaire Response,'' dated November 6, 2023.

[10] *See* Memorandum, ''Quantity and Value Delivery Confirmation in the Less-Than-Fair Value Investigation of Certain Aluminum Extrusions from the Republic of Turkey,'' dated November 6, 2023 (Delivery Confirmation Memorandum).

[11] *See* HAS Aluminyum's Q&V Response.

[12] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[13] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[14] *See* 19 CFR 351.309(c)(2) and (d)(2).

interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[15] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[16]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce will inform parties of the time and date for the hearing. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.[17]

On April 17, 2024, pursuant to 19 CFR 351.210(e), all parties requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[18] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of aluminum extrusions from Türkiye are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: May 1, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, wedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but

[15] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[16] *See APO and Service Final Rule.*

[17] *See* 19 CFR 351.210(e)(2).

[18] *See* Erdoganlar's and Sistem's Letter, ''Request for Postponement of Final Determination,'' dated April 17, 2024; *see also* Petitioners' Letter, ''Request for Postponement of Final Determinations,'' dated April 17, 2024. The petitioners are U.S. Aluminum Extruders Coalition and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigation on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigation are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as

designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000;

8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Use of Facts Available with Adverse Inferences
V. Discussion of the Methodology
VI. Currency Conversion
VII. Adjustments to Cash Deposit Rates for Export Subsidies in the Companion Countervailing Duty Investigation
VIII. Recommendation

[FR Doc. 2024–09934 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (REEEAC or the Committee) will hold an in-person meeting, accessible to the public in-person and online, on Wednesday, May 22, 2024 at the U.S. Department of Commerce in Washington, DC Registration instructions for the public to attend either in-person or online are provided below. The meeting has a limited number of spaces for members of the public to attend in-person. Requests to attend in-person will be considered on a first-come first-served basis.

DATES: Wednesday, May 22, 2024, from approximately 9:30 a.m. to 3:30 p.m. Eastern Daylight Time (EDT). Members of the public wishing to participate must register in advance with Cora Dickson at the contact information below by 5:00 p.m. EDT on Friday, May 17, 2024, including any requests to make comments during the meeting or for accommodations or auxiliary aids.

ADDRESSES: To register, please contact Cora Dickson, Designated Federal Officer (DFO), Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–6083; email: *Cora.Dickson@trade.gov.* In their registration, members of the public wishing to attend in-person must request in-person attendance by the firm deadline above.

FOR FURTHER INFORMATION CONTACT: Cora Dickson, DFO, Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–6083; email: *Cora.Dickson@trade.gov.* Registered participants joining virtually will be emailed the login information for the meeting, which will be accessible as a livestream via WebEx Webinar. Registered participants joining in-person will be emailed instructions on accessing the designated meeting space.

SUPPLEMENTARY INFORMATION:

Background: The Secretary of Commerce established the REEEAC pursuant to discretionary authority and in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. 1001 *et. seq.*), on July 14, 2010. The REEEAC was re-chartered most recently on May 27, 2022. The REEEAC provides the Secretary of Commerce with advice from the private sector on the development and administration of programs and policies to expand the export competitiveness of U.S. renewable energy and energy efficiency products and services. More information about the REEEAC, including the list of appointed members for this charter, is published online at *http://trade.gov/reeeac.*

On Wednesday, May 22, 2024, the REEEAC will hold the eighth meeting of its current charter term. The Committee, with officials from the Department of Commerce and other agencies, will discuss major issues affecting the competitiveness of the U.S. renewable energy and energy efficiency industries. The Committee will provide an overview of its recommendations to the relevant U.S. Government officials from the Trade Promotion Coordinating Committee agencies. An agenda will be made available by May 17, 2024 upon request to Cora Dickson.

The meeting will be open to the public and will be accessible to people with disabilities. All guests are required to register in advance by the deadline identified under the **DATE** caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted but may not be possible to fill.

A limited amount of time before the close of the meeting will be available for oral comments from members of the public attending the meeting. Members of the public attending virtually who wish to speak during the public comment period must give the DFO advance notice in order to facilitate their access. To accommodate as many speakers as possible, the time for public comments will be limited to two to five minutes per person (depending on number of public participants). Individuals wishing to reserve speaking time during the meeting must contact Cora Dickson using the contact information above and submit a brief statement of the general nature of the comments, as well as the name and address of the proposed participant, by 5:00 p.m. EDT on Friday, May 17, 2024. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a copy of their oral comments by email to Cora Dickson for distribution to the participants in advance of the meeting.

Any member of the public may submit written comments concerning the REEEAC's affairs at any time before or after the meeting. Comments may be submitted via email to the Renewable Energy and Energy Efficiency Advisory Committee, c/o: Cora Dickson, Designated Federal Officer, Office of Energy and Environmental Industries, U.S. Department of Commerce; *Cora.Dickson@trade.gov.* To be considered during the meeting, public comments must be transmitted to the REEEAC prior to the meeting. As such, written comments must be received no later than 5:00 p.m. EDT on Friday, May 17, 2024. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of REEEAC meeting minutes will be available within 30 days following the meeting.

Man K. Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2024–09959 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–331–804]

Aluminum Extrusions From Ecuador: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Ecuador are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Elizabeth Bremer or Stephanie Trejo, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4987 or (202) 482–4390, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Ecuador. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export price in accordance with section 772(a) of the Act. Constructed export prices have been calculated in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that, in the preliminary determination, Commerce shall determine an estimated all-others rate for all other exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act.

In this investigation, Commerce calculated estimated weighted-average dumping margins for CEDAL Durán S.A. (CEDAL Durán) and FISA Fundiciones Industriales S.A. (FISA) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a weighted average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[7]

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 88 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Ecuador,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memo II).

[7] *See* Memorandum, ''All-Others Rate Calculation,'' dated concurrently with this notice. With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53662 (September 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1. As complete publicly ranged sales data were available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, *see* the All-Others Rate Calculation Memorandum.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
CEDAL Durán S.A./Corporación Ecuatoriana de Aluminio S.A. CEDAL[8]	51.20
FISA Fundiciones Industriales S.A	17.23
All Others	22.52

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rates for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed in connection with this preliminary determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination for CEDAL Durán and FISA.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of cases and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[10] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[11]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[12] Further, we request that interested parties limit their public, executive summary of each issue to no more than 450 words, not including citations. We intend to use the public, executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public, executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce will inform parties of the time and date for the hearing. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

Between April 17 and 19, 2024, pursuant to 19 CFR 351.210(e), the petitioners,[14] CEDAL Durán, and FISA requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[15] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of

[8] Commerce preliminarily determines that CEDAL Duran and Corporación Ecuatoriana de Aluminio S.A. CEDAL are a single entity. *See* the Preliminary Decision Memorandum.

[9] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[10] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[13] *See APO and Service Final Rule.*

[14] The petitioners are U.S. Aluminum Extruders Coalition and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[15] *See* Petitioners' Letter, "Request for Postponement of Final Determinations," dated April 17, 2024; *see also* CEDAL Durán's Letter, "CEDAL Request for Postponement of Final Determination," dated April 18, 2024; and FISA's Letter, "Request to Postpone the Deadline for Final Determination," dated April 19, 2024.

exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those

antidumping and countervailing duty orders that are in effect as of the date of publication of orders resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigations.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm² and less than 906 mm², (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty

investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2024–09938 Filed 5–6–24; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–826]

Aluminum Extrusions From Malaysia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Malaysia are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Paola Aleman Ordaz or Benjamin Blythe, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4031 or (202) 482–3457, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

preliminary determination in this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Malaysia. For a complete description of the scope of this investigation, see Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memo II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export price in accordance with sections 772(a) of the Act. Commerce calculated normal value in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences, for EL Aluminium Billet (M) Sdn Bhd, Kosan Aluminum Extrusion SDN. BHD, and Winstar Group. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that, in the preliminary determination, Commerce shall determine an estimated all-others rate for all other exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any rates that are zero, *de minimis,* or determined entirely under section 776 of the Act.

Pursuant to section 735(c)(5)(B) of the Act, if the estimated weighted-average dumping margins established for all exporters and producers individually examined are zero, *de minimis,* or determined based entirely on facts otherwise available, Commerce may use any reasonable method to establish the estimated weighted-average dumping margin for all other producers and exporters.

Commerce has preliminarily determined that the estimated weighted-average dumping margins for Genesis Aluminium Industries Sdn. Bhd./Zenshin Industries Sdn. Bhd. and P.A. Extrusion (M) Sdn. Bhd. under section 776 of the Act are zero. Consequently, pursuant to section 735(c)(5)(B) of the Act, Commerce's normal practice under these circumstances has been to calculate the all-others rate as a simple average of the alleged dumping margin(s) from the petition.[7] For a full description of the methodology underlying Commerce's analysis, *see* the Preliminary Decision Memorandum.

Preliminary Determination

For this preliminary determination, Commerce calculated a zero estimated weighted-average dumping margin for each individually examined producer and or exporter of the subject merchandise. Consistent with section 733(b)(3) of the Act, Commerce preliminarily determines that these individually examined respondents with zero rates have not made sales of subject merchandise at LTFV.

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[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Malaysia,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memo II).

[7] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 21909, 21912 (April 23, 2008), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2; *see also Notice of Final Determination of Sales at Less Than Fair Value: Raw Flexible Magnets from Taiwan,* 73 FR 39673, 39674 (July 10, 2008); and *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances,* 78 FR 79670, 79671 (December 31, 2013), unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 79 FR 14476, 14477 (March 14, 2014).

Exporter/producer	Estimated weighted-average dumping margin (percent)
Genesis Aluminium Industries Sdn. Bhd./Zenshin Industries Sdn. Bhd.[8]	0.00
P.A. Extrusion (M) Sdn. Bhd.[9]	0.00
EL Aluminium Billet (M) Sdn Bhd	*27.51
Kosan Aluminum Extrusion SDN. BHD	*27.51
Winstar Group	*27.51
All Others	26.70

* Rate based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents with above *de minimis* dumping margins that are listed in the table above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a company identified in the table above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise, except as explained below; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Because the estimated weighted-average dumping margins for Genesis Aluminium Industries Sdn. Bhd/Zenshin Industries Sdn. Bhd. and P.A. Extrusion (M) Sdn. Bhd. are zero, entries of subject merchandise produced and exported by these companies will not be subject to suspension of liquidation or cash deposit requirements. In such situations, Commerce applies the exclusion to the provisional measures to the producer/exporter combination that was examined in the investigation. Accordingly, Commerce is directing CBP not to suspend the liquidation of entries of subject merchandise that was exported by Genesis Aluminium Industries Sdn. Bhd/Zenshin Industries Sdn. Bhd. and produced by Genesis Aluminium Industries Sdn. Bhd/Zenshin Industries Sdn. Bhd. or subject merchandise that was exported by P.A. Extrusion (M) Sdn. Bhd. and produced by P.A. Extrusion (M) Sdn. Bhd. Entries of shipments of subject merchandise from these companies in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, are subject to the provisional measures at the all-others rate.

Should the final estimated weighted-average dumping margin be zero or *de minimis* for the producer/exporter combinations identified above, entries of shipments of subject merchandise from these producer/exporter combinations will be excluded from the potential antidumping duty order. Such exclusions are not applicable to merchandise exported to the United States by these respondents in any other producer/exporter combinations or by third parties that sourced subject merchandise from the excluded producer/exporter combinations.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations and analysis it performed in this preliminary determination within five days of public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memo II for the deadlines for scope comments. After the submission of scope comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[10] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[11] Interested parties who submit case or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[12]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide, at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[13] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the executive summary of each issue.

Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant

[8] Commerce preliminarily determines that Genesis Aluminium Industries Sdn. Bhd. and Zenshin Industries Sdn. Bhd. should be collapsed and treated as a single entity. *See* the Preliminary Decision Memorandum.

[9] Although Commerce selected P.A. Resources Berhad (PARB) as a mandatory respondent, PARB reported that it is a holding company that is not involved in the production or exportation of the merchandise under investigation but that its subsidiary, P.A. Extrusion (M) Sdn. Bhd., produced the merchandise under investigation and sold that merchandise to the United States during the POI. Consequently, Commerce preliminarily determines that the estimated weighted-average dumping margin applies to P.A. Extrusion (M) Sdn. Bhd., the only producer and exporter of the merchandise under consideration owned by PARB. *See* the Preliminary Decision Memorandum.

[10] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[11] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[12] *See* 19 CFR 351.309(c)(2) and (d)(2).

[13] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[14] *See APO and Service Final Rule*.

Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests should contain (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On April 17 and 18, 2024, pursuant to 19 CFR 351.210(e), Genesis Aluminium Industries Sdn. Bhd. and P.A. Resources Berhad, respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[15] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this notice of preliminary determination in the **Federal Register**.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I—Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-

[15] *See* Genesis Aluminium Industries Sdn. Bhd.'s Letter, ''Genesis Request to Postpone Final Determination,'' dated April 17, 2024; *see also* P.A. Resources Berhad's Letter, ''Request to Extend Final Determination,'' dated April 18, 2024.

finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigations.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5)

packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m^2 and no greater than 30 g/m^2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment
V. Application of Facts Available with Adverse Inferences
VI. Discussion of the Methodology
VII. Currency Conversion

VIII. Recommendation

[FR Doc. 2024–09937 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–920]

Aluminum Extrusions From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from India are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Deborah Cohen, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4521.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from India. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences for Global Aluminium Private Limited (Global Aluminium). Additionally, nine potential exporters and/or producers of aluminum extrusions from India did not respond to Commerce's quantity and value questionnaire. Thus, pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences for these nine companies. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce calculated an estimated weighted-average dumping margin for Maan Aluminium Limited (Maan) that is not zero, *de minimis,* or based entirely on facts otherwise available. Commerce has preliminarily determined the dumping margin for Global Aluminium under section 776 of the Act. Consequently, pursuant to section 735(c)(5)(B) of the Act, we calculated the all-others rate based on Maan's calculated rate.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Global Aluminium Private Limited	* 39.05
Maan Aluminium Limited	3.44
Alom Extrusions Limited	3.44
Hindalco Industries	3.44
Aluka Extrusions Industries	* 39.05
Banco Aluminium, Ltd	* 39.05
Bhoruka Aluminium, Ltd	* 39.05
Century Extrusions, Ltd	* 39.05
Jindal Aluminium, Ltd	* 39.05
KMC Aluminium Pvt., Ltd	* 39.05
Mittal Extrusions	* 39.05
Sudal Industries, Ltd	* 39.05
Superfine Group of Industries	* 39.05

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, "Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from India," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, "Preliminary Scope Decision Memorandum II," dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

Exporter/producer	Estimated weighted-average dumping margin (percent)
All Others	3.44

* Rate based on Adverse Facts Available.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[7] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[8] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[9]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide a public, executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[10] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public, executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public, executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[11]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date of the hearing.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2)(A) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination may be accompanies by a request for extension of provisional measures from a four-month period to a period of not more than six months in duration.[12]

On April 17 and 18, 2024, pursuant to 19 CFR 351.210(e), the petitioners[13] and Maan Aluminium each requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[14] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S.

[7] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[8] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[9] *See* 19 351.309(c)(2) and (d)(2).

[10] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[11] *See APO and Service Final Rule.*

[12] *See* 19 CRF 351.210(e)(2).

[13] The petitioners are U.S. Aluminum Extruders Coalition and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[14] *See* Petitioners' Letter, ''Request for Postponement of Final Determinations,'' dated April 17, 2024; *see also* Maan's Letter, ''Maan Aluminium Limited's Request to Extend the Antidumping Duty Final Determination,'' dated April 18, 2024.

International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigation are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of orders resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In

addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 $\mu\Omega$/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m^2 and no greater than 30 g/m^2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet

the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Application of Facts Available and Use of Adverse Inference
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2024–09926 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–846]

Aluminum Extrusions From Italy: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Italy are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Eric Hawkins, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1988.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics

[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less Than Fair Value Investigation of Aluminum Extrusions from Italy,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Italy. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memo II.[6] Commerce is preliminarily modifying the scope language as it appeared in the Initiation Notice. *See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act and constructed export prices in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences for Alex S.p.A., Bodega G & C S.p.A., Estral S.p.A., Pasturi S.r.l., and PFA S.r.l.[7] For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that, in the preliminary determination, Commerce shall determine an estimated all-others rate for all other exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any rates that are zero, *de minimis,* or determined entirely under section 776 of the Act.

In this investigation, Commerce calculated an estimated weighted-average dumping margin that is above *de minimis* for one of the mandatory respondents, Metra S.p.A/Metra Ragusa S.p.A./IMET S.p.A (collectively, Metra). Commerce preliminarily determines that the other mandatory respondent, Eural Gnutti S.p.A. (Eural), did not make sales of subject merchandise at LTFV. Accordingly, Commerce is assigning Metra's dumping margin to all other producers and exporters not individually examined.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Producer/exporter	Weighted-average dumping margin (percent)
Eural Gnutti S.p.A	0.00
Metra S.p.A./Metra Ragusa S.p.A./IMET S.p.A [8]	15.30
Alex S.p.A	* 41.67
Bodega G & C S.p.A	* 41.67
Estral S.p.A	* 41.67
Pasturi S.r.l	* 41.67
PFA S.r.l	* 41.67
All Others	15.30

* Rate based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce with direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a company identified in the table above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Because the estimated weighted-average dumping margin for Eural is zero, entries of shipments of subject merchandise produced and exported by this company will not be subject to suspension of liquidation or cash deposit requirements. In such situations, Commerce applies the exclusion from the provisional measures to the producer/exporter combination that was examined in the investigation. Accordingly, Commerce is directing CBP not to suspend liquidation of entries of subject merchandise produced and exported by Eural. Entries of shipments of subject merchandise from this company in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, are subject to the provisional measures at the all-others rate.

Should the final estimated weighted-average dumping margin be zero or *de minimis* for Eural, entries of shipments of subject merchandise produced and exported by Eural will be excluded from the potential antidumping duty order. Such exclusion is not applicable to merchandise exported to the United States by this respondent in any other producer/exporter combinations or by third parties that sourced subject merchandise from the excluded producer/exporter combination.

These suspension of liquidation instructions will remain in effect until further notice.

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[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, "Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II," dated concurrently with this notice (Preliminary Scope Decision Memo II).

[7] *See* Preliminary Decision Memorandum.

[8] Commerce preliminarily determines that Metra S.p.A, Metra Ragusa S.p.A., and IMET S.p.A. are a single entity. *See* Preliminary Decision Memorandum.

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations and analysis it performed in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memo II for the deadlines for scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[10] Interested parties who submit case or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[11]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their briefs that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[12] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue.

Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests should contain (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period of not more than six months in duration.

On April 19, 2024, pursuant to 19 CFR 351.210(e), Eural and Metra requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[14] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I—Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy

[9] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[10] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[11] *See* 19 351.309(c)(2) and (d)(2).

[12] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[13] *See APO and Service Final Rule.*

[14] *See* Eural's Letter, ''Request to Extend Final Determination,'' dated April 19, 2024; *see also* Metra's Letter, ''Request to Extend Final Determination,'' dated April 19, 2024.

with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A "part or subassembly" is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigations.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise

collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 $\mu\Omega$/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m^2 and no greater than 30 g/m^2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts

and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Single Entity Treatment
V. Application of Facts Available and Use of Adverse Inference
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2024–09930 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–970]

Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2021–2022; Correction

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Notice; correction.

SUMMARY: The U.S. Department of Commerce (Commerce) published notice in the **Federal Register** of May 1, 2024 in which Commerce published the final results of the 2021–2022 administrative reviews of the antidumping duty (AD) order on multilayered wood flooring from the People's Republic of China (China). This notice contained an incomplete list of the companies determined to have no shipments of subject merchandise during the period of review (POR) December 1, 2021, through November 30, 2022.

FOR FURTHER INFORMATION CONTACT: Davyd Williams, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4338.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2024, Commerce published in the **Federal Register** the final results of the 2021–2022 administrative review of the AD order on multilayered wood flooring from China.[1] In Appendix II of this **Federal Register** notice, we listed the companies which had no shipments of subject merchandise during the POR. However, we failed to include two companies, Dongtai Fuan Universal Dynamics, LLC and Pinge Timber Manufacturing (Zhejiang) Co., Ltd., in the list of companies which had no shipments in Appendix II.

Correction

In the **Federal Register** of May 1, 2024, in FR Doc 2024–09316, on page 35058, in the second appendix, correct the list to include Dongtai Fuan Universal Dynamics, LLC and Pinge Timber Manufacturing (Zhejiang) Co., Ltd. The corrected No Shipments List in Appendix II is appended to this notice.

Notification to Interested Parties

This notice is issued and published in accordance with sections sections 751(a) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: May 2, 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 II (Corrected)

No Shipments
Anhui Longhua Bamboo Product Co., Ltd.
Benxi Flooring Factory (General Partnership)
Dalian Shengyu Science And Technology Development Co., Ltd.
Dongtai Fuan Universal Dynamics, LLC
Dun Hua Sen Tai Wood Co., Ltd.
Dunhua City Dexin Wood Industry Co., Ltd.
Dunhua Shengda Wood Industry Co., Ltd.
HaiLin LinJing Wooden Products Co., Ltd.
Hunchun Xingjia Wooden Flooring Inc.
Huzhou Sunergy World Trade Co., Ltd.
Jiangsu Keri Wood Co., Ltd.
Jiangsu Mingle Flooring Co., Ltd
Jiangsu Simba Flooring Co., Ltd.
Jiashan On-Line Lumber Co., Ltd.
Kingman Wood Industry Co., Ltd.
Linyi Youyou Wood Co., Ltd.
Pinge Timber Manufacturing (Zhejiang) Co., Ltd.
Power Dekor Group Co., Ltd.
Sino-Maple (Jiangsu) Co., Ltd.
Suzhou Dongda Wood Co., Ltd.
Zhejiang Dadongwu Greenhome Wood Co., Ltd.
Zhejiang Longsen Lumbering Co., Ltd.
Zhejiang Shiyou Timber Co., Ltd.

[FR Doc. 2024–09929 Filed 5–6–24; 8:45 am]

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[1] *See Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2021–2022,* 89 FR 35058 (May 1, 2024).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–017]

Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, Part; 2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that countervailable subsidies were provided to producers and exporters of certain passenger vehicles and light truck tires (PVLT) from the People's Republic of China (China) during the period of review (POR), January 1, 2022, through December 31, 2022. In addition, Commerce is rescinding this review, in part, with respect to 18 companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Nicholas Czajkowski, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1395.

Background

On August 10, 2015, Commerce published in the **Federal Register** the countervailing duty (CVD) order on PVLTs from China.[1] On August 2, 2023, Commerce published in the **Federal Register** the notice of initiation of an administrative review of the *Order*.[2] On January 31, 2024, Commerce selected Jiangsu General Science Technology Co., Ltd. (General Science) and Winrun Tyre Co., Ltd. (Winrun) for individual examination as the mandatory respondents in this review. On February 2 and February 22, 2024, Commerce received letters of intent to not participate in the review by General Science[3] and Winrun,[4] respectively. We received no response from the Government of China to the Initial Questionnaire.[5] Because no other company subject to the review had reviewable entries or all review requests were rescinded for the remaining companies, Commerce did not select additional mandatory respondents.

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[6] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise covered by the *Order* is PVLTs from China. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.[7]

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, Commerce preliminarily determines that there is a subsidy (*i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific).[8] For a full description of the methodology underlying our conclusions, including our reliance on adverse facts available (AFA) pursuant to section 776(a) and (b) of the Act, *see* the Preliminary Decision Memorandum.

Rescission of Administrative Review, in Part

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation. Commerce received timely-filed withdrawal requests with respect to 16 companies, pursuant to 19 CFR 351.213(d)(1).[9] Because the withdrawal requests were timely filed, and no other parties requested a review of these companies, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding this review of the *Order* with respect to these 16 companies; *see* Appendix II.

Based on our analysis of U.S. Customs and Border Protection (CBP) data, we determine that the following two companies had no entries of subject merchandise during the POR: Shandong Qilun Rubber Co., Ltd. and Shandong Transtone Tyre Co., Ltd. On March 29, 2024, we notified interested parties of our intent to rescind the review for Shandong Qilun Rubber Co., Ltd. and Shandong Transtone Tyre Co., Ltd.[10] No parties commented on our intent to rescind.[11] Pursuant to 19 CFR 351.213(d)(3), we are rescinding the administrative review of these two companies. For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

Commerce preliminarily determines that the following net countervailable subsidy rates exist for the period January 1, 2022, through December 31, 2022:

Company	Subsidy rate (percent *ad valorem*)
Winrun Tyre Co., Ltd	* 125.50
Jiangsu General Science Technology Co., Ltd	* 125.50

* Rate is based on facts available with adverse inferences.

Cash Deposit Requirements

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends upon publication of the final results, to instruct CBP to collect cash

[1] *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) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 71829 (October 18, 2023).

[3] *See* General Science's Letter, ''Intent Not to Respond as a Mandatory Respondent,'' dated February 2, 2024.

[4] *See* Winrun's Letter, ''Notice of Intent to Not Participate,'' dated February 22, 2024.

[5] *See* Commerce's Letter, ''Initial Questionnaire,'' dated December 22, 2023 (Initial Questionnaire).

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2022 Countervailing Duty Administrative Review and Rescission, in Part: Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *Id.*

[8] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[9] *See* Preliminary Decision Memorandum at ''Partial Rescission of Administrative Review.''

[10] *See* Memorandum, ''Notice of Intent to Rescind Review, in Part,'' dated March 29, 2024.

[11] *Id.*

deposits of the estimated countervailing duties in the amounts calculated in the final results of this review for the respective companies listed above with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. If the rate calculated in the final results is zero or *de minimis,* no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

For all non-reviewed firms, CBP will continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Assessment Rates

In accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.221(b)(4)(i), we preliminarily determined subsidy rates in the amounts shown above for the producers/exporters shown above. Upon completion of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review.

For the companies for which this review is rescinded with these preliminary results, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2022, through December 31, 2022, in accordance with 19 CFR 351.212(c)(l)(i). For the companies remaining in the review, we intend 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).

Disclosure and Public Comment

Normally, Commerce discloses its calculations and analysis performed in connection with the preliminary results to interested parties within five days of its public announcement, or if there is no public announcement, within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b). However, because Commerce preliminarily applied total AFA in the calculation of the benefit for Winrun and General Science, and the AFA rates are based on rates calculated in prior segments of the proceeding, there are no calculations to disclose.

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of these preliminary results of review.[12] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[13] Interested parties who submit case or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[14]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide a public executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[15] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[16] Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically-filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

[12] *See* 19 CFR 351.309(c)(1)(ii).

[13] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[14] *See* 19 351.309(c)(2) and (d)(2).

[15] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[16] *See APO and Service Final Rule.*

Final Results of Review

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Interested Parties

These preliminary results and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: April 30, 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 I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Recission of Administrative Review, In Part
V. Diversification of China's Economy
VI. Use of Facts Otherwise Available and Application of Adverse Inferences
VII. Recommendation

Appendix II

List of Companies Which Timely Withdrew Requests for Review

1. Anhui Jichi Tire Co., Ltd.
2. Anhui Prime Cord Fabrics Company Ltd.; (3) GITI Radial Tire (Anhui) Company Ltd., GITI Steel Cord (Hubei) Company Ltd.; GITI Tire (China) Investment Company Ltd., GITI Tire (Hualin) Company Ltd.; GITI Tire (USA) Ltd.; GITI Tire Global Trading Pte. Ltd.; GITI Tire (Fujian) Co., Ltd.Linyi Bomei Furniture Co., Ltd.
3. Qingdao Fullrun Tyre Corp., Ltd.
4. Qingdao Keter International Co., Limited.
5. Qingdao Lakesea Tyre Co., Ltd.
6. Qingdao Sentury Tire Co., Ltd.
7. Qingdao Sunfulcess Tyre Co., Ltd.
8. Sailun Group Co., Ltd.
9. Sailun Group (Hong Kong) Co., Ltd.
10. Shandong Haohua Tire Co., Ltd.

11. Shandong Hongsheng Rubber Technology Co., Ltd.
12. Shandong New Continent Tire Co., Ltd.
13. Shandong Province Sanli Tire Manufacture Co., Ltd.
14. Sumitomo Rubber (Changshu) Co. Ltd.; Sumitomo Rubber (China) Co., Ltd.; Sumitomo Rubber (Hunan) Co., Ltd.
15. Sumitomo Rubber Industries, Ltd.
16. Zhaoqing Junhong Co., Ltd.

[FR Doc. 2024–09870 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–837]

Aluminum Extrusions From the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from the Socialist Republic of Vietnam (Vietnam) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2023, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Rebecca Janz, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2972.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination in this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Vietnam. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act and calculated constructed export prices in accordance with section 772(b) of the Act. Because Vietnam is a non-market economy (NME) country, within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act. In addition, pursuant to sections 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences, to assign a dumping margin for the Vietnam-wide entity. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[7] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[8]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the Socialist Republic of Vietnam,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 88 at FR 74423.

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

[7] *See Initiation Notice,* 88 FR at 74427.

[8] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available at *https://access.trade.gov/Resources/policy/bull05-1.pdf.*

Exporter	Producer	Estimated weighted-average dumping margin (percent)
East Asia Aluminum Company Limited	East Asia Aluminum Company Limited	2.85
Austdoor Group Joint Stock Company	Austdoor Group Joint Stock Company	2.85
BKQ Manufacturing and Trading Company Limited	Fravi Vietnam Group Joint Stock Company	2.85
Viet Nam Chuangxing Aluminium Company Limited	Vietnam Yongxing Aluminium Industry Co., Ltd	2.85
Do Thanh Aluminium Joint Stock Company	Do Thanh Aluminium Joint Stock Company	2.85
Ha Noi DST Joint Stock Company	Ha Noi DST Joint Stock Company	2.85
Euroha Joint Stock Company	Euroha Joint Stock Company	2.85
Fravi Viet Nam Group Joint Stock Company	Fravi Viet Nam Group Joint Stock Company	2.85
Gold Well Co., Ltd	Gold Well Co., Ltd	2.85
Hong Xin Co., Ltd	Vietnam Yongxing Aluminium Industry Co., LTD	2.85
Hyundai Aluminum Vina Shareholding Company	Hyundai Aluminum Vina Shareholding Company	2.85
KIMSEN Industrial Corporation	KIMSEN Industrial Corporation	2.85
Mien Hua Precision Mechanical Co., Ltd	Mien Hua Precision Mechanical Co., Ltd	2.85
Ngoc Diep Aluminium Joint Stock Company	Ngoc Diep Aluminium Joint Stock Company	2.85
Nhon Troch Branch of Tung Kuang Industrial Joint Stock Company.	Nhon Troch Branch of Tung Kuang Industrial Joint Stock Company.	2.85
Northstar Precision (Vietnam) Co., Ltd	Northstar Precision (Vietnam) Co., Ltd	2.85
Sapa Ben Thanh Aluminium Profiles, Co., Ltd	Sapa Ben Thanh Aluminium Profiles, Co., Ltd	2.85
Song Hong Aluminum Shalumi Group Joint Stock Company	Song Hong Aluminum Shalumi Group Joint Stock Company	2.85
Shinyang Metal Korea Co., Ltd	Shinyang Metal Korea Co., Ltd	2.85
Shinyang Metal Vietnam Co., Ltd	Shinyang Metal Vietnam Co., Ltd	2.85
Tan A Aluminum Company Limited	Tan A Aluminum Company Limited	2.85
Tin An Investment Production Trading Joint Stock Company	Austdoor Group Joint Stock Company	2.85
Tin An Investment Production Trading Joint Stock Company	Viet Phap Aluminium Factory—Viet Phap Shal Aluminium Joint Stock Company.	2.85
Tin Kim Plastic Joint Stock Company	Austdoor Group Joint Stock Company	2.85
Tin Kim Plastic Joint Stock Company	Viet Phap Aluminium Factory—Viet Phap Shal Aluminium Joint Stock Company.	2.85
Tung Kuang Industrial Joint Stock Company	Tung Kuang Industrial Joint Stock Company	2.85
Tung Shin Industrial Co., Ltd	Tung Shin Industrial Co., Ltd	2.85
Vietnam Beta Aluminum Company Limited	Vietnam Beta Aluminum Company Limited	2.85
Vietnam Yongxing Aluminium Industry Co., Ltd	Vietnam Yongxing Aluminium Industry Co., Ltd	2.85
Vietnam-Wide Entity		*41.84

* Rate based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted-average amount by which normal value exceeds U.S. price, as indicated in the table above as follows: (1) for the producer/exporter combinations listed in the table above, the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Vietnamese producers/exporters of merchandise under consideration that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the Vietnam-wide entity; and (3) for all third-country exporters of merchandise under consideration not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Vietnamese producer/exporter combination or Vietnam-wide entity that supplied that third-country exporter.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations and analysis performed in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the deadlines of scope comments. After the submission of scope comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the final verification report is issued in this investigation.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[10] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of

[9] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[10] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

contents listing each issue; and (2) a table of authorities.[11]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide, at the beginning of their briefs, a public, executive summary for each issue raised in their briefs.[12] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue.

Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.[14]

On April 17, 2024, pursuant to 19 CFR 351.210(e), East Asia Aluminum Co., Ltd requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[15] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this notice of preliminary determination in the **Federal Register**.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I—Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[13] *See APO and Service Final Rule.*

[14] *See* 19 CFR 351.210(e)(2).

[15] *See* East Asia's Letter, ''East Asia's Final Determination Extension Request,'' dated April 17, 2024.

are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigations.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as

designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000;

8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Use of Facts Available with Adverse Inferences
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2024–09932 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–874]

Aluminum Extrusions From Taiwan: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from Taiwan are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 01, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3477.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation nuntil May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Taiwan. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act. Constructed export prices have been calculated in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences for Cheng Hsin Aluminum Corp. (Cheng Hsin), Chiao Tai Aluminum Industry (Chiao Tai), Formosa Shinn Yoan Industrial Co., Ltd. (Formosa Shinn), and Yuan Sheng Aluminium Mfg. Corp. (Yuan Sheng).[7] For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in a preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from Taiwan'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 88 at FR 74423.

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

[7] *See* Memorandum, ''Affiliation and Collapsing Memorandum for Yuan Sheng Aluminium Mfg. Corp,'' dated concurrently with this memorandum (Collapsing Memorandum).

zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. Where the rates for individually investigated companies are all zero or *de minimis,* or determined entirely using facts otherwise available, section 735(c)(5)(B) of the Act instructs Commerce to rely on ''any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted-average dumping margins determined for exporters and producers individually investigated.''

In this investigation, Commerce has preliminarily determined the dumping margin for Yuan Sheng under section 776 of the Act and has calculated an estimated weighted-average dumping margin for Sow Shin of 0.00 percent.

We received timely Q&V questionnaire responses from the following companies in addition to the mandatory respondents, Shin Hsin Aluminum Co., Ltd. (Shin Hsin), E8 Green Energy Technology Co., Ltd. (Green Energy), Fusheng Precision Co., Ltd. (Fusheng), and M&M Hardware Corporation (M&M Hardware).[8] Shin Hsin, Green Energy, Fusheng, and M&M Hardware: (1) were not selected as mandatory respondents; (2) responded to our Q&V questionnaire in a timely manner; [9] and (3) were not otherwise collapsed with a mandatory respondent. Accordingly, these companies are subject to the all-others rate.

As such, we are preliminarily applying to the non-selected respondents, Shing Hsin Green Energy, Fusheng, and M&M Hardware, the all-others rate of 33.93 percent, which is the simple average of the zero percent dumping margin we preliminarily calculated for Sow Shin and the dumping margin we preliminarily assigned to Yuan Sheng, determined entirely under section 776 of the Act.[10]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Weighted-average dumping margin (percent)
Sow Shin Aluminum Co., Ltd.; Xiashin International Co., Ltd.[11]	0.73 (*de minimis*).
Yuan Sheng Aluminium Mfg. Corp.; Great Well Aluminium Industrial Ltd.; Ye Fong Aluminum Industrial Ltd.[12]	67.86.*
Chiao Tai Aluminum Industry	67.86.*
Formosa Shinn Yoan Industrial Co., Ltd	67.86.*
Cheng Hsin Aluminum Corp.	67.86.*
All Others	33.93.

* Rates based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce with direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Because the estimated weighted-average dumping margin for Sow Shin is *de minimis,* entries of shipments of subject merchandise from Sow Shin will not be subject to suspension of liquidation or cash deposit requirements. In such situations, Commerce applies the exclusion to the provisional measures to the producer/exporter combination that was examined in the investigation. Accordingly, Commerce is directing CBP not to suspend liquidation of entries of subject merchandise from Sow Shin. Entries of shipments of subject merchandise from Sow Shin in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, are subject to the provisional measures at the all-others rate.

Should the final estimated weighted-average dumping margin be zero or *de minimis* for Sow Shin identified above, entries of shipments of subject merchandise produced and exported by Sow Shin will be excluded from the potential antidumping duty order. Such exclusions are not applicable to merchandise exported to the United States by these respondents in any other producer/exporter combinations or by third parties that sourced subject merchandise from the excluded producer/exporter combinations. These suspension of liquidation measures will remain in effect until further notice.

Disclosure

Commerce intends to disclose the calculations and analysis performed in connection with this preliminary determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

[8] *See* Memorandum, ''Aluminum Extrusions from Taiwan: Respondent Selection,'' dated December 1, 2023 (Respondent Selection Memorandum).

[9] *Id.*

[10] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 21909, 21912 (April 23, 2008), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2; *see also Notice of Final Determination of Sales at Less Than Fair Value: Raw Flexible Magnets from Taiwan,* 73 FR 39673, 39674 (July 10, 2008); *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances,* 78 FR 79670, 79671 (December 31, 2013), unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 79 FR 14476, 14477 (March 14, 2014).

[11] Commerce preliminarily determines that Sow Shin and Xiashin International Co., Ltd. are a single entity. *See* Preliminary Decision Memorandum.

[12] Commerce preliminarily determines that Yuan Sheng, Great Well Aluminium Industrial Ltd, and Ye Fong Aluminium Industrial Ltd are a single entity. *See* Preliminary Decision Memorandum.

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[13] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[14] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[15]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[16] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[17]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination may be accompanies by a request for extension of provisional measures from a four-month period to a period of not more than six months in duration.[18]

On April 17, 2024, pursuant to 19 CFR 351.210(e), the mandatory respondent (*i.e.,* Sow Shin) and the petitioner requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[19] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of aluminum extrusions from Taiwan are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy

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[13] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[14] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[15] *See* 19 351.309(c)(2) and (d)(2).

[16] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[17] *See APO and Service Final Rule.*

[18] *See* 19 CRF 351.210(e)(2).

[19] *See* Sow Shin's Letter, ''Request for Extension of Final Determination,'' dated April 17, 2024; *see also* Petitioner's Letter, ''Request for Postponement of Final Determinations,'' dated April 17, 2024.

with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigations.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with

other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/− 0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/− 0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/− 0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and

subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Single Entity Treatment
V. Application of Facts Available and Use of Adverse Inference
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2024–09969 Filed 5–6–24; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–918]

Aluminum Extrusions From the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from the Republic of Korea (Korea) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Brittany Bauer or Christopher Maciuba, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3860 or (202) 482–0413, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination in this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are aluminum extrusions from Korea. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memo II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation*

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 24, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II,'' dated concurrently with this notice (Preliminary Scope Decision Memo II).

Notice. See the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce preliminarily relied upon facts otherwise available, with adverse inferences, to assign a dumping margin to: Bowon Light Metal Co., Ltd; Changwon Precision Extrusions; Dong Young Industrial Co., Ltd; Han Yeong Aluminum Industrial Co., Ltd; Kyung Hee Aluminum Co., Ltd; Namsun Aluminium Co., Ltd; Nam Sung Aluminum Co., Ltd; and Sung Hoon Aluminium Co., Ltd.[7] For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that, in the preliminary determination, Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any rates that are zero, *de minimis,* or determined entirely under section 776 of the Act.

In this investigation, Commerce calculated an estimated weighted-average dumping margin that is above *de minimis* for one of the mandatory respondents, Shin Yang Metal Industries Co., Ltd (SMI). Commerce preliminarily determines that the other mandatory respondent, ALMAC Co., Ltd/ALMAC Korea Co., Ltd./AR Aluminum Co., Ltd. (collectively, ALMAC), did not make sales of subject merchandise at LTFV. Accordingly, Commerce is assigning SMI's dumping margin to all other producers and exporters not individually examined.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
ALMAC Co., Ltd/ALMAC Korea Co., Ltd./AR Aluminum Co., Ltd[8]	0.00
Shin Yang Metal Industrial Co., Ltd	2.42
Bowon Light Metal Co., Ltd*	43.56
Changwon Precision Extrusions*	43.56
Dong Young Industrial Co., Ltd*	43.56
Han Yeong Aluminum Industrial Co., Ltd*	43.56
Kyung Hee Aluminum Co., Ltd*	43.56
Namsun Aluminium Co., Ltd*	43.56
Nam Sung Aluminum Co., Ltd*	43.56
Sung Hoon Aluminium Co., Ltd*	43.56
All Others	2.42

* Rate based on facts available with adverse inferences.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination, except if that rate is zero or *de minimis,* no cash deposit will be required; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Because the estimated weighted-average dumping margin for ALMAC is zero, entries of shipments of subject merchandise produced and exported by this company will not be subject to suspension of liquidation or cash deposit requirements. In such situations, Commerce applies the exclusion from the provisional measures to the producer/exporter combination that was examined in the investigation. Accordingly, Commerce is directing CBP not to suspend liquidation of entries of subject merchandise produced and exported by ALMAC. Entries of shipments of subject merchandise from this company in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, are subject to the provisional measures at the all-others rate.

Should the final estimated weighted-average dumping margin be zero or *de minimis* for ALMAC, entries of shipments of subject merchandise produced and exported by ALMAC will be excluded from the potential antidumping duty order. Such exclusion is not applicable to merchandise exported to the United States by this respondent in any other producer/exporter combinations or by third parties that sourced subject merchandise from the excluded producer/exporter combination.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memo II for the deadlines for scope comments. After the submission of scope comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the date for filing case briefs.[10] Interested parties who submit

[7] *See* Preliminary Decision Memorandum.

[8] Commerce preliminarily determines that ALMAC Co., Ltd, ALMAC Korea, and AR Aluminum are affiliates and that the companies should be treated as a single entity. *See* Preliminary Decision Memorandum.

[9] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements) (*APO and Service Final Rule*).

[10] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in*

case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[11]

As provided under 19 CFR 351.309©(2) and (d)(2), in prior proceedings, we have encouraged interested parties to provide a public executive summary of their briefs that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public executive summary for each issue raised in their briefs.[12] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue.

Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests should contain (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.[14]

On April 19 and 22, 2024, pursuant to 19 CFR 351.210(e), mandatory respondents ALMAC and SMI, respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[15] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

U.S. International Trade Commission Notification

In accordance with section 773(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary decision of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.2025(c).

Dated: May 1, 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 I

Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for

Antidumping and Countervailing Duty Proceedings, 88 FR 67069, 67077 (September 29, 2023).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[13] *See APO and Service Final Rule.*

[14] *See* 19 CFR 351.410(e)(2).

[15] *See* ALMAC's Letter, "Request for Extension of Final Determination," dated April 19, 2024; *see also* SMI's Letter, "Request for Extension of Final Determination," dated April 22, 2024.

assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A ''part or subassembly'' is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of the order resulting from this investigation) are excluded from the scope of the investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigations.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body

equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm² and less than 906 mm², (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m² and no greater than 30 g/m², and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100;

7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Single Entity Treatment
V. Application of Facts Available and Use of Adverse Inference
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2024–09931 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–810]

Aluminum Extrusions From the United Arab Emirates: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that aluminum extrusions from the United Arab Emirates are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2022, through September 30, 2023. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Jinny Ahn (OSE), or John K. Drury (Gulfex), AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0339, and (202) 482–0195, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation in the **Federal Register** on October 31, 2023.[1] On February 15, 2024, Commerce postponed the preliminary determination of this investigation until May 1, 2024.[2]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The product covered by this investigation are aluminum extrusions from the United Arab Emirates. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] in the *Initiation Notice,* Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum II.[6] Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. Further, pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available with adverse inferences (AFA) for Al Buraq Trading & Enterprises, Co.; Al Hamad Industrial Co., LLC; Al Jaber Aluminium Extrusions, LLC; Aluminum Products Co.; Arabian Extrusions Factory; Emirates Extrusion Factory, LLC; Taweelah Aluminium Extrusion Co.; and White Aluminum Extrusions, LLC. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

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[1] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 74421 (October 31, 2023) (*Initiation Notice*).

[2] *See Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 89 FR 11814 (February 15, 2024).

[3] *See* Memorandum, "Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the United Arab Emirates" dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, "Antidumping Duty Investigations and Countervailing Duty Investigations of Aluminum Extrusions from People's Republic of China, Colombia, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Türkiye, the United Arab Emirates, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum II," dated concurrently with this notice (Preliminary Scope Decision Memorandum II).

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce calculated estimated weighted-average dumping margins for Gulf Extrusions LLC (Gulfex) and OSE Industries LLC (OSE) that are not zero, *de minimis,* or based entirely on facts otherwise available. Consequently, pursuant to section 735(c)(5)(A) of the Act, we calculated the all-others rate using a weighted average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[7]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Weighted-average dumping margin (percent)
OSE Industries LLC	9.17
Gulf Extrusions LLC/Automotive Precision Technology (APT)—Sole Proprietorship LLC[8]	9.13
Al Buraq Trading & Enterprises, Co	*42.29
Al Hamad Industrial Co., LLC	*42.29
Al Jaber Aluminium Extrusions, LLC	*42.29
Aluminum Products Co	*42.29
Arabian Extrusions Factory	*42.29
Emirates Extrusion Factory, LLC	*42.29
Taweelah Aluminium Extrusion Co	*42.29
White Aluminum Extrusions, LLC	*42.29
All-Others Rate	9.15

* Rates based AFA.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce with direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exported is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed in connection with this preliminary determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

For scope-related comments, please refer to the Preliminary Scope Decision Memorandum II for the timeline of scope comments. After the submission of comments, Commerce will set a schedule for the submission of case and rebuttal briefs limited to scope issues.

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case

[7] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53662 (September 1, 2010), and accompanying Issues and Decisions Memorandum at Comment 1. As complete publicly ranged sales data were available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, *see* the All-Others Rate Calculation Memorandum.

[8] As explained in the Preliminary Decision Memorandum, based on the record information, Commerce preliminarily determines that Gulf Extrusions LLC and a non-selected respondent, Automotive Precision Technology LLC, are affiliated within the meaning of section 771(33)(F) of the Act and should be treated as a single entity pursuant to 19 CFR 351.401(f) for this preliminary determination. *See* Preliminary Decision Memorandum; *see also* Memorandum, ''Preliminary Collapsing Memorandum for Gulf Extrusions LLC and Automotive Precision Technology—Sole Proprietorship LLC,'' dated concurrently with this notice.

[9] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

briefs.[10] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[11]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[12] Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date of the hearing.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register** if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination may be accompanied by a request for extension of provisional measures from a four-month period to a period of not more than six months in duration.[14]

On April 17 and April 22, 2024, pursuant to 19 CFR 351.210(e), Gulfex the petitioners,[15] and OSE,[16] respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months. . In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination in the **Federal Register**, pursuant to section 735(a)(2) of the Act.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of aluminum extrusions from the United Arab Emirates are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: May 1, 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 I—Scope of the Investigation

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished,

[10] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[11] *See* 19 351.309(c)(2) and (d)(2)

[12] We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[13] *See APO and Service Final Rule.*

[14] *See* 19 CRF 351.210(e)(2).

[15] *See* Gulfex's Letter, "Gulf Request to Postpone Final Determination," dated April 17, 2024; *see also* Petitioners' Letter, "Request for Postponement of Final Determinations," dated April 17, 2024.

[16] *See* OSE's Letter, "Request to Extend Final Determination," dated April 22, 2024.

anodized (including bright dip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, spun, etched, and engraved. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigation.

The types of products that meet the definition of subject merchandise include but are not limited to, the aluminum extrusion portions of vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of the investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope. Excluded from the scope of the investigations are large, multi-finned extruded aluminum heat sinks designed to dissipate heat, meeting the following criteria: (1) an aspect ratio (defined as the ratio of the area of a void in an extrusion to the size of the smallest gap opening at the entrance of that void and calculated by dividing the void area by the square of the gap opening) greater than 15 to 1; or (2) the circumscribing circle diameter (defined as the diameter of the smallest circle that will entirely enclose the extrusion's cross-sectional profile) rounded up to the next half inch, exceeds 10 inches, and the weight-per-foot (defined as the theoretical weight of the profile as extruded prior to any machining that may remove material and calculated by multiplying the area of the profile in square inches by 1.2) exceeds 3.50 pounds per foot.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also includes aluminum extrusions contained in merchandise that is a part or subassembly of a larger whole, whether or not the merchandise also contains a component other than aluminum extrusions that is beyond a fastener. Such merchandise may be either assembled or unassembled at the time of importation. A "part or subassembly" is defined as a unit designed to be attached to, or incorporated with, one or more other units or components into a larger completed product. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject merchandise included in the scope and subject to duties. Examples of merchandise that is a part or subassembly of a larger whole include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders (defined as those antidumping and countervailing duty orders that are in effect as of the date of publication of orders resulting from this investigation) are excluded from the scope of this investigation. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of the investigation.

The scope excludes aluminum extrusions contained in fully and permanently assembled merchandise, if the assembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the assembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the assembled merchandise must be ready for use as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling).

The scope also excludes aluminum extrusions contained in unassembled merchandise if the unassembled merchandise is not a part or subassembly of a larger whole. To be excluded under this paragraph, the unassembled merchandise must also contain a component other than aluminum extrusions, beyond fasteners. In addition, to be excluded under this paragraph, the unassembled merchandise must be a packaged combination of parts that is ready to be assembled as imported, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material (with the exception of consumable parts or material or interchangeable media or tooling). To be excluded under this paragraph, the unassembled merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, appliances, and solar panels and solar modules.

The scope also excludes merchandise containing multiple subassemblies of a larger whole with non-extruded aluminum components beyond fasteners. A subassembly that meets the definition of subject merchandise, including any product expressly identified as subject merchandise in this scope, can only be excluded if it is fully and permanently assembled with at least one other different subassembly, and where (1) at least one of the subassemblies, if entered individually, would not itself be subject to the scope; (2) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the actual weight of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations); and (3) the aluminum extrusions within the merchandise collectively account for 50 percent or less of the number of pieces of the combined multiple subassemblies (without including any non-extruded aluminum fasteners in the calculations).

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and

aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope are extruded drawn solid profiles made from an aluminum alloy with the Aluminum Association series designation commencing with the number 1, 3, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) solid cross sectional area greater than 62.4 mm^2 and less than 906 mm^2, (2) minimum electrical conductivity of 58% of the international annealed copper standard (IACS) or maximum resistivity of 2.97 μΩ/cm, (3) a uniformly applied nonelectrically conductive temperature-resistant coating co-extruded over characteristic (1) of either polyamide, cross-linked polyethylene, or silicone rubber material which meets the following standards: (a) Vicat A temperature threshold of >140 degrees Celsius, (b) flammability requirements of UL 94V–0, and (c) a minimum coating thickness of 0.10 mm and maximum coating thickness of 2.0 mm, with a maximum thickness tolerance of +/−0.20 mm, (4) characteristic 3 may or may not be encapsulated with a ''Precision Drawn Tubing,'' wall thicknesses less than 1.2 mm, which is mechanically fixed in place, and (5) packaged in straight lengths, bent or formed and/or attached to hardware.

Also excluded from the scope are extruded tubing and drawn over a ID plug and through a OD die made from an aluminum alloy with the Aluminum Association series designation commencing with the number 3, 5, or 6 (or proprietary equivalents or other certifying body equivalents), including variants on individual alloying elements not to circumvent the other Aluminum Association series designations, which meet each of the following characteristics: (1) an outside mean diameter no greater than 30 mm with a tolerance less than or equal to +/−0.10 mm, (2) uniform wall thickness no greater than 2.7 mm with wall tolerances less than or equal to +/−0.1 mm, (3) may be coated with materials, including zinc, such that the coating material weight is no less than 3 g/m2 and no greater than 30 g/m2, and (4) packaged in continuous coils, straight lengths, bent or formed.

The scope also excludes fully and permanently assembled glass refrigerator shelves with decorative aluminum trim meeting the following characteristics: (1) aluminum trim meeting Aluminum Association series 6063–T5 designation that is anodized; (2) aluminum trim length of not more than 800 mm, and (3) aluminum trim width of not more than 40 mm. Such fully and permanently assembled glass refrigerator shelves include other components in addition to the aluminum trim, including, but not limited to, glass, steel, and plastic. Only fully and permanently assembled glass refrigerator shelves that require no further processing, fabrication, finishing, assembly, or the addition of any parts or material are excluded. Imports of glass refrigerator shelves are classified under HTSUS 8418.99.8050, which is being included for convenience.

Also excluded from the scope of this investigation is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of the antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (collectively, Aluminum Extrusions from the People's Republic of China). Solely for the investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products where the aluminum extrusion portions thereof meet the definition of subject merchandise. The language contained in the rest of the scope applies to this exhaustive list of products. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on Aluminum Extrusions from the People's Republic of China remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive.

The aluminum extrusion portions of the following products are included in the scope of the investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; automotive heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for Light Emitting Diode (LED) lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and Recreational Vehicle (RV) window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS

categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8547.90.0040; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Affiliation and Single Entity Treatment
V. Application of Facts Available and Use of Adverse Inference
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2024–09933 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–074]

Common Alloy Aluminum Sheet From the People's Republic of China: Final Results of the First Expedited Sunset Review of the Countervailing Duty Order on Common Alloy Aluminum Sheet From the People's Republic of China

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on common alloy aluminum sheet (aluminum sheet) from the People's Republic of China (China) would likely lead to the continuation or recurrence of countervailable subsidies at the levels indicated in the ''Final Results of Sunset Review'' section of this notice.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Theodora Mattei, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4834.

SUPPLEMENTARY INFORMATION:

Background

On February 6, 2019, Commerce published in the **Federal Register** the CVD *Order.*[1] On January 2, 2024, Commerce published in the **Federal Register** the notice of initiation of the first five-year sunset review of the *Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On January 9, 2024, we received a timely notice of intent to participate in this sunset review from the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members (Domestic Industry) within the deadline specified in 19 CFR 351.218(d)(1)(i).[3] The Domestic Industry claimed interested party status pursuant to 19 CFR 351.102(b)(29)(viii) and section 771(9)(E) of the Act.

On February 1, 2024, Commerce received an adequate substantive response from the Domestic Industry within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] Commerce received no substantive responses from any other interested parties, including the Government of China, nor was a hearing requested. On February 22, 2024, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.[5] As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited *i.e.,* 120-day, sunset review of the Order.

Scope of the Order

The product covered by the scope of the *Order* is common alloy aluminum sheet from China. A complete description of the scope of the *Order* is contained in the Issues and Decision Memorandum.[6]

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review, including the likelihood of the continuation or recurrence of subsidization in the event of revocation of the *Order* and the countervailable subsidy rates likely to prevail if the *Order* were to be revoked, is provided in the Issues and Decision Memorandum. A list of the topics discussed in the Issues and Decision Memorandum is included 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), which 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.*

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the *Order* would likely lead to the continuation or recurrence of countervailable subsidies at the following rates:

[1] *See Common Alloy Aluminum Sheet from the People's Republic of China: Countervailing Duty Order,* 84 FR 2157 (February 6, 2019) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 89 FR 66 (January 2, 2024).

[3] *See* Domestic Industry's Letter, ''Notice of Intent to Participate,'' dated January 9, 2024.

[4] *See* Domestic Industry's Letter, ''Substantive Response to the Notice of Initiation,'' dated February 1, 2024.

[5] *See* Commerce's Letter, ''Sunset Reviews for January 2024,'' dated February 22, 2024.

[6] *See* Memorandum, ''Decision Memorandum for the Final Results of the First Expedited Sunset Review of the Countervailing Duty Order on Common Alloy Aluminum Sheet from the People's Republic of China,'' dated May 1, 2024 (Issues and Decision Memorandum).

Company	Subsidy rate (percent *ad valorem*)
Yong Jie New Material Co., Ltd	57.00
Henan Mingtai Industrial Co., Ltd./Zhengzhou Mingtai Industry Co	48.46
All Others	52.73

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). 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 expedited sunset review and this notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act, and 19 CFR 351.218.

Dated: May 1, 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

I. Summary
II. Background
III. Scope of the *Order*
IV. History of the *Order*
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy
  2. Net Countervailable Subsidy Rates Likely to Prevail
  3. Nature of the Subsidies
VII. Final Results of Expedited Sunset Review
VIII. Recommendation

[FR Doc. 2024–09921 Filed 5–6–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–073]

Common Alloy Aluminum Sheet From the People's Republic of China: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of this expedited sunset review, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping (AD) duty order on certain common alloy aluminum sheet (CAAS) from the People's Republic of China (China) would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Sunset Review'' section of this notice.

DATES: Applicable May 7, 2024.

FOR FURTHER INFORMATION CONTACT: Erin Kearney, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; (202) 482–0167.

SUPPLEMENTARY INFORMATION:

Background

On January 2, 2024, Commerce published the notice of initiation of the first sunset review of the *Order,*[1] pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On January 9, 2024, Commerce received a notice of intent to participate in the sunset review from the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members (collectively, the domestic interested parties),[3] within the deadline specified in 19 CFR 351.218(d)(1)(i).[4] The domestic interested parties claimed interested party status under section 771(9)(E) of the Act as a trade or business association, a majority of whose members manufacture, produce, or wholesale the domestic like product in the United States. The domestic interested parties stated that its members are interested parties under section 771(9)(C) of the Act as U.S. manufacturers, producers, or wholesalers of the domestic like product.[5]

On February 1, 2024, the domestic interested parties filed an adequate substantive response within the deadline specified in 19 CFR 351.218(d)(3)(i).[6] Commerce did not receive a substantive response from any respondent interested party. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited (120-day) sunset review of the *Order.*

Scope of the Order

The merchandise covered by this *Order* is common alloy aluminum sheet from China. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.[7]

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review, including the likelihood of continuation or recurrence of dumping in the event of revocation of the *Order* and the magnitude of the margin of dumping likely to prevail if the *Order* was to be revoked, is provided in the Issues and Decision Memorandum.[8] A list of the topics discussed in the Issues and Decision Memorandum is attached as an appendix to this notice. The Issues and

[1] *See Common Alloy Aluminum Sheet from the People's Republic of China: Antidumping Duty Order,* 84 FR 2813 (February 8, 2019) (*Order).*

[2] *See Initiation of Five-Year (Sunset) Reviews,* 89 FR 66 (January 2, 2023) (*Initiation Notice*).

[3] The individual members of Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group are: Arconic Corporation; Commonwealth Rolled Products, Inc.; Constellium Rolled Products Ravenswood, LLC; Jupiter Aluminum Corporation; JW Aluminum Company; Novelis Corporation; and Texarkana Aluminum, Inc.

[4] *See* Domestic Interested Parties' Letter, ''Domestic Interested Parties' Notice of Intent To Participate,'' dated January 9, 2024.

[5] *Id.*

[6] *See* Domestic Interested Parties' Letter, ''Domestic Interested Parties' Substantive Response,'' dated February 1, 2024 (Substantive Response).

[7] *See* Memorandum, ''Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Antidumping Duty Order on Common Alloy Aluminum Sheet from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[8] *Id.*

Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Services System (ACCESS). ACCESS is available to registered users at *http://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.*

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Order* would be likely to lead to the continuation or recurrence of dumping, and that the magnitude of the dumping margin likely to prevail would be weighted-average margins of up to 59.72 percent.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely 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 expedited final results of sunset review and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: April 30, 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

I. Summary
II. Background
III. Scope of the *Order*
IV. History of the *Order*
V. Legal Framework
VI. Discussion of the Issues
1. Likelihood of Continuation or Recurrence of Dumping
2. Magnitude of Dumping Margin Likely to Prevail
VII. Final Results of Sunset Review
VIII. Recommendation

[FR Doc. 2024–09920 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 240430–0122]

Request for Comments on Draft Documents Responsive to NIST's Assignments Under Executive Order 14110 (Sections 4.1, 4.5, and 11)

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice; request for comments.

SUMMARY: The National Institute of Standards and Technology (NIST) requests comments on four draft documents responsive to NIST assignment under Executive Order 14110 on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI) issued on October 30, 2023 (E.O. 14110): NIST AI 600–1, Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile; NIST SP 800–218A, Secure Software Development Practices for Generative AI and Dual-Use Foundation Models; NIST AI 100–5, A Plan for Global Engagement on AI Standards; and NIST AI 100–4, Reducing Risks Posed by Synthetic Content: An Overview of Technical Approaches to Digital Content Transparency.

DATES: Comments containing information in response to this notice must be received on or before June 2, 2024 at 11:59 p.m. Eastern Time. Submissions received after that date may not be considered.

ADDRESSES: The drafts of NIST AI 600–1, NIST AI 100–5, and NIST AI 100–4 are available for review and comment on the NIST Artificial Intelligence Resource Center website at *https://airc.nist.gov* and at *www.regulations.gov* under docket number NIST–2024–0001. The draft of NIST SP 800–218A is available for review and comment on the NIST Computer Security Resource Center *https://csrc.nist.gov* and at *www.regulations.gov* under docket number NIS–2024–0001.

Comments may be submitted by either of the following methods:

By email:

- Comments on NIST AI 600–1 may be sent electronically to *NIST-AI-600-1@nist.gov* with ''NIST AI 600–1, Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile'' in the subject line. Comments on NIST AI 100–5 may be sent electronically to *NIST-AI-100-5@nist.gov* with ''NIST AI 100–5, A Plan for Global Engagement on AI Standards'' in the subject line. Comments on NIST SP 800–218A may be sent electronically to *SSDF@nist.gov* with ''NIST SP 800–218A, Secure Software Development Practices for Generative AI and Dual-Use Foundation Models'' in the subject line. Comments on NIST AI 100–4 may be sent electronically to *NIST-AI-100-4@nist.gov* with ''NIST AI 100–4, Reducing Risks Posed by Synthetic Content: An Overview of Technical Approaches to Digital Content Transparency''. Electronic submissions may be sent as an attachment in any of the following unlocked formats: HTML; ASCII; Word; RTF; or PDF.

Submitted via *www.regulations.gov:*

- To submit electronic public comments via the Federal eRulemaking Portal.

1. Go to *www.regulations.gov* and enter NIST–2024–0001 in the search field,
2. Click the ''Comment Now!'' icon, complete the required fields, including the relevant NIST document number and title in the subject field, and
3. Enter or attach your comments.

- Written comments may also be submitted by mail to Information Technology Laboratory, ATTN: AI E.O. Document Comments, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8900, Gaithersburg, MD 20899–8900.

Comments containing references, studies, research, and other empirical data that are not widely published should include copies of the referenced materials. All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure.

NIST will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

All relevant comments received by the deadline will be posted at *https://www.regulations.gov* under docket number NIST–2024–0001 and at *https://www.nist.gov/artificial-intelligence/executive-order-safe-secure-and-trustworthy-artificial-intelligence.* Attachments and other supporting materials may become part of the public record and may be subject to public disclosure.

FOR FURTHER INFORMATION CONTACT: For questions about this request for comments contact: *ai-inquiries@nist.gov*

or Rachel Trello, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8900, Gaithersburg, MD 20899, (202) 570–3978. Direct media inquiries to NIST's Office of Public Affairs at (301) 975–2762. Users of telecommunication devices for the deaf, or a text telephone, may call the Federal Relay Service toll free at 1–800–877–8339. Accessible Format: NIST will make the request for comments available in alternate formats, such as Braille or large print, upon request by persons with disabilities.

SUPPLEMENTARY INFORMATION: NIST requests comments on four draft NIST documents that have been developed in response to NIST assignments under Executive Order 14110 on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI) (E.O. 14110), issued on October 30, 2023 (88 FR 75191). The four draft documents are: NIST AI 600–1, Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile; NIST SP 800–218A, Secure Software Development Practices for Generative AI and Dual-Use Foundation Models; NIST AI 100–5, A Plan for Global Engagement on AI Standards; and NIST AI 100–4, Reducing Risks Posed by Synthetic Content: An Overview of Technical Approaches to Digital Content Transparency.

The drafts of NIST AI 600–1, NIST AI 100–5, and NIST AI 100–4 were informed by responses to a Request for Information (RFI) that was published in the **Federal Register** on December 21, 2023 (88 FR 88368), in which NIST requested information to assist in carrying out several of its responsibilities under E.O. 14110. The comments and information received in response to that RFI are available at *https://www.nist.gov/artificial-intelligence/executive-order-safe-secure-and-trustworthy-artificial-intelligence/comments* and at *https://www.regulations.gov* under docket number NIST–2023–0009. The draft of NIST SP 800–218A was informed by a virtual workshop that was held on January 17, 2024 (*https://www.nist.gov/news-events/events/nist-secure-software-development-framework-generative-ai-and-dual-use-foundation*).

The drafts of NIST AI 600–1, NIST AI 100–5, and NIST AI 100–4 are available for review and comment on the NIST Artificial Intelligence Resource Center website at *https://airc.nist.gov* and at *www.regulations.gov.* The draft of NIST SP 800–218A is available for review and comment on the NIST Computer Security Resource Center *https://csrc.nist.gov* and at *www.regulations.gov.*

Authority: Executive Order 14110 of Oct. 30, 2023; 15 U.S.C. 272.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2024–09824 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Request for Nominations for Members To Serve on National Institute of Standards and Technology and National Technical Information Service Federal Advisory Committees

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST or Institute) and the National Technical Information Service (NTIS) invites and requests nomination of individuals for appointment to eleven existing Federal Advisory Committees (Committees): Advisory Committee on Earthquake Hazards Reduction; Board of Overseers of the Malcolm Baldrige National Quality Award; Industrial Advisory Committee; Information Security and Privacy Advisory Board; Internet of Things Advisory Board; Judges Panel of the Malcolm Baldrige National Quality Award; Manufacturing Extension Partnership Advisory Board; National Artificial Intelligence Advisory Committee; National Construction Safety Team Advisory Committee; National Technical Information Service Advisory Board; and Visiting Committee on Advanced Technology. NIST and NTIS will consider nominations received in response to this notice for appointment to the Committees, in addition to nominations already received. Registered Federal lobbyists may not serve on NIST or NTIS Federal Advisory Committees in an individual capacity.

DATES: Nominations for all Committees will be accepted on an ongoing basis and will be considered as and when vacancies arise.

ADDRESSES: See below.

SUPPLEMENTARY INFORMATION:

Advisory Committee on Earthquake Hazards Reduction (ACEHR)

Address: Please submit nominations to Tina Faecke via email at *tina.faecke@nist.gov.* Nominations may also be mailed to Tina Faecke, Designated Federal Officer, National Earthquake Hazards Reduction Program, NIST, 100 Bureau Drive, Mail Stop 8615, Gaithersburg, MD 20899–8615. Additional information regarding the ACEHR, including its charter and current members may be found on its electronic home page at *https://nehrp.gov/committees/index.htm.*

Contact Information: John ''Jay'' Harris, Acting Director, National Earthquake Hazards Reduction Program, NIST, 100 Bureau Drive, Mail Stop 8615, Gaithersburg, MD 20899–8615, telephone 301–975–6538 or via email at *john.harris@nist.gov.*

Committee Information

The Advisory Committee on Earthquake Hazards Reduction (Committee) was established in accordance with the National Earthquake Hazards Reduction Program Reauthorization Act of 2004, Public Law 108–360 (42 U.S.C. 7704(a)(5)) and the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Committee will act in the public interest to assess trends and developments in the science and engineering of earthquake hazards reduction; effectiveness of the National Earthquake Hazards Reduction Program (Program) in carrying out the activities under section (a)(2) of the Earthquake Hazards Reduction Act of 1977, as amended (42 U.S.C. 7704(a)(2)); the need to revise the Program; and the management, coordination, implementation, and activities of the Program.

2. The Committee will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. The Committee shall report to the Director of NIST at least once every two years on its findings of the assessments and its recommendations for ways to improve the Program. In developing recommendations, the Committee shall consider the recommendations of the United States Geological Survey (USGS) Scientific Earthquake Studies Advisory Committee (SESAC).

Membership

1. The Committee shall consist of not fewer than 11, nor more than 17 members. Members shall reflect the wide diversity of technical disciplines, competencies, and communities involved in earthquake hazards reduction. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting the National Earthquake Hazards Reduction Program.

2. The Director of NIST shall appoint the members of the Committee. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

3. The term of office of each member of the Committee shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy and that members shall have staggered terms such that the Committee will have approximately one-third new or reappointed members each year.

Miscellaneous

1. Members of the Committee shall not be compensated for their services, but may, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or subcommittees thereof, or while otherwise performing duties at the request of the Chairperson, while away from their homes or regular places of business.

2. Members of the Committee shall serve as Special Government Employees (SGEs) and will be subject to the ethics standards applicable to SGEs and are required to file an annual Executive Branch Confidential Financial Disclosure Report.

3. The Committee members shall meet face-to-face at least once per year. Additional meetings may be called whenever requested by the NIST Director; such meetings may be in the form of telephone conference calls and/or videoconferences.

4. Committee meetings are open to the public.

Nomination Information

1. Members will be drawn from industry and other communities having an interest in the Program, such as, but not limited to, research and academic institutions, industry standards development organizations, state and local government, and financial communities, who are qualified to provide advice on earthquake hazards reduction and represent all related scientific, architectural, and engineering disciplines.

2. Any person who has completed two consecutive full terms of service on the Committee shall be ineligible for appointment for a third term during the two-year period following the expiration of the second term.

3. Nominees should have established records of distinguished service. The field of expertise that the candidate represents should be specified in the nomination letter. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on federal advisory boards and Federal employment.

4. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad based and diverse Committee membership.

Board of Overseers of the Malcolm Baldrige National Quality Award

Address: Please submit nominations to Robert Fangmeyer, Director, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020. Nominations may also be submitted via email to *Robert.Fangmeyer@nist.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary, may be found at *http://www.nist.gov/baldrige/community/overseers.cfm.*

Contact Information: Robyn Decker, Designated Federal Officer, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020; telephone 301–975–2361 or via email at *Robyn.Decker@nist.gov.*

Committee Information

The Board of Overseers of the Malcolm Baldrige National Quality Award (Board) was established in accordance with 15 U.S.C. 3711a(d)(2)(B), pursuant the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Board shall review the work of the private sector contractor(s), which assists the Director of NIST in administering the Malcolm Baldrige National Quality Award (Award). The Board will make such suggestions for the improvement of the Award process as it deems necessary.

2. The Board shall make an annual report on the results of Award activities to the Director of NIST, along with its recommendations for the improvement of the Award process.

3. The Board will function solely as an advisory committee under the

Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

4. The Board will report to the Director of NIST.

Membership

1. The Board will consist of at least five and approximately 12 members selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance, and for their preeminence in the field of organizational performance excellence. There will be a balanced representation from U.S. service, manufacturing, nonprofit, education, and health care industries. The Board will include members familiar with the quality, performance improvement operations, and competitiveness issues of manufacturing companies, service companies, nonprofits, health care providers, and educational institutions.

2. Board members will be appointed by the Secretary of Commerce for three-year terms and will serve at the discretion of the Secretary. All terms will commence on March 1 and end on the last day of February of the appropriate years.

Miscellaneous

1. Members of the Board shall serve without compensation, but may, upon request, be reimbursed travel expenses, including per diem, as authorized by 5 U.S.C. 5701 *et seq.*

2. The Board will meet at least annually, but usually two times a year. Additional meetings may be called as deemed necessary by the NIST Director.

3. Board meetings are open to the public. Board members do not have access to classified or proprietary information in connection with their Board duties.

Nomination Information

1. Nominations are sought from the private and public sector as described above.

2. Nominees should have established records of distinguished service and shall be familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, educational institutions, health care providers, and nonprofit organizations. The relevant expertise of the candidate should be specified in the nomination letter. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. Besides participation at meetings, it is desired that members be able to devote the equivalent of seven days between meetings to either developing or researching topics of potential interest, and so forth, in furtherance of their Board duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Board membership.

Industrial Advisory Committee

Address: Please submit nominations to Benjamin Davis, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 8615, Gaithersburg, MD 20899. Nominations may also be submitted via email to *IACNOM@chips.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary, may be found at *https://www.nist.gov/chips/industrial-advisory-committee.*

Contact Information: Benjamin Davis, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 8615, Gaithersburg, MD 20899. Nominations may also be submitted via email to *IACNOM@Chips.gov.*

Committee Information

The Secretary of Commerce (Secretary), in consultation with the Secretary of Defense, the Secretary of Energy, and the Secretary of Homeland Security, established the Industrial Advisory Committee (the Committee) in accordance with the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.,* and the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Act), Public Law 116–283, section 9906(b). The Committee shall assess and provide guidance to the Secretary, through the National Institute for Standards and Technology (NIST), on matters relating to microelectronics research, development, manufacturing, and policy.

Objectives and Duties

1. The Committee shall act in the public interest to provide advice to the Secretary of Commerce through the National Institute of Standards and Technology (NIST) on matters relating to microelectronics research, development, manufacturing, and policy.

2. The Committee will function solely as an advisory body, in accordance with the provisions of FACA. The Committee shall assess and provide guidance to the Secretary of Commerce, through NIST, on—

a. science and technology needs of the nation's domestic microelectronics industry;

b. the extent to which the strategy developed under section 9906(a)(3) of the Act is helping maintain United States leadership in microelectronics manufacturing;

c. assessment of the research and development programs and activities authorized under section 9906 of the Act; and

d. opportunities for new public-private partnerships to advance microelectronics research, development, and domestic manufacturing.

The Committee shall not participate in selecting recipients of Federal financial assistance.

Membership

Members of the Committee shall be appointed by the Secretary of Commerce. The Committee shall be composed of not fewer than 12 members who are qualified to provide advice to the United States Government on matters relating to microelectronics research, development, manufacturing, and policy. The membership shall be fairly balanced among representatives of the semiconductor industry, representatives of Federal laboratories and academia, and other members. Members of the Committee shall serve as representative members or as regular government employee (RGE) members.

Miscellaneous

1. The Committee members serve three-year terms and may serve two consecutive terms at the discretion of the Secretary, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy and that members shall have staggered terms such that the Committee will have approximately one-third new or reappointed members each year. Members who are not able to fulfill the duties and responsibilities of the Committee will have their membership terminated. A member who has served two consecutive full terms is ineligible to serve a third term for a period of one year following the expiration of the second term. Vacancies are filled as soon as highly qualified candidates in needed areas are identified and available to serve.

2. The Secretary of Commerce shall appoint the Committee Chair and Vice-Chair from among the Committee membership. The tenures of the Chair and Vice-Chair shall be two years and can be modified at the discretion of the Secretary. The Vice-Chair shall perform the duties of the Chair in his or her absence. In case a vacancy occurs in the position of the Chair or Vice-Chair, the Secretary shall select a member to fill such a vacancy; the Vice-Chair will

succeed the Chair in the interim until the Secretary's appointment of a member to fill the Chair's vacancy.

3. Committee members will be reimbursed for travel and per diem as it pertains to official business of the Committee in accordance with 5 U.S.C. 5701 *et seq.* Committee members will serve without compensation, except that Federal Government employees who are members of the Committee shall remain covered by their compensation system pursuant to 41 CFR 102–3.130(h).

4. Members shall not reference or otherwise utilize their membership on the Committee in connection with public statements made in their personal capacities without a disclaimer that the views expressed are their own and do not represent the views of the Committee, NIST, or the Department of Commerce.

5. NIST, when necessary and consistent with the Committee's mission and Departmental policies and procedures, may establish subcommittees, task forces, and working groups, drawn in whole or in part from the Committee, pursuant to the provisions of FACA, the FACA implementing regulations, and applicable Departmental guidance. The Department of Commerce requires that each subcommittee include at least one member of the Committee. Subcommittees must report back to the Committee and must not provide advice or work products directly to NIST or the Secretary, and any recommendations based on their work will be deliberated and adopted by the Committee prior to dissemination.

Nomination Information

NIST uses a nomination process to identify candidates for the Committee. Nominations are requested through annual announcements in the **Federal Register** and through solicitations to NIST, the Department of Commerce, the Department of Defense, the Department of Energy, the Department of Homeland Security, the National Academies, professional societies, business associations, labor associations, and other appropriate organizations and individuals in order to ensure a diverse pool of applicants. Candidates may be nominated by their peers or may self-nominate. NIST requests that the nomination includes a resume or biographical sketch that specifically identifies the qualifications of the individual being nominated. Qualifications considered may include, among others: scientific and technical knowledge in selected areas and professional experience. The Director of NIST recommends one or more candidates for further review to fill vacancies on the Committee on the basis of the qualifications, the sectors the candidates may represent and the existing representation on the Committee, and the other balance factors. This further review is to ensure compliance with Federal governance requirements, including compliance with the Committee's charter and membership balance plan. The Secretary of Commerce makes the final decision for appointment to the Committee.

Information Security and Privacy Advisory Board (ISPAB)

Address: Please submit nominations to Jeffrey Brewer, NIST, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930. Nominations may also be submitted via email at *Jeffrey.Brewer@nist.gov,* Attn: ISPAB Nominations. Additional information regarding the ISPAB, including its charter and current membership list, may be found on its electronic home page at *http://csrc.nist.gov/groups/SMA/ispab/index.html.*

Contact Information: Jeffrey Brewer, ISPAB Designated Federal Officer (DFO), NIST, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930; telephone 301–975–2489; or via email at *Jeffrey.Brewer@nist.gov.*

Committee Information

The ISPAB (Committee or Board) was originally chartered as the Computer System Security and Privacy Advisory Board by the Department of Commerce pursuant to the Computer Security Act of 1987 (Pub. L. 100–235). The E-Government Act of 2002 (Pub. L. 107–347, title III), amended section 21 of the National Institute of Standards and Technology Act (15 U.S.C. 278g-4), including changing the Committee's name, and the charter was amended accordingly.

Objectives and Duties

1. The Board will identify emerging managerial, technical, administrative, and physical safeguard issues relative to information security and privacy.

2. The Board will advise NIST, the Secretary of Homeland Security, and the Director of the Office of Management and Budget (OMB) on information security and privacy issues pertaining to Federal Government information systems, including through review of proposed standards and guidelines developed by NIST.

3. The Board shall report to the Director of NIST.

4. The Board reports annually to the Secretary of Commerce, the Secretary of Homeland Security, the Director of OMB, the Director of the National Security Agency, and the appropriate committees of the Congress.

5. The Board will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Membership

1. The Director of NIST will appoint the Chairperson and the members of the ISPAB, and members serve at the discretion of the NIST Director. Members will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

2. The ISPAB will consist of a total of 12 members and a Chairperson, for a total of 13.

- The Board will include four members from outside the Federal Government who are eminent in the information technology industry, at least one of whom is representative of small or medium sized companies in such industries.
- The Board will include four members from outside the Federal Government who are eminent in the fields of information technology, or related disciplines, but who are not employed by or representative of a producer of information technology.
- The Board will include four members from the Federal Government who have information system management experience, including experience in information security and privacy, at least one of whom shall be from the National Security Agency.

Miscellaneous

1. Members of the Board, other than full-time employees of the Federal government, will not be compensated for their services, but will, upon request, be allowed travel expenses pursuant to 5 U.S.C. 5701 *et seq.,* while otherwise performing duties at the request of the Board Chairperson, while away from their homes or a regular place of business.

2. Meetings of the ISPAB are usually two to three days in duration and are usually held quarterly. ISPAB meetings are open to the public, including the press. Members do not have access to classified or proprietary information in connection with their ISPAB duties.

Nomination Information

1. Nominations are being accepted in all three categories described above.

2. Nominees should have specific experience related to information security or privacy issues, particularly as they pertain to Federal information

technology. Letters of nomination should include the category of membership for which the candidate is applying and a summary of the candidate's qualifications for that specific category. Also include (where applicable) current or former service on Federal advisory boards and any Federal employment. Each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the ISPAB, and that they will actively participate in good faith in the tasks of the ISPAB.

3. Besides participation at meetings, it is desired that members be able to devote a minimum of two days between meetings to developing draft issue papers, researching topics of potential interest, and so forth in furtherance of their ISPAB duties.

4. Selection of ISPAB members will not be limited to individuals who are nominated. Nominations that are received and meet the requirements will be kept on file to be reviewed as ISPAB vacancies occur.

5. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse ISPAB membership.

Internet of Things Advisory Board

Address: Please submit nominations to Barbara Cuthill, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 2000, Gaithersburg, MD 20899. Nominations may also be submitted via email to *barbara.cuthill@nist.gov.*

Contact Information: Alison Kahn, Electronics Engineer, National Institute of Standards and Technology, 100 Bureau Drive, MS 2000, Gaithersburg, MD 20899. Her email is *alison.kahn@nist.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary, may be found at *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

Committee Information

The Secretary of Commerce (Secretary) established the Internet of Things Advisory Board (IoTAB) in accordance with the requirements of 9204(b)(5) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), and in accordance with the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.* The IoTAB shall provide advice to the Internet of Things Federal Working Group (IoTFWG) on matters related to the Internet of Things as specified below. The IoTAB shall submit to the IoTFWG a report that includes any findings or recommendations related to the specific scope below.

Objectives and Duties

The Board shall advise the Internet of Things Federal Working Group convened by the Secretary pursuant to section 9204(b)(1) of the Act on matters related to the Federal Working Group's activities, as specified below.

The Board shall advise the Federal Working Group with respect to—

a. the identification of any Federal regulations, statutes, grant practices, programs, budgetary or jurisdictional challenges, and other sector-specific policies that are inhibiting, or could inhibit, the development of the Internet of Things;

b. situations in which the use of the Internet of Things is likely to deliver significant and scalable economic and societal benefits to the United States, including benefits from or to—

i. smart traffic and transit technologies;

ii. augmented logistics and supply chains;

iii. sustainable infrastructure;

iv. precision agriculture;

v. environmental monitoring;

vi. public safety; and

vii. health care;

c. whether adequate spectrum is available to support the growing Internet of Things and what legal or regulatory barriers may exist to providing any spectrum needed in the future;

d. policies, programs, or multi-stakeholder activities that—

i. promote or are related to the privacy of individuals who use or are affected by the Internet of Things;

ii. may enhance the security of the Internet of Things, including the security of critical infrastructure;

iii. may protect users of the Internet of Things; and

iv. may encourage coordination among Federal agencies with jurisdiction over the Internet of Things;

e. the opportunities and challenges associated with the use of Internet of Things technology by small businesses; and

f. any international proceeding, international negotiation, or other international matter affecting the Internet of Things to which the United States is or should be a party.

The Board shall submit to the Internet of Things Federal Working Group a report that includes any of its findings or recommendations. The report will be administratively delivered to the Internet of Things Federal Working Group through the Director of the National Institute of Standards and Technology (NIST).

The Board shall set its own agenda in carrying out its duties. The Federal Working Group may suggest topics or items for the Board to study, and the Board shall take those suggestions into consideration in carrying out its duties.

The Board will function solely as an advisory body, in accordance with the provisions of FACA.

Membership

Members of the Board shall be appointed by the Secretary. The Board shall consist of 16 members representing a wide range of stakeholders outside of the Federal Government with expertise relating to the Internet of Things, including: (i) information and communications technology manufacturers, suppliers, service providers, and vendors; (ii) subject matter experts representing industrial sectors other than the technology sector that can benefit from the Internet of Things, including the transportation, energy, agriculture, and health care sectors; (iii) small, medium, and large businesses; (iv) think tanks and academia; (v) nonprofit organizations and consumer groups; (vi) security experts; (vii) rural stakeholders; and (viii) other stakeholders with relevant expertise, as determined by the Secretary.

The Board members shall serve terms of two years (unless the Board terminates earlier). Vacancies are filled as soon as highly qualified candidates in a needed area of stakeholder interest are identified and available to serve. Members of the Board shall serve as representative members. Full-time or permanent part-time Federal officers or employees will not be appointed to the Board. Members must be citizens of the United States of America.

Members of the Board shall not be compensated for their services. Members of the Board, while attending meetings of the Board away from their homes or regular place of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for individuals intermittently serving in the Government without pay.

Members shall not reference or otherwise utilize their membership on the Board in connection with public statements made in their personal capacities without a disclaimer that the views expressed are their own and do not represent the views of the Board, the Federal Working Group, NIST, or the Department of Commerce.

The Secretary will appoint the Board's Chair from among the approved members in accordance with policies and procedures and, in doing so, shall determine the term of service for the Board's Chair.

Miscellaneous

Meetings will be conducted at least twice each year.

Nomination Information

NIST uses a nomination process to identify candidates for the Board. Nominations are requested through an announcement in the **Federal Register** and through solicitations through the Federal Working Group, NIST, the Department of Commerce, other Federal agencies, and organizations representing relevant businesses, consumers, communities, and economic sectors in order to ensure a robust and diverse pool of applicants. Candidates may be nominated by their peers or may self-nominate. NIST requests that the nomination includes a resume for the individual that specifically identifies the stakeholder interest of the individual being nominated. Qualifications considered may include, among others: education, professional experience, and scientific and technical expertise in selected areas. The Director of the Information Technology Laboratory (ITL) recommends candidates for further review to fill vacancies on the Board in the areas of needed stakeholder interest and on the basis of the qualifications, the sectors the candidates may represent and the existing representation on the Board, and other balance factors. The Director of ITL recommends nominees to the Director of NIST, who reviews the recommendation for submission to the Secretary of Commerce. Candidates for the Board are then reviewed by and appointed by the Secretary of Commerce.

The Board members shall serve terms of two years (unless the Board terminates earlier). Vacancies are filled as soon as highly qualified candidates in a needed area of stakeholder interest are identified and available to serve.

The Department of Commerce seeks a broad-based and diverse IoTAB membership.

Judges Panel of the Malcolm Baldrige National Quality Award

Address: Please submit nominations to Robert Fangmeyer, Director, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive Mail Stop 1020, Gaithersburg, MD 20899–1020. Nominations may also be submitted via email *Robert.Fangmeyer@nist.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary, may be found at *https://www.nist.gov/baldrige/how-baldrige-works/baldrige-community/judges-panel.*

Contact Information: Robyn Decker, Designated Federal Officer, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020; telephone 301–975–2361 or via email at *Robyn.Decker@nist.gov.*

Committee Information

The Judges Panel of the Malcolm Baldrige National Quality Award (Panel) was established in accordance with 15 U.S.C. 3711a(d)(1) and the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Panel will ensure the integrity of the Malcolm Baldrige National Quality Award (Award) selection process. Based on a review of results of examiners' scoring of written applications, Panel members will vote on which applicants' merit site visits by examiners to verify the accuracy of quality improvements claimed by applicants. The Panel will also review results and findings from site visits, and recommend Award recipients.

2. The Panel will ensure that individual judges will not participate in the review of applicants as to which they have any real or perceived conflict of interest.

3. The Panel will function solely as an advisory body, and will comply with the provisions of the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

4. The Panel will report to the Director of NIST.

Membership

1. The Panel will consist of no less than 9, and not more than 12, members selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. There will be a balanced representation from U.S. service, manufacturing, nonprofit, education, and health care industries. The Panel will include members familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, nonprofits, health care providers, and educational institutions.

2. Panel members will be appointed by the Secretary of Commerce for three-year terms and will serve at the discretion of the Secretary. All terms will commence on March 1 and end on the last day of February of the appropriate year.

3. Members who are not Federal employees will serve as Special Government Employees (SGEs) and will be subject to the ethical standards applicable to SGEs.

Miscellaneous

1. Members of the Panel shall serve without compensation, but may, upon request, be reimbursed travel expenses, including per diem, as authorized by 5 U.S.C. 5701 *et seq.*

2. The Panel will meet three times per year. Additional meetings may be called as deemed necessary by the NIST Director or by the Chairperson. Meetings are usually one to four days in duration. In addition, each Judge must attend an annual three-day Examiner training course.

3. When approved by the Department of Commerce Chief Financial Officer and Assistant Secretary for Administration, Panel meetings are closed or partially closed to the public.

Nomination Information

1. Nominations are sought from all U.S. service and manufacturing industries, education, health care, and nonprofits as described above.

2. Nominees should have established records of distinguished service and shall be familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, health care providers, educational institutions, and nonprofit organizations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. Besides participation at meetings, it is desired that members be either developing or researching topics of potential interest, reading Baldrige applications, and so forth, in furtherance of their Panel duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Panel membership.

Manufacturing Extension Partnership (MEP) Advisory Board

Address: Please submit nominations to Beverly R. Bobb, NIST, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800. Nominations may also be submitted via email at *Beverly.Bobb@nist.gov.* Additional information regarding MEP, including its charter,

may be found on its electronic home page at *http://www.nist.gov/mep/advisory-board.cfm.*

Contact Information: Beverly R. Bobb, Designated Federal Officer, NIST, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800; telephone 301–975–5917, or via email at *Beverly.Bobb@nist.gov.*

Committee Information

The MEP Advisory Board (Board) is authorized under section 501 of the American Innovation and Competitiveness Act (Pub. L. 114–329); codified at 15 U.S.C. 278k(m), as amended, in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Board will provide advice on MEP activities, plans, and policies.
2. The Board will assess the soundness of MEP plans and strategies.
3. The Board will assess current performance against MEP program plans.
4. The Board will function solely in an advisory capacity, and in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*
5. The Board shall transmit through the Director of NIST an annual report to the Secretary of Commerce for transmittal to Congress not later than 30 days after the submission to Congress of the President's annual budget request each year. The report shall address the status of the MEP program.

Membership

1. The Board shall consist of not fewer than 10 members, appointed by the Director of NIST and broadly representative of stakeholders. At least 2 members shall be employed by or on an advisory board for a MEP Center, at least 5 members shall be from U.S. small businesses in the manufacturing sector, and at least 1 member shall represent a community college. No member shall be an employee of the Federal Government.
2. The Director of NIST shall appoint the members of the Board. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. Board members serve at the discretion of the Director of NIST.
3. The term of office of each member of the Board shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy. Any person who has completed two consecutive full terms of service on the Board shall thereafter be ineligible for appointment during the one-year period following the expiration of the second term.

Miscellaneous

1. Members of the Board will not be compensated for their services but will, upon request, be allowed travel and per diem expenses as authorized by 5 U.S.C. 5701 *et seq.,* while attending meetings of the Board or subcommittees thereof, or while otherwise performing duties at the request of the Chair, while away from their homes or regular places of business.
2. The Board will meet at least biannually. Additional meetings may be called by the Director of NIST or the Designated Federal Officer (DFO).
3. Committee meetings are open to the public.

Nomination Information

1. Nominations are being accepted in all categories described above.
2. Nominees should have specific experience related to manufacturing and industrial extension services. Letters of nomination should include the category of membership for which the candidate is applying and a summary of the candidate's qualifications for that specific category.
3. Nominations that are received and meet the requirements will be kept on file to be reviewed as Board vacancies occur.
4. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse MEP Advisory Board membership.

National Artificial Intelligence Advisory Committee (NAIAC)

Address: Please submit nominations to Cheryl Gendron, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899. Nominations may also be submitted via email to *Cheryl.Gendron@nist.gov.*

Contact Information: Elham Tabassi, NIST Chief AI Advisor, Information Technology Laboratory, National Institute of Standards and Technology, 100 Bureau Drive, MS 8940, Gaithersburg, MD 20899, 301–975–5292. Her email is *elham.tabassi@nist.gov.*

Committee Information

The Secretary of Commerce established the National Artificial Intelligence Advisory Committee (the NAIAC or the Committee) pursuant to section 5104 of the National Artificial Intelligence Initiative Act of 2020 (Pub. L. 116–283), hereinafter referred to as the Act, and the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

The Committee shall provide advice to the President and the National Artificial Intelligence Initiative Office on matters related to the National Artificial Intelligence Initiative (Initiative). The purposes of the Initiative are: (1) ensuring continued United States leadership in artificial intelligence research and development; (2) leading the world in the development and use of trustworthy artificial intelligence systems in the public and private sectors; (3) preparing the present and future United States workforce for the integration of artificial intelligence systems across all sectors of the economy and society; and (4) coordinating ongoing artificial intelligence research, development, and demonstration activities among the civilian agencies, the Department of Defense, and the Intelligence Community to ensure that each informs the work of the others.

Objectives and Duties

The Committee shall advise the President and the Initiative Office on matters related to the Initiative, including recommendations related to:

a. The current state of United States competitiveness and leadership in artificial intelligence, including the scope and scale of United States investments in artificial intelligence research and development in the international context;

b. The progress made in implementing the Initiative, including a review of the degree to which the Initiative has achieved the goals according to the metrics established by the Interagency Committee under section 5103(d)(2) of the Act;

c. The state of the science around artificial intelligence, including progress toward artificial general intelligence;

d. Issues related to artificial intelligence and the United States workforce, including matters relating to the potential for using artificial intelligence for workforce training, the possible consequences of technological displacement, and supporting workforce training opportunities for occupations that lead to economic self-sufficiency for individuals with barriers to employment and historically underrepresented populations, including minorities, Indians (as defined in 25 U.S.C. 5304), low-income populations, and persons with disabilities;

e. How to leverage the resources of the Initiative to streamline and enhance operations in various areas of government operations, including health care, cybersecurity, infrastructure, and disaster recovery;

f. The need to update the Initiative;

g. The balance of activities and funding across the Initiative;

h. Whether the strategic plan developed or updated by the Interagency Committee established under section 5103(d)(2) of the Act is helping to maintain United States leadership in artificial intelligence;

i. The management, coordination, and activities of the Initiative;

j. Whether ethical, legal, safety, security, and other appropriate societal issues are adequately addressed by the Initiative;

k. Opportunities for international cooperation with strategic allies on artificial intelligence research activities, standards development, and the compatibility of international regulations;

l. Accountability and legal rights, including matters relating to oversight of artificial intelligence systems using regulatory and nonregulatory approaches, the responsibility for any violations of existing laws by an artificial intelligence system, and ways to balance advancing innovation while protecting individual rights; and

m. How artificial intelligence can enhance opportunities for diverse geographic regions of the United States, including urban, Tribal, and rural communities.

In addition, pursuant to section 5104(e) of the Act, the Committee's Chairperson shall establish a subcommittee that shall provide advice to the President, through the Committee, on matters related to the development of AI relating to law enforcement, including advice on the following:

A. Bias, including whether the use of facial recognition by government authorities, including law enforcement agencies, is taking into account ethical considerations and addressing whether such use should be subject to additional oversight, controls, and limitations.

B. Security of data, including law enforcement's access to data and the security parameters for that data.

C. Adoptability, including methods to allow the United States Government and industry to take advantage of artificial intelligence systems for security or law enforcement purposes while at the same time ensuring the potential abuse of such technologies is sufficiently mitigated.

D. Legal standards, including those designed to ensure the use of artificial intelligence systems are consistent with the privacy rights, civil rights and civil liberties, and disability rights issues raised by the use of these technologies.

Membership

Members of the Committee shall be appointed by the Secretary of Commerce. The Committee shall consist of not less than 9 members, who represent broad and interdisciplinary expertise and perspectives, including from academic institutions, companies across diverse sectors, nonprofit and civil society entities, including civil rights and disability rights organizations, and Federal laboratories, who represent geographic diversity, and who are qualified to provide advice and information on science and technology research, development, ethics, standards, education, technology transfer, commercial application, security, and economic competitiveness related to artificial intelligence.

In selecting the members of the Committee, the Secretary of Commerce shall seek and give consideration to recommendations from Congress, industry, nonprofit organizations, the scientific community (including the National Academies of Sciences, Engineering, and Medicine, scientific professional societies, and academic institutions), the defense and law enforcement communities, and other appropriate organizations.

Miscellaneous

Meetings will be conducted at least twice each year.

1. Generally, Committee meetings are open to the public.

2. Meetings may be held in-person in selected locations across the country and/or virtually.

Nomination Information

1. Nominations are sought from all fields, sectors, and perspectives described above.

2. Nominees should represent broad and interdisciplinary expertise and perspectives, including from academic institutions, companies across diverse sectors, nonprofit and civil society entities, including civil rights and disability rights organizations, and Federal laboratories, who represent geographic diversity, and who are qualified to provide advice and information on science and technology research, development, ethics, standards, education, technology transfer, commercial application, security, and economic competitiveness related to artificial intelligence. A resume or C.V. should be sent that includes a summary of the candidate's qualifications with a nomination letter, including (where applicable) current or former service on Federal advisory boards and Federal employment. The field of eminence for which the candidate is qualified should be specified in the nomination letter. In addition, each nomination letter should state whether the candidate seeks to serve on the Committee, the Subcommittee, or both; and that the candidate acknowledges the responsibilities of serving and will actively participate in good faith in the tasks of the Committee or Subcommittee, as appropriate. Third-party nomination letters should state that the candidate agrees to the nomination.

3. The Department of Commerce seeks a broad-based and diverse Committee and subcommittee membership.

National Construction Safety Team (NCST) Advisory Committee

Address: Please submit nominations to Tina Faecke, Designated Federal Officer, NIST, 100 Bureau Drive, Mail Stop 8615, Gaithersburg, MD 20899–8615 or via email at *Tina.Faecke@nist.gov.* Additional information regarding the NCST Advisory Committee, including its charter, may be found on its electronic home page at *https://www.nist.gov/el/disaster-resilience/disaster-and-failure-studies/national-construction-safety-team-ncst/advisory.*

Contact Information: Tanya Brown-Giammanco, Director, Disaster and Failure Studies Program, NIST, 100 Bureau Drive, Mail Stop 8615, Gaithersburg, MD 20899–8615, telephone 301–975–2822; or via email at *Tanya.Brown-Giammanco@nist.gov.*

Committee Information

The NCST Advisory Committee (Committee) was established in accordance with the National Construction Safety Team Act, Public Law 107–231, and the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Committee shall advise the Director of NIST on carrying out the National Construction Safety Team Act (Act), review the procedures developed under section 2(c)(1) of the Act, and review the reports issued under section 8 of the Act.

2. The Committee functions solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. On January 1 of each year, the Committee shall transmit to the Committee on Science, Space, and Technology of the House of Representatives and to the Committee

on Commerce, Science, and Transportation of the Senate a report that includes: (1) an evaluation of National Construction Safety Team (Team) activities, along with recommendations to improve the operation and effectiveness of Teams, and (2) an assessment of the implementation of the recommendations of Teams and of the Committee.

Membership

1. The Committee shall consist of no less than 4 and no more than 12 members. Members shall reflect the wide diversity of technical disciplines and competencies involved in the National Construction Safety Teams investigations. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting the National Construction Safety Teams.

2. The Director of NIST shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

Miscellaneous

1. Members of the Committee shall not be compensated for their services but may, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5703.

2. Members of the Committee shall serve as Special Government Employees (SGEs), will be subject to the ethics standards applicable to SGEs, and are required to file an annual Executive Branch Confidential Financial Disclosure Report.

3. The Committee shall meet at least once per year. Additional meetings may be called whenever requested by the NIST Director or the Designated Federal Officer (DFO); such meetings may be in the form of telephone conference calls and/or videoconferences.

Nomination Information

1. Nominations are sought from industry and other communities having an interest in the National Construction Safety Teams investigations.

2. Nominees should have established records of distinguished service. The field of expertise that the candidate represents should be specified in the nomination letter. Nominations for a particular field should come from organizations or individuals within that field. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Committee membership.

National Technical Information Service Advisory Board (NTIS)

Address: Please submit nominations to the Designated Federal Officer, NTIS, via email at *FACA@ntis.gov.* Additional information regarding the NTIS, including its charter, current membership list, and past reports may be found on its electronic homepage at *https://www.ntis.gov/about/advisorybd/index.xhtml.*

Contact Information: Steven Holland, Designated Federal Officer, NTIS, via email at *Steven.Holland@ntis.gov* and phone at (703) 605–6076.

Committee Information

The National Technical Information Service Advisory Board (NTIS Advisory Board or Advisory Board) was established in accordance with section 3704b(c) of title 15 of the United States Code, and the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Advisory Board shall review and make recommendations to improve NTIS programs, operations, and general policies in support of NTIS' mission to advance Federal data priorities, promote economic growth, and enable operational excellence by providing innovative data services to Federal agencies through joint venture partnerships with the private sector.

2. The Advisory Board shall act in the public interest to:

a. Provide advice on the optima data services business and operating model to best implement NTIS' joint venture authority.

b. Provide advice on the means, including infrastructure and process improvements, to make Federal data easier to find, access, analyze, and combine.

c. Assess progress in evolving NTIS programs toward a focus on Federal data priorities.

d. Assess the use of merit-based criteria and processes to plan, conduct, and oversee programs and projects, including the selection of joint venture partners.

e. Assess policies in connection with fees and charges for NTIS services in order for the agency to operate on a substantially self-sustaining basis, as required by law.

f. Assess organizational capabilities required to carry out NTIS's mission, including capabilities in data science and for operational management of its project portfolio.

3. The Committee will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

4. The Committee shall report to the Secretary of Commerce and to the Under Secretary of Commerce for Standards and Technology through the Director of NTIS.

Membership

a. The NTIS Advisory Board shall be composed of a Chairperson appointed by the Secretary and four other members appointed by the Secretary. In the event of a vacancy in the Chairperson position, the NTIS Director may designate a member to serve as acting Chairperson until a Chairperson is appointed by the Secretary.

b. Members shall be selected solely on the basis of established records of distinguished service and objectivity; shall have recognized expertise in data collection, compilation, analysis, use, and dissemination, as well as data science, information technology, cybersecurity, and privacy. Members will be selected from the business, academic, non- profit, and state and local government communities. Reasonable efforts will be made to ensure members represent the entire spectrum of Federal data interests including demographic, economic, trade, health, scientific, patent, environmental, geospatial, cybersecurity, and transactional data. No Federal Government employee shall serve as a member of the Board.

c. The term of office of each member of the Board shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy. All appointments shall automatically terminate if the charter is terminated or not renewed. All members serve at the pleasure of the Secretary.

d. Any person who has completed two consecutive full terms of service on the Board shall be ineligible for appointment for a third term during the one-year period following the expiration of the second term.

e. Members shall serve as Special Government Employees (SGEs) and will be subject to all ethical standards and rules applicable to SGEs.

2. Members shall not reference or otherwise utilize their membership on the Board in connection with public statements made in their personal capacities without a disclaimer that the views expressed are their own and do not represent the views of the Advisory Board, the National Technical

Information Service, or the Department of Commerce.

3. Subcommittees: NTIS may establish such subcommittees of its members as may be necessary, pursuant to the provisions of FACA, the FACA implementing regulations, and applicable Department of Commerce guidance. Subcommittees will report to the NTIS Advisory Board and may not provide advice or work products directly to the Department of Commerce or NTIS.

Miscellaneous

1. The Board shall meet at the call of the Secretary or the Secretary's designee, but not less often than once every six months.

2. Generally, Committee meetings are open to the public.

Nomination Information

1. Nominations are sought from all fields described above.

2. Nominees should have established records of distinguished service and shall be eminent in fields. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse NTIS membership.

Visiting Committee on Advanced Technology (VCAT)

Address: Please submit nominations to Stephanie Shaw, Designated Federal Officer, VCAT, NIST, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, MD 20899–1060. Nominations may also be submitted via email at *Stephanie.Shaw@nist.gov.* Additional information regarding the VCAT, including its charter, current membership list, and past reports may be found on its electronic homepage at *http://www.nist.gov/director/vcat/.*

Contact Information: Stephanie Shaw, Designated Federal Officer, VCAT, NIST, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, MD 20899–1060, via email at *Stephanie.Shaw@nist.gov* or telephone: 301–975–2667.

Committee Information

The VCAT (Committee) was established in accordance with 15 U.S.C. 278 and the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.*

Objectives and Duties

1. The Committee shall review and make recommendations regarding general policy for NIST, its organization, its budget, and its programs, within the framework of applicable national policies as set forth by the President and the Congress. 15 U.S.C. 278(a).

2. The Committee shall provide an annual report, through the Director of NIST, to the Secretary of Commerce for submission to the Congress not later than 30 days after the submittal to Congress of the President's annual budget request in each year. Such report shall deal essentially, though not necessarily exclusively, with policy issues or matters which affect NIST, or with which the Committee in its official role as the private sector policy adviser of NIST is concerned. Each such report shall identify areas of research and research techniques of the Institute of potential importance to the long-term competitiveness of United States industry, in which the Institute possesses special competence, which could be used to assist United States enterprises and Untied States industrial joint research and development ventures. 15 U.S.C. 278(h)(1). The Committee shall submit, through the Director of NIST, to the Secretary and the Congress such additional reports on specific policy matters as it deems appropriate. 15 U.S.C. 278(h)(2).

3. The Committee will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. app.

4. The Committee shall report to the Director of NIST.

Membership

1. The Director of NIST shall appoint the members of the Committee. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. 15 U.S.C. 278(a). Members shall be selected solely on the basis of established records of distinguished service; shall provide representation of a cross-section of traditional and emerging United States industries; and shall be eminent in fields such as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. No employee of the Federal Government shall serve as a member of the Committee. 15 U.S.C. 278(b).

2. Members of the Committee shall serve as Special Government Employees (SGEs) and will be subject to the ethics standards applicable to SGEs.

3. The Committee shall consist of not fewer than nine members appointed by the Director of NIST, a majority of whom shall be from United States industry. 15 U.S.C. 278(a). The term of office of each member of the Committee shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy. 15 U.S.C. 278(c)(1). Members shall serve at the discretion of the Director of NIST.

4. Any person who has completed two consecutive full terms of service on the Committee shall be ineligible for appointment for a third term during the one-year period following the expiration of the second term. 15 U.S.C. 278(c)(1).

5. Pursuant to 15 U.S.C. 278(f), the Committee chairperson and vice chairperson shall be elected by the members of the Committee at each annual meeting occurring in an even-numbered year. The vice chairperson shall perform the duties of the chairperson in his or her absence. In case a vacancy occurs in the position of the chairperson or vice chairperson, the Committee shall elect a member to fill such vacancy.

6. Members of the Committee will not be compensated for their services, but will, upon request, be allowed travel expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

7. Pursuant to 15 U.S.C. 278(g), the Committee may, with the concurrence of a majority of its members, permit the appointment of a staff consisting of not more than four professional staff members and such clerical staff members as may be necessary. Such staff members shall be appointed by the Director after consultation with the chairperson of the Committee and assigned at the direction of the Committee.

8. Subcommittees: Pursuant to 15 U.S.C. 278(e), the Committee shall have an executive committee, and may delegate to it such powers and functions of the Committee as it deems appropriate. The Committee and/or the Director of NIST may establish such other subcommittees, task forces, and working groups consisting of members from the parent Committee as may be necessary, subject to the provisions of FACA, the FACA implementing regulations, and applicable Department of Commerce guidance. Subcommittees must report back to the Committee and any recommendations based on their work will be deliberated and agreed

upon by the Committee prior to dissemination to NIST.

Miscellaneous

1. Meetings of the VCAT usually take place at the NIST headquarters in Gaithersburg, Maryland. The Committee will meet at least twice each year at the call of the chairperson or whenever one-third of the members so request in writing. The Committee shall not act in the absence of a quorum, which shall consist of a majority of the members of the Committee not having a conflict of interest in the matter being considered by the Committee. 15 U.S.C. 278(d).

2. Generally, Committee meetings are open to the public.

Nomination Information

1. Nominations are sought from all fields described above.

2. Nominees should have established records of distinguished service and shall be eminent in fields such as business, research, new product development, engineering, labor, education, management consulting, environment and international relations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the candidate agrees to the nomination, acknowledges the responsibilities of serving on the VCAT, and will actively participate in good faith in the tasks of the VCAT.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse VCAT membership.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2024–09886 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD893]

Applications for Membership to the American Fisheries Advisory Committee

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

ACTION: Notice; request for applications.

SUMMARY: Applications are being sought for appointment by the Secretary of Commerce (Secretary) for 9 membership positions to serve on the 22-member American Fisheries Advisory Committee (AFAC or Committee). Individuals selected to serve on the Committee will serve a term of three years, unless otherwise stipulated.

DATES: Applications must have an email date stamp on or before June 20, 2024.

ADDRESSES: Applications should be submitted by email to: *nmfs.afac.nominations@noaa.gov,* or by mail to: Clifford Cosgrove, American Fisheries Advisory Committee Designated Staff Member, NMFS Office of Management and Budget, 1315 East-West Highway, Rm. #14456, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Cliff Cosgrove, American Fisheries Advisory Committee Designated Staff Member, NMFS Office of Management and Budget, by email, at *nmfs.afac.nominations@noaa.gov;* or by phone at (301) 427–8736. Please visit the Saltonstall-Kennedy (S–K) Research and Development Program web page at: *https://www.fisheries.noaa.gov/national/funding-financial-services/saltonstall-kennedy-research-and-development-program,* or contact Cliff Cosgrove, American Fisheries Advisory Committee Designated Staff Member, NMFS Office of Management and Budget, by email, at: *nmfs.afac.nominations@noaa.gov.*

SUPPLEMENTARY INFORMATION: The AFAC Committee was created from Public Law (Pub. L. 117–121) signed on May 12, 2022. The Committee meets no more than 3 times annually and membership is comprised of 22 individuals appointed by the Secretary with the following geographic representation:

Region 1 consisting of Alaska, Hawaii, the Commonwealth of the Northern Mariana Islands, and the Territories of Guam and American Samoa;

Region 2 consisting of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut;

Region 3 consisting of Texas, Alabama, Louisiana, Mississippi, Florida, Arkansas, Puerto Rico, and the Territory of the Virgin Islands of the United States;

Region 4 consisting of California, Washington, Oregon, and Idaho;

Region 5 consisting of New Jersey, New York, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and

Region 6 consisting of Michigan, Minnesota, Wisconsin, Illinois, Indiana, Ohio, and Pennsylvania.

Membership for each region will be composed of highly qualified, diverse individuals with experience in one or more of the following areas of expertise, and in as many seafood species as possible: seafood harvesting or processing; recreational or commercial fishing; growing seafood; fisheries science; and/or food distribution, marketing, retail, or food service.

Four at-large members shall also be appointed by the Secretary as follows: one individual with experience in food distribution, marketing, retail, or food service; one individual with experience in the recreational fishing industry supply chain, such as fishers, manufacturers, retailers, and distributors; one individual with experience in the commercial fishing industry supply chain, such as fishers, manufacturers, retailers, and distributors; and one individual who is an employee of NMFS with expertise in fisheries research.

AFAC is responsible for making recommendations to the Secretary for financial assistance awards under the S–K Grant Competition under the Department of Commerce. AFAC will also make recommendations to the Secretary to assist in the development of the annual Notice of Funding Opportunities (NOFO) for submission to the S–K Grant Competition. This may include identifying the needs of the fishing communities (program priorities), establishing individual award funding limits, specifying the application review criteria and selection processes, and other sections of the NOFO as appropriate and allowable. Applicants for these nine membership positions must have demonstrable experience listed below in as many seafood species as possible from the specific AFAC fisheries regions as follows:

- Region 1, one individual with experience in the Fisheries Science Community or Relevant Fishery Management Council;
- Region 2, one individual with experience as a Recreational or Commercial Fisher and/or Experience Growing Seafood;
- Region 3, two positions, one individual with experience as a Recreational or Commercial Fisher and/or Experience Growing Seafood and one individual with experience as a Seafood Harvester or Processor;
- Region 4, two positions, one individual with experience in the Fisheries Science Community or Relevant Fishery Management Council, one individual with experience as a Recreational or Commercial Fisher and/or Experience Growing Seafood;

• Region 5, one individual with experience as a Recreational or Commercial Fisher and/or Experience Growing Seafood;

• Region 6, one individual with experience as a Seafood Harvester or Processor; At-Large Region, one individual with experience in Food Distribution, Marketing, Retail, or Food Service.

Members must be able to fulfill the time commitments required for up to two annual in-person meetings and one virtual meeting. The in person meetings rotate between regions and last up to four business days, subject to the time needs of each meeting. The virtual meeting is one business day for approximately four to six hours.

Committee membership is voluntary and, except for reimbursable travel and related expenses per federal travel regulations, service is without compensation.

Each nominee must submit a cover letter and a resume/curriculum vitae (CV) in PDF format. The cover letter shall include a brief statement as to their interest in serving on the Committee and their qualifications. The resume/CV shall detail the applicant's contact information (address, telephone number, email address) and specific qualifications/experience/expertise as referenced in Public Law 117–121. Any applicants selected for Committee membership shall be required to complete a conflict of interest form. The first Committee meeting of members selected from this notice will be September 17 through September 20, 2024.

Applications must be submitted by email to *nmfs.afac.nominations@noaa.gov,* and must be received or email date stamped by June 20, to be considered. The full text of Public Law 117–121 and other relevant documents can be viewed on the Saltonstall-Kennedy web page at the following link: *https://www.fisheries.noaa.gov/national/funding-financial-services/saltonstall-kennedy-research-and-development-program*

Dated: April 30, 2024.

Daniel A. Namur,

Acting Director, Office of Management and Budget, National Marine Fisheries Service.

[FR Doc. 2024–09878 Filed 5–2–24; 4:15 pm]

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; Applications and Reports for Registration as an Agent or Tanner

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 24, 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: Applications and Reports for Registration as an Agent or Tanner.

OMB Control Number: 0648–0179.

Form Number(s): None.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 25.

Average Hours per Response: 2 hours for an application and 2 hours for a report.

Total Annual Burden Hours: 50 hours.

Needs and Uses: This is a request for extension of an approved information collection. The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) mandates the protection and conservation of marine mammals and makes the taking, killing or serious injury of marine mammals, except under permit or exemption, a violation of the Act. An exemption is provided for Alaskan natives to take marine mammals if the taking is for subsistence or for creating and selling authentic native articles of handicraft and clothing. Possession of marine mammals and marine mammal parts by other than Alaskan natives is therefore prohibited (exception, 50 CFR 216.26: beach found non-Endangered Species Act (ESA) teeth or bones that have been registered with NOAA's National Marine Fisheries Service (NMFS)). As native handicrafts are allowed by the MMPA to enter interstate commerce, an exemption is also needed to allow non-natives to handle the skins or other marine mammal produce, whether to tan the pinniped hide or to act as an agent for the native to sell his handicraft products. The information is necessary for law enforcement purposes to ensure that only Alaska Indians, Aleuts, or Eskimos are submitting marine mammal hides or parts for tanning.

The information required by 50 CFR 216.23 is of two types. Applications: Information is required to identify the applicant as a tanner/agent in order to preclude prosecution under the MMPA and to determine that he/she has an acceptable record keeping program to accurately account for those marine mammal products received. This information serves as a deterrent for those individuals who might use this registration program for entering prohibited marine mammal products into interstate commerce. Reports: Information is also needed annually to evaluate the agent/tanner's activities during the year, and his/her procedures for bookkeeping and yearly inventory to assure NMFS, the Marine Mammal Commission, and the general public that prohibited marine mammal products were not being transshipped through registered agents.

The reporting requirements are: report in writing to the Assistant Administrator for Fisheries, NMFS, any changes in the facts stated in Registrant's applications for this Certificate of Registration within 30 days of such change; maintain current records of each transaction authorized stating the marine mammals or marine mammal parts or products involved, from whom received, any processing accomplished, to whom returned, and the date of each such transaction. These records shall be kept separate and apart from other records maintained in the ordinary course of business and shall be retrained for not less than three years; and annually, during the month of January, send certified copies of such records (annual report) to the Assistant Administrator for Fisheries.

Affected Public: Business or other for-profit organizations; state, local or tribal governments.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

Legal Authority: U.S. Code: 16 U.S.C. 1361; Marine Mammal Protection Act.

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 0648–0179.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09841 Filed 5–6–24; 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; Socio-Economic Survey of Hired Captains and Crew in New England, Mid-Atlantic, South Atlantic, and Gulf of Mexico Commercial Fisheries

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before July 8, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0636 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Dr. Matthew J. Cutler, Social Scientist, NOAA/Northeast Fisheries Science Center, 166 Water St., Woods Hole, MA 02543, (508–495–4731), *matthew.cutler@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension to an approved collection. This collection is currently approved for implementation in the New England, Mid-Atlantic, South Atlantic and Gulf of Mexico regions by NOAA National Marine Fisheries Service, Northeast Fisheries Science Center's Social Sciences Branch (NEFSC–SSB) and Southeast Fisheries Science Center Social Science Research Group (SEFSC–SSRG). The NEFSC and SEFSC seek to conduct surveys to provide for the ongoing collection of social and economic data related to the fishing industries in those states. The purpose of this survey is to assess and track over time the social and economic conditions of commercial fishing crews and hired captains for which little is known. This survey will provide data on social and economic impacts for this population and the changes in fisheries because of regulatory changes. Data to be collected include demographic information on crew, individual and community well-being, fishing practices, job satisfaction, job opportunities, and attitudes toward fisheries management.

The National Environmental Policy Act (NEPA) and Magnuson-Stevens Conservation and Management Act (MSA) both contain requirements for considering the social and economic impacts of fishery management decisions. There is a need to understand how such fishery management policies and programs will affect the social and economic characteristics of those involved in the commercial fishing industry. To help meet these requirements of NEPA and MSA, the NEFSC and SEFSC will collect data on an ongoing basis to track how socio-economic characteristics of fisheries are changing over time and the impact of fishery management policies and programs implemented in New England, Mid-Atlantic, South Atlantic and Gulf of Mexico regions.

II. Method of Collection

This information will be collected through in-person intercept interviews.

III. Data

OMB Control Number: 0648–0636.

Form Number(s): None.

Type of Review: Regular submission [extension of a current information collection].

Affected Public: Individuals, households; business or other for-profit organizations.

Estimated Number of Respondents: 924.

Estimated Time Per Response: 15 minutes.

Estimated Total Annual Burden Hours: 231 hours.

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Voluntary.

Legal Authority: MSA and NEPA.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09881 Filed 5–6–24; 8:45 am]

BILLING CODE 3510–22–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Comment Request; Grantee and Sponsor Portal

AGENCY: The Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Corporation for National and Community Service (operating as AmeriCorps) is proposing a new information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by July 8, 2024.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) Electronically through *www.regulations.gov* (preferred method).

(2) By mail sent to: AmeriCorps, Attention Emily Poore, 250 E Street SW, Washington, DC 20525.

(3) By hand delivery or by courier to the AmeriCorps mailroom at the mail address given in paragraph (2) above, between 9 a.m. and 4 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Comments submitted in response to this notice may be made available to the public through *regulations.gov.* For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Emily Poore, (202) 355–2190, or by email at *epoore@americorps.gov.*

SUPPLEMENTARY INFORMATION:

Title of Collection: Grantee and Sponsor Portal (GSP).

OMB Control Number: 3045–NEW.

Type of Review: New.

Respondents/Affected Public: Businesses and organizations.

Total Estimated Number of Annual Responses: 6,000.

Total Estimated Number of Annual Burden Hours: 240,000 hours.

Abstract: This new information collection is for AmeriCorps' new Grantee and Sponsor Portal (GSP), which entities will use to apply for any AmeriCorps program resources and recipients of any AmeriCorps award will use to report on their grants or projects. The GSP will ultimately replace the eGrants system AmeriCorps currently uses.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency'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 of information 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. All written comments will be available for public inspection on *regulations.gov.*

Fernando Laguarda,

General Counsel.

[FR Doc. 2024–09912 Filed 5–6–24; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0005]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Joint Consolidation Loan Separation Application

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before June 6, 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 Beth Grebeldinger, (202) 377–4018.

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: Joint Consolidation Loan Separation Application.

OMB Control Number: 1845–NEW.

Type of Review: New ICR.

Respondents/Affected Public: Individuals or Households; Private Sector.

Total Estimated Number of Annual Responses: 74,000.

Total Estimated Number of Annual Burden Hours: 24,051.

Abstract: This is a new collection. The Joint Consolidation Loan Separation Act (JCLSA), amended the Higher Education Act of 1965, as amended (HEA) to allow joint consolidation co-borrowers to apply to separate an existing joint Direct Consolidation Loan or Federal Consolidation Loan into individual Direct Consolidation Loans. The HEA, as amended by the JCLSA, requires joint consolidation loan borrowers to apply to the U.S. Department of Education if they wish to separate an existing joint consolidation loan into one or more individual Direct Consolidation Loans. The JCLSA allows for either joint application or separate application. Under the joint application option, each joint consolidation loan co-borrower applies for an individual Direct Consolidation Loan. Unless the co-borrowers agree on an alternate amount specified in a divorce decree, court order, or settlement agreement, each co-borrowers new individual Direct Consolidation Loan will be made for an amount equal to the co-borrowers' portion of the remaining outstanding balance of the joint consolidation loan. Under the separate application option, a co-borrower who certifies that they have experienced an act of domestic violence or economic abuse from the other co-borrower, or that they are unable to reasonably reach or access the loan information of the other co-borrower, may apply separately for a new individual Direct Consolidation Loan, without regard to whether or when the other co-borrower applies. In this circumstance, the applying co-borrowers new Direct Consolidation Loan will be made for an amount equal to that individual's portion of the joint consolidation loan, determined as described above for the joint application option.

Dated: May 1, 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. 2024–09865 Filed 5–6–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0068]

Agency Information Collection Activities; Comment Request; Subminimum Wage to Competitive Integrated Employment (SWTCIE) Program Evaluation

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before July 8, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2024–SCC–0068. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov*. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Diandrea Bailey, 202–987–0126.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Subminimum Wage to Competitive Integrated Employment (SWTCIE) Program Evaluation.

OMB Control Number: 1820–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and households.

Total Estimated Number of Annual Responses: 4,866.

Total Estimated Number of Annual Burden Hours: 2,005.

Abstract: The U.S. Department of Education's Rehabilitation Services Administration (RSA) requests clearance for new data collection activities to support the evaluation of the Disability Innovation Fund (DIF) Subminimum Wage to Competitive Integrated Employment (SWTCIE) program. The aim of this project is to increase transitions to competitive integrated employment (CIE) among people working in subminimum wage employment (SWE)—or considering doing so—through innovative activities to build systemwide alternatives to subminimum wage employment. Advocacy, policy, and practice have evolved in recent decades toward a shift to CIE, as reflected in the Workforce Innovation and Opportunity Act and in the Consolidated Appropriations Act of 2021, which provides funding for the DIF SWITCIE program awarded in fiscal year 2022. This request covers primary data collection activities, including survey data, administrative data, site visits, and focus groups.

RSA's Training and Services Program Division (TSPD) contracted with Mathematica to assist RSA in evaluating the Federal fiscal year (FFY) 2022 DIF program. In September 2022, the RSA

awarded five-year grants for the DIF (Assistance Listing Number 84.421D). The grants provide 14 State vocational rehabilitation (VR) agencies with funding to implement SWTCIE Innovative Model Demonstration projects to decrease SWE and increase CIE among people with disabilities currently employed in or contemplating SWE. To achieve this purpose, the projects will create innovative models for dissemination and replication to (1) identify strategies for addressing barriers associated with accessing CIE, (2) provide integrated services that support CIE, (3) support integration into the community through CIE, (4) identify and coordinate wraparound services for project participants who obtain CIE, (5) develop and disseminate evidence-based practices, and (6) provide entities holding section 14(c) certificates (which allows them to pay below the minimum wage for workers with disabilities that impair their productivity) with readily accessible transformative business models for adoption.

Dated: May 2, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–09903 Filed 5–6–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Electricity Advisory Committee

AGENCY: Department of Energy, Office of Electricity.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Electricity Advisory Committee (EAC). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, June 5, 2024; 1 p.m.–5:35 p.m. EDT; Thursday, June 6, 2024; 8:30 a.m.–12:30 p.m. EDT.

ADDRESSES: The National Rural Electric Cooperative Association Conference Center, 4301 Wilson Blvd., Arlington, VA 22203. Members of the public are encouraged to participate virtually, however, limited physical space is available for members of the public to attend onsite. To register to attend either in-person or virtually, please visit the meeting website: *https://www.energy.gov/oe/electricity-advisory-committee-june-2024-meeting.* Please note, you must register for each day you would like to attend.

FOR FURTHER INFORMATION CONTACT: Ms. Jayne Faith, Designated Federal Officer, Office of Electricity, U.S. Department of Energy, Washington, DC 20585; Telephone: (202) 586–2983 or Email: *Jayne.Faith@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The EAC was established in accordance with the provisions of FACA, as amended, to provide advice to the U.S. Department of Energy (DOE) in implementing the Energy Policy Act of 2005, executing certain sections of the Energy Independence and Security Act of 2007, and modernizing the nation's electricity delivery infrastructure. The EAC is composed of individuals of diverse backgrounds selected for their technical expertise and experience, established records of distinguished professional service, and their knowledge of issues that pertain to the electric sector.

Tentative Agenda

June 5, 2024

12:45 p.m.–1:00 p.m. WebEx Attendee Sign-On
1:00 p.m.–1:15 p.m. Welcome, Introductions, Developments since February Meeting
1:15 p.m.–1:30 p.m. Introductory Remarks from the Office of Electricity
1:30 p.m.–3:30 p.m. Discussion on Secure Data Portal
3:30 p.m.–3:45 p.m. Break
3:45 p.m.–4:30 p.m. Presentation on the 2024 Solar Eclipse
4:30 p.m.–5:00 p.m. EAC Discussion on the Institute of Electrical and Electronics Engineers Standards
5:00 p.m.–5:30 p.m. EAC Presentation and Vote on Gas-Electric Recommendations
5:30 p.m.–5:35 p.m. Wrap-up and Adjourn Day 1 of the June 2024 EAC Meeting

June 6, 2024

8:00 a.m.–8:30 a.m. WebEx Attendee Sign-On
8:30 a.m.–8:45 a.m. Opening Remarks
8:45 a.m.–9:45 a.m. Discussion on Secure Communications
9:45 a.m.–10:00 a.m. Break
10:00 a.m.–11:00 a.m. Discussion on Energy Storage
11:00 a.m.–11:30 a.m. DOE's Clean Energy Workforce Development Efforts
11:30 a.m.–11:40 a.m. Energy Storage Subcommittee Update
11:40 a.m.–11:50 a.m. Smart Grid Subcommittee Update
11:50 a.m.–12:00 p.m. Grid Resilience for National Security Subcommittee Update
12:00 p.m.–12:15 p.m. Public Comments
12:15 p.m.–12:30 p.m. Wrap-up and Adjourn June 2024 Meeting of the EAC

The meeting agenda and times may change to accommodate EAC business. For EAC agenda updates, see the EAC website at: *https://www.energy.gov/oe/electricity-advisory-committee-june-2024-meeting.*

Public Participation: The EAC welcomes the attendance of the public at its meetings. Individuals who wish to offer public comments at the EAC meeting may do so on June 6, 2024, but must register in advance by 9 a.m. EDT on June 6, 2024, by sending a written request identified by ''Electricity Advisory Committee June 2024 Meeting,'' to Ms. Jayne Faith at *Jayne.Faith@hq.doe.gov.* Approximately 15 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but is not expected to exceed three minutes. Anyone who is not able to attend the meeting, or for whom the allotted public comments time is insufficient to address pertinent issues with the EAC, is invited to send a written statement identified by ''Electricity Advisory Committee June 2024 Meeting,'' to Ms. Jayne Faith at *Jayne.Faith@hq.doe.gov.*

Minutes: Minutes will be posted on the EAC web page at *https://www.energy.gov/oe/electricity-advisory-committee-june-2024-meeting.* They can also be obtained by contacting Ms. Jayne Faith at the email address or telephone number listed in **FOR FURTHER INFORMATION CONTACT** section.

Signing Authority: This document of the Department of Energy was signed on May 1, 2024, by Alyssa Petit, Acting Deputy Committee Management Officer, 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 May 1, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–09858 Filed 5–6–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. 23–34–LNG]

Gulfstream LNG Development, LLC; Amendment to Application for Long-Term Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of amended application.

SUMMARY: The Office of Fossil Energy and Carbon Management (FECM) of the Department of Energy (DOE) gives notice (Notice) of receipt of an Amendment to Application (Amendment) filed by GULFSTREAM LNG DEVELOPMENT, LLC (Gulfstream LNG) on March 22, 2024, and corrected on April 4, 2024. Gulfstream LNG is amending its pending Application requesting authorization to export liquefied natural gas (LNG) filed on March 10, 2023, to change the site of its proposed LNG export project in Plaquemines Parish, Louisiana. No other part of the pending Application is affected. Gulfstream LNG filed the Amendment under the Natural Gas Act (NGA).

DATES: Protests, motions to intervene, or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed electronically as detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, June 6, 2024.

ADDRESSES:

Electronic Filing by email (Strongly encouraged): fergas@hq.doe.gov.

Postal Mail, Hand Delivery, or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E–056, 1000 Independence Avenue SW, Washington, DC 20585.

Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit filings electronically to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT:

Jennifer Wade or Peri Ulrey, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability, Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–4749 or (202) 586–7893, *jennifer.wade@hq.doe.gov* or *peri.ulrey@hq.doe.gov*

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Energy Delivery and Resilience, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–4798, *cassandra.bernstein@hq.doe.gov*

SUPPLEMENTARY INFORMATION: On March 10, 2023, Gulfstream LNG filed an Application requesting long-term, multi-contract authorization to export domestically produced LNG in a volume equivalent to 237.5 billion cubic feet per year (Bcf/yr) of natural gas from the proposed Gulfstream LNG Project (Project), a LNG export project to be located in Plaquemines Parish, Louisiana. In the portion of the Application relevant here, Gulfstream LNG is seeking to export this LNG to any country with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by United States law or policy (non-FTA countries), under section 3(a) of the NGA.[1] In the Application, Gulfstream LNG proposed to construct and locate the Project ''on an approximately 500-acre parcel of land south of the town of Belle Chasse, Plaquemines Parish, Louisiana.'' [2]

In the Amendment to the Application, Gulfstream LNG indicates that it was necessary to change the site for the Project. The new site ''is on an approximate 418-acre parcel of land located south of the town of Belle Chasse, Plaquemines Parish, Louisiana, just three miles downstream on the same side of [the] river from the original site.'' [3] Gulfstream LNG states that it has executed a Ground Lease for the new Project site with the owner of the site, Magnolia Terminal, LLC, which is attached to the Amendment as Exhibit A. Gulfstream LNG further states that the new site does not necessitate any other changes to the Project, and therefore ''this Amendment does not affect any other part of Gulfstream LNG's original Application.'' [4] On April 4, 2024, Gulfstream LNG submitted a revised Exhibit B to the Amendment showing the map and site plan for the Project.

Additional details can be found in the Amendment, posted on the DOE website at *https://www.energy.gov/sites/default/files/2024-03/Gulfstream LNGAmendmentApplication.pdf.*

DOE Evaluation

In reviewing Gulfstream LNG's Amendment to its pending Application, DOE will consider any issues required by law or policy under NGA section 3(a), DOE's regulations, and any documents deemed appropriate. Parties that may oppose this Amendment should comment in their responses on any issues relevant to the Amendment.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable, addressing the Amendment. Interested parties will be provided 30 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention. The public previously was given an opportunity to intervene in, protest, and comment on Gulfstream LNG's Application in Docket No. 23–34–LNG.[5] Therefore, DOE will not consider comments or protests that do not bear directly on the proposed site change described in the Amendment.

Any person wishing to become a party to this proceeding evaluating Gulfstream LNG's Amendment must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Amendment will not serve to make the commenter or protestant a party to this proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Amendment. All protests, comments, motions to intervene, or notices of intervention must meet the

[1] 15 U.S.C. 717b(a). On June 26, 2023, in DOE/FECM Order No. 5014, DOE granted the portion of the Application requesting authorization to export LNG to FTA countries under section 3(c) of the NGA, 15 U.S.C. 717b(c). That authorization is not subject to this Notice.

[2] GULFSTREAM LNG DEVELOPMENT, LLC; Application for Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations; Notice of Application, 88 FR 23023 (Apr. 14, 2023).

[3] GULFSTREAM LNG DEVELOPMENT, LLC, Amendment to Application for Long-Term Authorization to Export Liquefied Natural Gas to Free Trade Agreement and Non-Free Trade Agreement Nations, Docket No. 23–34–LNG, at 2 (Mar. 22, 2024).

[4] *Id.*

[5] *See supra* note 2.

requirements specified by the regulations in 10 CFR part 590, including the service requirements.

Filings may be submitted using one of the following methods:

(1) Submitting the filing electronically at *fergas@hq.doe.gov;*

(2) Mailing the filing to the Office of Regulation, Analysis, and Engagement at the address listed in the **ADDRESSES** section; or

(3) Hand delivering the filing to the Office of Regulation, Analysis, and Engagement at the address listed in the **ADDRESSES** section.

For administrative efficiency, DOE prefers filings to be filed electronically. All filings must include a reference to ''Docket No. 23–34–LNG'' or ''Gulfstream LNG Amendment'' in the title line.

For electronic submissions: Please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner.

The Amendment, and any filed protests, motions to intervene, notices of intervention, and comments will be available electronically on the DOE website at *www.energy.gov/fecm/regulation.*

A decisional record on the Amendment will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Order may be issued based on the official record, including the Amendment and responses filed by parties pursuant to this Notice, in accordance with 10 CFR 590.316.

Signed in Washington, DC, on May 2, 2024.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.

[FR Doc. 2024–09884 Filed 5–6–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Attendance at the Southwest Power Pool, Inc. Regional State Committee Meeting, Quarterly Joint Stakeholder Meeting, and Members' Committee/Board of Directors' Meetings

The Federal Energy Regulatory Commission (Commission) hereby gives notice that Commissioners and members of their staff may attend the meetings of the Southwest Power Pool, Inc., Regional State Committee (RSC), Quarterly Joint Stakeholder Meeting, Special Meeting of Members and Members' Committee/Board of Directors (Board), as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

The meetings will be held at the Hyatt Regency Aurora-Denver Conference Center, 13200 East 14th Place, Aurora, CO 80111. All meetings are Mountain Time.

SPP RSC and Quarterly Joint Stakeholder Meeting

May 6, 2024 (1:00 p.m.–5:00 p.m.)

Special Meeting of Members and Members' Committee/Board Meeting

May 7, 2024 (8:00 a.m.–3:00 p.m.)

The discussions may address matters at issue in the following proceedings:

Docket No. EL22–59, *Tenaska Clear Creek Wind, LLC* v. *Southwest Power Pool, Inc. et al.*
Docket No. EL22–65, *Southwest Power Pool, Inc.*
Docket No. EL22–89, *Cage Ranch Solar I, LLC and Cage Ranch Solar II, LLC* v. *Southwest Power Pool, Inc.*
Docket No. EL24–3, *Missouri River Energy Services* v. *Southwest Power Pool, Inc.*
Docket No. EL24–61, *Montana-Dakota Utilities Company* v. *Midcontinent Independent System Operator, Inc. and Southwest Power Pool, Inc.*
Docket No. EL24–85, *Midcontinent Independent System Operator, Inc.* v. *Southwest Power Pool, Inc.*
Docket No. EL24–96, *Sierra Club, Natural Resources Defense Council, Inc., and Sustainable FERC Project* v. *Southwest Power Pool, Inc.*
Docket No. ER16–1341, *Southwest Power Pool, Inc.*
Docket No. ER18–194, *Southwest Power Pool, Inc.*
Docket No. ER18–195, *Southwest Power Pool, Inc.*
Docket No. ER18–2358, *Southwest Power Pool, Inc.*
Docket No. ER20–1796, *Entergy Arkansas, LLC*
Docket No. ER20–2040, *Southwest Power Pool, Inc.*
Docket No. ER20–2041, *Southwest Power Pool, Inc.*
Docket No. ER20–2042, *Southwest Power Pool, Inc.*
Docket No. ER20–2044, *Southwest Power Pool, Inc.*
Docket No. ER22–1525, *Southwest Power Pool, Inc.*
Docket No. ER22–1697, *Southwest Power Pool, Inc.*
Docket No. ER22–1846, *Southwest Power Pool, Inc.*
Docket No. ER22–1986, *Basin Electric Power Cooperative and North Iowa Municipal Electric Cooperative*
Docket No. ER22–2339, *Southwest Power Pool, Inc.*
Docket No. ER24–289, *Southwest Power Pool, Inc.*
Docket No. ER24–708, *Transource Oklahoma, LLC and Southwest Power Pool, Inc.*
Docket No. ER24–1201, *Southwest Power Pool, Inc.*
Docket No. ER24–1221, *Southwest Power Pool, Inc.*
Docket No. ER24–1317, *Southwest Power Pool, Inc.*
Docket No. ER24–1362, *Southwest Power Pool, Inc.*
Docket No. ER24–1431, *Southwestern Public Service Company*
Docket No. ER24–1432, *Southwest Power Pool, Inc.*
Docket No. ER24–1452, *Southwest Power Pool, Inc.*
Docket No. ER24–1497, *Southwest Power Pool, Inc.*
Docket No. ER24–1583, *Southwest Power Pool, Inc.*
Docket No. ER24–1586, *Midcontinent Independent System Operator, Inc.*
Docket No. ER24–1606, *Sol Systems, LLC*
Docket No. ER24–1610, *Basin Electric Power Cooperative*
Docket No. ER24–1658, *Southwest Power Pool, Inc.*
Docket No. ER24–1729, *Upper Missouri G&T Electric Cooperative Inc.*
Docket No. ER24–1754, *Southwest Power Pool, Inc.*
Docket No. ER24–1765, *Southwest Power Pool, Inc.*
Docket No. ER24–1775, *Southwest Power Pool, Inc.*
Docket No. ER24–1827, *Southwest Power Pool, Inc.*
Docket No. ER24–1835, *Southwest Power Pool, Inc.*
Docket No. ER24–1855, *Southwest Power Pool, Inc.*

The meetings are open to the public by teleconference. Registration for the

teleconference and additional information are available at *www.spp.org.*

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov.*

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09833 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24–705–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: EEP Nonconforming and Negotiated Rate Agreements to be effective 6/1/2024.
Filed Date: 4/29/24.
Accession Number: 20240429–5263.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–706–000.
Applicants: Discovery Gas Transmission LLC.
Description: Annual Imbalance Cash Out Report for 2023 of Discovery Gas Transmission LLC.
Filed Date: 4/29/24.
Accession Number: 20240429–5326.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–707–000.
Applicants: Florida Southeast Connection, LLC.
Description: Annual System Balancing Adjustment of Florida Southeast Connection, LLC.
Filed Date: 4/29/24.
Accession Number: 20240429–5328.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–708–000.
Applicants: Mountain Valley Pipeline, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements—6/1/2024 to be effective 6/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5000.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–709–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: Compliance filing: Fuel Filing on 4–30–2024 to be effective N/A.
Filed Date: 4/30/24.
Accession Number: 20240430–5004.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–710–000.
Applicants: ETC Tiger Pipeline, LLC.
Description: § 4(d) Rate Filing: Fuel Filing on 4–30–2024 to be effective 6/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5005.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–711–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement—5/1/2024 to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5049.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–712–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 5–1–24 to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5080.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–713–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing (BP) to be effective 6/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5097.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–714–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (Conoco May 2024) to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5105.
Comment Date: 5 p.m. ET 5/13/24

Docket Numbers: RP24–715–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements Update (Pioneer May 2024) to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5113.
Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: RP24–716–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements Update (Hartree 614700 615843 610670 May 2024) to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5143.
Comment Date: 5 p.m. ET 5/13/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09835 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD24–1–000]

Commission Information Collection Activities (FERC–725S and FERC 725A); Comment Request; Revision & Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collection revision and extension and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting

public comment on the requirements and burden of the information collection FERC–725S—*Mandatory Reliability Standards: Emergency Preparedness and Operations (EOP) Reliability Standards* and FERC–725A—*Mandatory Reliability Standards for the Bulk-Power System.* No comments were received in response to the 60-day notice published on February 22, 2024.

DATES: Comments on the collection of information are due June 6, 2024.

ADDRESSES: Send written comments on FERC–725S and/or FERC–725A (identified by Docket No. RD24–1–000) to the Office of Management and Budget (OMB) through *www.reginfo.gov/public/do/PRAMain,* Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB Control Number 1902–0270 (Mandatory Reliability Standards: Emergency Preparedness and Operations [EOP] Reliability Standards) or OMB Control Number 1902–0244 (Mandatory Reliability Standards for the Bulk-Power System) in the subject line. Your comments should be sent within 30 days of publication of this notice in the **Federal Register**.

Please submit copies of your comments (identified by Docket No. RD24–1–000, FERC–725S, and/or FERC–725A) to the Commission as noted below. Electronic filing through *https://www.ferc.gov* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:
  - *Mail via U.S. Postal Service only, addressed to:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
  - *Hand (including courier) delivery to:* Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Please reference the specific collection number(s) (FERC–725A and/or FERC–725S) and/or title(s) (Mandatory Reliability Standards: Emergency Preparedness and Operations [EOP]) Reliability Standards) or (Mandatory Reliability Standards for the Bulk-Power System) in your comments.

Instructions: OMB submissions must be formatted and filed in accordance with submission guidelines at: *www.reginfo.gov/public/do/PRAMain.* Using the search function under the ''Currently Under Review field,'' select ''Federal Energy Regulatory Commission,'' click ''submit,'' and select ''comment'' to the right of the subject collection. FERC submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov/ferc-online/overview.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov/ferc-online/overview.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–725S (Mandatory Reliability Standards: Emergency Preparedness and Operations (EOP) Reliability Standards)); FERC–725A (Mandatory Reliability Standards for the Bulk-Power System).

OMB Control No.: 1902–0270 & 1902–0244.

Type of Request: Revision and Extension to Existing Collections of Information in FERC–725S and FERC–725A.

Abstract: On February 15, 2024, the Commission published an order in Docket No. RD24–1–000 that approved Extreme Cold Weather Reliability Standards EOP–011–4 and TOP–002–5, which were submitted by the North American Electric Corporation (NERC).[1] The order included a 60-day notice in the **Federal Register** and received no comments or protests. The order modifies the FERC 725S and FERC 725A Information Collections and both information collections are currently OMB approved.

The EOP Reliability Standards are currently located in the FERC–725S (OMB Control No. 1902–0270) collection. The collection is currently approved by OMB and contains Reliability Standards EOP–010–1, EOP–011–2, EOP–004–4, EOP–005–3, EOP–006–3, EOP–008–2, and EOP–012–1. There is one Reliability Standard that is being updated within the FERC–725S due to the revisions in Docket No. RD24–1–000: Reliability Standard EOP–011–4. The currently approved Reliability Standard is EOP–011–3, which is being replaced by Reliability Standard EOP–011–4 (table 1).

The TOP Reliability Standards are currently located in FERC–725A (OMB Control No. 1902–0270) collection. This collection is currently approved by OMB and contains Reliability Standards TOP–001–4, TOP–002–4, TOP–003–4, FAC–008–5, FAC003–2, and ''Mandatory Reliability Standards'' recordkeeping and reporting. There are six information collections within the FERC–725A that will remain unchanged from the revisions in Docket No. RD24–1–000. These six collections include the Reliability Standards: TOP–001–4, TOP–003–4, FAC–008–5, FAC–003–2, and ''Mandatory Reliability Standards'' recordkeeping and reporting. There is one Reliability Standard being updated within the FERC–725A due to revisions in Docket No. RD24–1–000: Reliability Standard TOP–002–4, which is being replaced by Reliability Standard TOP–002–5 (table 2).

Types of Respondents: Balancing Authority (BA), Transmission Operations (TOP), Reliability Coordinators (RC), UFLS-Only Distribution Providers (DP), Distribution Providers (DP), and Transmission Owners (TO).

Estimate of Annual Burden:[2] The Commission based its paperwork burden estimates on the NERC compliance registry as of December 15, 2023. The Commission estimates the total annual burden and cost for this information collection in the tables below.

[1] 88 FR 76201.

[2] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR1320.3.

TABLE 1—PROPOSED CHANGES TO FERC 725S DUE TO MODIFICATIONS IN DOCKET NO. RD24–1–000

Reliability standard & requirement	Type[3] and number of entity (1)	Number of annual responses per entity (2)	Total number of responses (1) * (2) = (3)	Average number of burden hours per response[4] (4)	Total burden hours (3) * (4) = (5)
FERC–725S—Proposed estimates due to RD24–1 for EOP–011–4					
One Time Estimate—Years 1 and 2 in EOP–011–4					
EOP–011–4	165 (TOP)	1	165	40 hrs. $3,031.60	6,600 hrs. $500,214.00.
EOP–011–4	98 (BA)	1	98	20 hrs. $1,515.80	1,960 hrs. $148,548.40.
EOP–011–4	12 (RC)	1	12	20 hrs. $1,515.80	240 hrs. $18,189.60.
EOP–011–4	72 (UFLS-Only DP)	1	72	40 hrs. $3,031.60	2,880 hrs. $218,275.20.
EOP–011–4	300 (DP)	1	300	40 hrs. $3,031.60	12,000 hrs. $909,480.00.
EOP–011–4	324 (TO)	1	324	40 hrs. $3,031.60	12,960 hrs. $982,238.40.
Sub-Total of EOP–011–4 (One time)			971		36,640 hrs. $2,776,945.60.
Annualized One-Time Costs (average cost per year is calculated by the sub-total divided by 3).			323.67 (rounded)		12,213 hrs. (rounded) $925,623.27.
Ongoing Estimate—Year 3 ongoing EOP–011–4					
EOP–011–4	165(TOP)	1	165	20 hrs. $1,515.80	3,300 hrs. $250,107.00.
EOP–011–4	98 (BA)	1	98	4 hrs. $303.16	392 hrs. $29,709.68.
EOP–011–4	12 (RC)	1	12	4 hrs. $303.16	48 hrs. $3,637.92.
EOP–011–4	72 (UFLS-Only DP)	1	72	10 hrs. $757.90	720 hrs. $54,568.80.
EOP–011–4	300 (DP)	1	300	10 hrs. $757.90	3,000 hrs. $227,370.00.
EOP–011–4	324 (TO)	1	324	10 hrs. $757.90	3,240 hrs. $245,559.60.
Sub-Total of EOP–011–4 (ongoing)			971		10,700 hrs. $810,953.00.
Sub-Total of ongoing burden averaged over three years.			323.67 (rounded)		3,566.67 hrs. (rounded) $270,317.92.
Proposed Total Annual Burden Estimate of EOP–011–4 (one-time plus ongoing).			647.34		15,779.67 hrs. $1,195,941.19 (rounded).

TABLE 2—PROPOSED CHANGES TO FERC 725A DUE TO MODIFICATIONS IN DOCKET NO. RD24–1–000

Requirement change	Type[5] and number of respondents (1)	Annual number of annual responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost per response[6] (4)	Total annual burden hours & total annual cost (3) * (4) = (5)
FERC–725A—Proposed estimates due to RD24–1					
One Time Estimate—Years 1 and 2 in TOP–002–5					
TOP–002–5	98 (BA)	1	98	40 hrs. $3,031.60	3,920 hrs. $297,096.80.
Ongoing Estimate—Year 3 ongoing TOP–002–5					
TOP–002–5	98 (BA)	1	98	20 hrs. $1,515.80	1,960 hrs. $148,548.40.
Sub-Total of One-Time estimate for years 1 and 2.			98	40 hrs. $3,031.60	3,920 hrs. $297,096.80
Sub-Total for Ongoing estimate of year 3 and beyond.			98	20 hrs. $1,515.80	1,960 hrs. $148,548.40.
Annualized one-time Total burden for years 1 and 2 (one-time sub-total divided by 3).			32.67 (rounded)	13.33 hrs. (rounded) $1,010.28.	1,306.67 hrs. $99,032.52 (rounded).
Annualized ongoing total burden for years 3 and beyond (ongoing sub-total divided by 3).			32.67 (rounded)	6.67 hrs. $505.52 (rounded)	653.33 hrs. $49,515.88 (rounded).
Annualized Total Burden Estimate of TOP–002–5.			65.34	20 hrs. $1,515.80	1,960 hrs. 148,548.40.

[3] TOP = Transmission Operator, BA = Balancing Authority, RC = Reliability Coordinator, UFLS-Only DP = Underfrequency Load Shed-Only Distribution Provider, DP = Distribution Provider, and TO = Transmission Owner.

[4] The estimated hourly cost (salary plus benefits) is a combination based on the Bureau of Labor Statistics (BLS), as of 2023, for 75% of the average of an Electrical Engineer (17–2071) – $77.29,

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09827 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

mechanical engineers (17–2141) – $87.38. $77.29 + $87.38/2 = 82.335 × .75 = 54.303 ($61.75 rounded) ($61.75/hour) and 25% of an Information and Record Clerk (43–4199) $56.14 × .25% = 14.035 ($14.04 rounded) ($14.04/hour), for a total ($61.75 + $14.04 = $75.79/hour).

[5] BA = Balancing Authority.

[6] The estimated hourly cost (salary plus benefits) is a combination based on the Bureau of Labor Statistics (BLS), as of 2023, for 75% of the average of an Electrical Engineer (17–2071) – $77.29, mechanical engineers (17–2141) – $87.38. $77.29 + $87.38/2 = 82.335 × .75 = 54.303 ($61.75 rounded) ($61.75/hour) and 25% of an Information and Record Clerk (43–4199) $56.14 × .25% = 14.035 ($14.04 rounded) ($14.04/hour), for a total ($61.75 + $14.04 = $75.79/hour).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1889–085, Project No. 2485–071]

FirstLight MA Hydro LLC; Northfield Mountain LLC; Notice of Reasonable Period of Time for Water Quality Certification Application

On April 22, 2024, the Massachusetts Department of Environmental Protection (Massachusetts DEP) filed with the Federal Energy Regulatory Commission (Commission) notice that it received complete requests for Clean Water Act section 401(a)(1) water quality certifications from FirstLight MA Hydro LLC and Northfield Mountain LLC in conjunction with the above captioned projects, on April 22, 2024. Pursuant to section 5.23(b) of the Commission's regulations,[1] we hereby notify Massachusetts DEP of the following:

Date of Receipt of the Certification Request: April 22, 2024.

Reasonable Period of Time to Act on the Certification Request: One year, April 22, 2025.

If Massachusetts DEP fails or refuses to act on the water quality certification requests on or before the above date, then the certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09832 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 5.23(b).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2307–086]

Alaska Electric Light & Power Company; Notice of Application for Non-Capacity Amendment of License Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Capacity Amendment of License.

b. *Project No:* 2307–086.

c. *Date Filed:* October 13, 2023, and supplemented on April 26, 2024.

d. *Applicant:* Alaska Electric Light & Power Company (licensee).

e. *Name of Project:* Annex Creek and Salmon Creek Hydroelectric Project.

f. *Location:* The project is located on Annex and Salmon Creeks in the City and Borough of Juneau, Alaska. The project occupies Federal land within the Tongass National Forest, administered by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Bryan Farrell, Vice President, Director of Generation, Alaska Electric Light & Power Company, 5601 Tonsgard Court, Juneau, AK, 99801; telephone: (907) 463–6387.

i. *FERC Contact:* Marybeth Gay, (202) 502–6125, *Marybeth.gay@ferc.gov.*

j. *Cooperating agencies:* With this notice, the Commission is inviting Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if applicable, to follow the instructions for filing such requests described in item k below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. *Deadline for filing comments, motions to intervene, and protests:* May 30, 2024.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–2307–086. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Request:* The licensee proposes to replace the upper Salmon Creek penstock, which runs from the valvehouse to the abandoned upper powerhouse. The licensee states that the penstock, which is over 100 years old, must be replaced to ensure safe and reliable operation of the project for the reminder of the project license. As proposed, the licensee would replace the entire upper penstock with modern welded steel pipe that meets modern engineering and construction standards. Additionally, the licensee states that

penstock bridges over Salmon Creek that have not been recently rebuilt would be replaced with new bridges to support the new penstock.

m. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

q. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09830 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD22–11–000, AD21–9–000]

Office of Public Participation Fundamentals for Participating in FERC Matters; Notice of Video Workshop: ''WorkshOPP on FERC's eLibrary''

The Office of Public Participation (OPP)'s ''WorkshOPP on FERC's eLibrary'' video is now available for the public. The WorkshOPP provides an overview of FERC's online library of documents issued or received by FERC, including its organization, services, and search functions. The video is posted on FERC's YouTube channel under OPP's Playlist at *https://www.youtube.com/@FERC/playlists.* It includes captioning in English and Spanish and is compliant with Section 508 of the Rehabilitation Act of 1973. Additionally, a standalone demonstration video of how to search eLibrary is available.

OPP supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 30, 2024.

Debbie-Anne Reese,

Acting Secretary.

[FR Doc. 2024–09838 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5698–022]

Triton Power Company; Notice of Continuation of Relicense Proceeding

On December 31, 2020, Triton Power Company (Triton), licensee for the Chateaugay High Falls Hydroelectric Project No. 5698 (project), filed a notice of intent (NOI) to file an application for a new license for the project pursuant to section 15(b)(1) of the Federal Power Act (FPA).[1] On February 26, 2021, Commission staff issued public notice of the NOI and approved the use of the traditional licensing process to develop the license application.

Pursuant to section 15(c)(1) of the FPA [2] and section 16.9 of the Commission's regulations,[3] an existing licensee must file an application for a new license at least 24 months prior to the expiration of the current license. The current license for the project expires on December 31, 2025,[4] so the deadline for filing an application for a new license was December 31, 2023. Triton did not file an application for a new license by the filing deadline.

After Triton failed to file a timely license application, on January 12, 2024, the Commission issued a notice soliciting applications from potential applicants other than the existing licensee, pursuant to sections 16.24(a)(2) and 16.25(a) of the Commission's regulations.[5] Notices of intent to file an application for a new license were due by April 11, 2024. No potential applicants other than the existing licensee filed a notice of intent for the project.

In comments filed on January 31, 2024, Triton states that it was not able to file a timely license application due to a number of extenuating circumstances, but it intends to file a license application as soon as possible.[6] On April 26, 2024, Triton filed another letter stating that it intends to resume the relicensing process and file a license application for the project.

Because no other potential applicant filed a notice of intent to file an application for the project in response to the January 12 notice, we are waiving sections 16.24(a)(2) and 16.25(a) of the

[1] 16 U.S.C. 808(b)(1).

[2] 16 U.S.C. 808(c)(1).

[3] 18 CFR 16.9 (2023).

[4] *Triton Power Company,* 34 FERC ¶ 61,055 (1986).

[5] 18 CFR 16.24(a), 16.25(a) (2023).

[6] We consider Triton's January 31, 2024 letter to be a notice of intent under section 16.25(a).

Commission's regulations that bar an existing licensee that missed the two-year application filing deadline from filing an application.[7] An application for a new license for the project may be filed within 18 months of Triton's January 31 filing (*i.e.,* by July 31, 2025).[8] Failure to file an application by July 31, 2025, may result in Triton being directed to file a schedule for filing a surrender application pursuant to section 16.25(c)(2) of the Commission's regulations.

Questions concerning this notice should be directed to Arash Barsari at (202) 502–6207 or email at *Arash.JalaliBarsari@ferc.gov.*

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09828 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER24–1871–000.
Applicants: ORNI 18 LLC.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5013.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1872–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: East River Electric Power Cooperative, Inc. Formula Rates Revisions to be effective 1/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5014.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1873–000.
Applicants: Ormesa LLC.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5015.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1874–000.
Applicants: Mammoth Three LLC.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5016.
Comment Date: 5 p.m. ET 5/21/24

Docket Numbers: ER24–1875–000.
Applicants: Heber Geothermal Company LLC.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5017.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1876–000.
Applicants: ORNI 36 LLC.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5018.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1877–000.
Applicants: Ormat Stillwater Solar PV II LLC.
Description: § 205(d) Rate Filing: Notice of Succession and Tariff Revisions to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5020.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1878–000.
Applicants: Ormat Stillwater Solar LLC.
Description: § 205(d) Rate Filing: Notice of Succession and Tariff Revisions to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5021.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1879–000.
Applicants: Ormat Stillwater LLC.
Description: § 205(d) Rate Filing: Notice of Succession and Tariff Revisions to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5022.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1880–000.
Applicants: Ormat Cove Fort LLC.
Description: § 205(d) Rate Filing: Notice of Succession and Tariff Revisions to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5023.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1881–000.
Applicants: Canisteo Wind Energy LLC.
Description: Canisteo Wind Energy LLC requests a prospective waiver of Section 30.4.4.5.1 in Attachment X of the NYISO OATT.
Filed Date: 4/26/24.
Accession Number: 20240426–5393.
Comment Date: 5 p.m. ET 5/17/24.

Docket Numbers: ER24–1882–000.
Applicants: Clover Creek Solar Project, LLC.
Description: Request for Limited Waiver of Clover Creek Solar Project, LLC.
Filed Date: 4/30/24.
Accession Number: 20240430–5121.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1883–000.
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) Rate Filing: Q1 2024 Quarterly Filing of City and County of San Francisco's WDT SA (SA 275) to be effective 3/31/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5168.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1884–000.
Applicants: Franklin Solar LLC.
Description: Baseline eTariff Filing: Co-Tenancy and Shared Facilities Agreement to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5177.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1885–000.
Applicants: Jackpot Holdings, LLC.
Description: Baseline eTariff Filing: Amended and Restated Co-Tenancy and Shared Facilities Agreement to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5181.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1886–000.
Applicants: Midcontinent Independent System Operator, Inc., Ameren Transmission Company of Illinois.
Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2024–04–30_ATXI Request for Transmission Rate Incentive RE DZTM Project to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5185.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1887–000.
Applicants: Franklin Solar LLC.
Description: § 205(d) Rate Filing: Certificate of Concurrence to A&R Co-Tenancy and Shared Facilities Agreement to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5188.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1888–000.
Applicants: NMRD Data Center II, LLC.
Description: § 205(d) Rate Filing: NMRD DC II MBR Tariff Change-Notice of Cancellation to be effective 5/1/2024.
Filed Date: 4/30/24.

[7] *See Pacific Gas and Electric Co.,* 98 FERC ¶ 61,032 (2002), *reh'g denied,* 99 FERC ¶ 61,045, *aff'd, City of Fremont* v. *FERC,* 336 F.3d 910 (9th Cir. 2003).

[8] *See* 18 CFR 16.25(b)(1).

Accession Number: 20240430–5195.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1889–000.
Applicants: NMRD Data Center III, LLC.
Description: § 205(d) Rate Filing: NMRD DC III MBR Tariff and Notice of Cancel filing to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5196.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1890–000.
Applicants: BRP Capital & Trade LLC.
Description: Compliance filing: Notice of Change in Status to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5200.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1891–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: RS No. 175—Concurrence—Jackpot Holdings, LLC SFA to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5216.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1892–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: RS No. 176—Concurrence—Franklin Solar SFA to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5219.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1893–000.
Applicants: Duke Energy Florida, LLC.
Description: § 205(d) Rate Filing: Annual Filing of Cost Factor Updates to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5230.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1894–000.
Applicants: Stanton Clean Energy, LLC.
Description: Initial rate filing: FERC Rate Schedule No. 1, Stanton OUC PPA to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5276.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1895–000.
Applicants: New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: May 2024 Membership Filing to be effective 4/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5280.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1896–000.
Applicants: Cavalry Energy Center, LLC.
Description: Compliance filing: Notice of Non-Material Change in Status and MBR Tariff Revisions to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5290.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1897–000.
Applicants: Northampton Generating Company, L.P.
Description: Compliance filing: Northampton Change in Status to be effective 5/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5292.
Comment Date: 5 p.m. ET 5/21/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09836 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1904–078; Project No. 1855–050; Project No. 1892–030]

Great River Hydro, LLC; Notice of Reasonable Period of Time for Water Quality Certification Application

On April 19, 2024, the Vermont Agency of Natural Resources (Vermont ANR) filed with the Federal Energy Regulatory Commission (Commission) notice that it received complete requests for Clean Water Act section 401(a)(1) water quality certifications from Great River Hydro, LLC in conjunction with the above captioned projects, on April 18, 2024. Pursuant to section 5.23(b) of the Commission's regulations,[1] we hereby notify Vermont ANR of the following:

Date of Receipt of the Certification Request: April 18, 2024.

Reasonable Period of Time to Act on the Certification Request: One year, April 18, 2025.

If Vermont ANR fails or refuses to act on the water quality certification requests on or before the above date, then the certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09831 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2307–086]

Alaska Electric Light & Power Company; Notice of Intent To Prepare an Environmental Assessment

On October 13, 2023, and supplemented on April 26, 2024, Alaska Electric Light & Power Company (licensee) filed an application for a non-capacity amendment for the Annex Creek and Salmon Creek Hydroelectric Project No. 2307. The project is located on Annex and Salmon Creeks in the City and Borough of Juneau, Alaska. The project occupies federal land within the Tongass National Forest, administered by the U.S. Forest Service.

The licensee proposes to replace the upper Salmon Creek penstock, which

[1] 18 CFR 5.23(b).

runs from the valvehouse to the abandoned upper powerhouse. The licensee states that the penstock, which is over 100 years old, must be replaced to ensure safe and reliable operation of the project for the remainder of the project license. As proposed, the licensee would replace the entire upper penstock with modern welded steel pipe that meets modern engineering and construction standards. Additionally, the licensee states that penstock bridges over Salmon Creek that have not been recently rebuilt would be replaced with new bridges to support the new penstock. A Notice of Application for Non-Capacity Amendment of License Accepted for Filing, Soliciting Comments, Motions to Intervene, and Protests was issued on April 30, 2024.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the project. The planned schedule for the completion of the EA is October 2024.[1] Revisions to the schedule may be made as appropriate. The EA will be issued and made available for review by all interested parties. All comments filed on the EA will be reviewed by staff and considered in the Commission's final decision on the proceeding.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members, and others to access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Any questions regarding this notice may be directed to Marybeth Gay at (202) 502–6125 or *Marybeth.gay@ferc.gov.*

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09829 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

[1] 42 U.S.C. 4336a(g)(1)(B) requires lead federal agencies to complete EAs within 1 year of the agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare an EA for the project; therefore, the EA must be issued within 1 year of the issuance date of this notice.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24–74–000.
Applicants: Kimmel Road Solar, LLC, BCD 2024 Fund 3 Lessee, LLC.
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Kimmel Road Solar, LLC, et al.
Filed Date: 4/29/24.
Accession Number: 20240429–5451.
Comment Date: 5 p.m. ET 5/20/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–170–000.
Applicants: Peacock Energy Project, LLC.
Description: Peacock Energy Project, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 4/29/24.
Accession Number: 20240429–5402.
Comment Date: 5 p.m. ET 5/20/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2354–016.
Applicants: Midway-Sunset Cogeneration Company.
Description: Notice of Non-Material Change in Status of Midway-Sunset Cogeneration Company.
Filed Date: 4/30/24.
Accession Number: 20240430–5258.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER16–131–005; ER10–2294–009; ER11–3808–008; ER11–3980–008; ER11–4500–011; ER12–128–009; ER13–413–009; ER13–534–008; ER13–2103–006; ER13–2414–005; ER14–325–008; ER15–2330–005; ER20–2696–000; ER17–737–002; ER17–2471–006; ER17–2472–006; ER17–2548–001; ER18–301–005; ER18–664–006; ER22–645–000; ER18–2214–003; ER18–2216–003; ER18–2435–005; ER19–1047–004; ER20–2977–002; ER22–1882–003; ER22–2178–003; ER22–2799–002; ER22–2800–002; ER22–2801–002; ER23–1238–002; ER23–1239–002; ER23–1773–003; ER24–561–001; ER24–564–001.
Applicants: VESI 12 LLC, VESI 23 LLC, Pomona Energy Storage 2 LLC, USG Nevada LLC, ORNI 36 LLC, VESI 25 LLC, VESI 24 LLC, VESI 21 LLC, ORNI 50 LLC, VESI 10 LLC, ORNI 34 LLC, VESIVEC LLC, ORNI 41 LLC, Plumsted 537 LLC, Stryker 22, LLC., Ormat Dixie Valley LLC, Steamboat Hills LLC, Ormesa LLC, EGP Stillwater Solar PV II, LLC, ONGP LLC, ORNI 43 LLC, Viridity Energy Solutions Inc., VESI Pomona Energy Storage, Inc., ORNI 37 LLC, Enel Cove Fort, LLC, Mammoth Three LLC, ORNI 47 LLC, Mammoth One LLC, USG Oregon LLC, EGP Stillwater Solar, LLC, Enel Stillwater, LLC, ORNI 14 LLC, ORNI 39, LLC, ORNI 18 LLC, Heber Geothermal Company LLC.
Description: Notice of Non-Material Change in Status of Heber Geothermal Company LLC, et al.
Filed Date: 4/25/24.
Accession Number: 20240425–5331.
Comment Date: 5 p.m. ET 5/16/24.

Docket Numbers: ER19–1575–011; ER10–2488–028; ER13–1586–023; ER14–2871–022; ER15–463–021; ER15–621–021; ER15–622–021; ER16–72–017; ER16–182–017; ER16–902–014; ER17–47–014; ER17–48–015; ER18–47–014; ER18–2240–010; ER18–2241–010; ER19–427–010; ER19–1660–010; ER19–1662–010; ER19–1667–010; ER20–71–010; ER20–72–010; ER20–75–010; ER20–76–012; ER20–77–010; ER20–79–010; ER21–1368–006; ER21–1369–007; ER21–1371–007; ER21–1373–008; ER21–1376–008; ER21–2782–007; ER22–149–007; ER22–1439–008; ER22–1440–008; ER22–1441–008; ER22–1442–006; ER22–2419–004; ER22–2420–004; ER23–562–004; ER23–1048–004; ER23–2001–003.
Applicants: Sagebrush ESS II, LLC, Lockhart ESS, LLC, TGP Energy Management II, LLC, Lockhart Solar PV II, LLC, Lockhart Solar PV, LLC, EdSan 1B Group 3, LLC, EdSan 1B Group 2, LLC, EdSan 1B Group 1 Sanborn, LLC, EdSan 1B Group 1 Edwards, LLC, Sagebrush Line, LLC, Sagebrush ESS, LLC, ES 1A Group 3 Opco, LLC, ES 1A Group 2 Opco, LLC, Edwards Sanborn Storage II, LLC, Edwards Sanborn Storage I, LLC, Valley Center ESS, LLC, Voyager Wind IV Expansion, LLC, Painted Hills Wind Holdings, LLC, Tehachapi Plains Wind, LLC, Oasis Alta, LLC, Coachella Wind Holdings, LLC, Coachella Hills Wind, LLC, Terra-Gen VG Wind, LLC, Mojave 16/17/18 LLC, Mojave 3/4/5 LLC, LUZ Solar Partners IX, Ltd., Garnet Wind, LLC, Yavi Energy, LLC, Voyager Wind II, LLC, Terra-Gen Mojave Windfarms, LLC, DifWind Farms LTD VI, Voyager Wind I, LLC, Cameron Ridge II, LLC, San Gorgonio Westwinds II—Windustries, LLC, Ridgetop Energy, LLC, Pacific Crest Power, LLC, San Gorgonio Westwinds II, LLC, Cameron Ridge, LLC, TGP Energy Management, LLC, Oasis Power Partners, LLC, Alta Oak Realty, LLC.

Description: Notice of Non-Material Change in Status of Alta Oak Realty, LLC, et al.
Filed Date: 4/26/24.
Accession Number: 20240426–5391.
Comment Date: 5 p.m. ET 5/17/24.

Docket Numbers: ER22–2116–005; ER22–2115–005.
Applicants: Timber Road Solar Park LLC, Blue Harvest Solar Park LLC.
Description: Notice of Change in Status of Blue Harvest Solar Park LLC, et al.
Filed Date: 4/29/24.
Accession Number: 20240429–5352.
Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER23–1584–002.
Applicants: Pearl River Solar Park LLC.
Description: Notice of Non-Material Change in Status of Pearl River Solar Park LLC.
Filed Date: 4/29/24.
Accession Number: 20240429–5354.
Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER24–55–002.
Applicants: Silver Peak Energy, LLC.
Description: Notice of Change in Status of Silver Peak Energy, LLC.
Filed Date: 4/29/24.
Accession Number: 20240429–5454.
Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER24–1376–001.
Applicants: Yuma Solar Energy LLC.
Description: Tariff Amendment: Response to Request for Additional Information to be effective 3/1/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5001.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1865–000.
Applicants: GridLiance West LLC.
Description: § 205(d) Rate Filing: GridLiance West VEA Upgrades CWIP filing to be effective 6/28/2024.
Filed Date: 4/29/24.
Accession Number: 20240429–5325.
Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER24–1866–000.
Applicants: Power Authority of the State of New York, New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: Power Authority of the State of New York submits tariff filing per 35.13(a)(2)(iii: NYPA Section 205 filing of formula rate template revisions to be effective 7/1/2024.
Filed Date: 4/29/24.
Accession Number: 20240429–5336.
Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER24–1867–000.
Applicants: Puget Sound Energy, Inc.
Description: § 205(d) Rate Filing: Certificate of Concurrence and a Tariff Record SA 5105 to be effective 4/12/2024.
Filed Date: 4/29/24.
Accession Number: 20240429–5348.
Comment Date: 5 p.m. ET 5/20/24.

Docket Numbers: ER24–1868–000
Applicants: El Paso Electric Company.
Description: Compliance filing: OATT Attachment M and N revisions to be effective 6/3/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5002.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1869–000.
Applicants: VESI Pomona Energy Storage, Inc.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5011.
Comment Date: 5 p.m. ET 5/21/24.

Docket Numbers: ER24–1870–000.
Applicants: USG Nevada LLC.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariffs to be effective 6/30/2024.
Filed Date: 4/30/24.
Accession Number: 20240430–5012.
Comment Date: 5 p.m. ET 5/21/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

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Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09837 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–239–000]

ANR Pipeline Company; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on April 26, 2024, ANR Pipeline Company (ANR), 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700, filed in the above referenced docket, a prior notice request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and ANR's blanket certificate issued in Docket No. CP82–480–000, for authorization to abandon one injection/withdrawal well located in its Loreed Storage Field in Osceola County, Michigan (Loreed PN 8868 Well Abandonment Project). The project will allow ANR to limit integrity risk in alignment with the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration's Storage Final Rule. ANR estimates the cost for the project to be $265,000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the

Public Reference Room at *public.referenceroom@ferc.gov.*

Any questions concerning this request should be directed to David A. Alonzo, Manager of Project Authorizations, ANR Pipeline Company, 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700, at (832) 320–5477, or *david_alonzo@tcenergy.com.*

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on July 1, 2024. How to file protests, motions to intervene, and comments is explained below.

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Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is July 1, 2024. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is July 1, 2024. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before July 1, 2024. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP24–239–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP24–239–000.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To file via any other method: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: David A. Alonzo, Manager of Project Authorizations, ANR Pipeline Company, 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700, or *david_alonzo@tcenergy.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: April 30, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09834 Filed 5–6–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2024–0093; FRL–11877–01–OCSPP]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations and/or Amend Registrations To Terminate Certain Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by the registrants to voluntarily cancel their registrations of certain products and/or to amend their product registrations to terminate one or more uses. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled and/or uses terminated only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before June 6, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2024–0093, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2707; email address: *green.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets.*

II. What action is the Agency taking?

This notice announces receipt by EPA of requests from registrants to cancel certain and/or terminate certain pesticide product registrations. The affected products and the registrants making the requests are identified in Tables 1–3 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order canceling and/or amending the affected registrations.

TABLE 1—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name	Active ingredients
4–473	4	Bonide Garden Dust	Basic copper sulfate (008101/1344–73–6)—(5%), Pyrethrins (069001/8003–34–7)—(.03%), Sulfur (077501/7704–34–9)—(25%).
4–474	4	Bonide Vegetable-Floral Dust	Basic copper sulfate (008101/1344–73–6)—(13.72%), Carbaryl (056801/63–25–2)—(1.25%).
100–1441	100	Bravo Top	Chlorothalonil (081901/1897–45–6)—(40%), Difenoconazole (128847/119446–68–3)—(4%).
228–423	228	DQD Selective Herbicide	2,4–D, dimethylamine salt (030019/2008–39–1)—(25.4%), Dicamba (029801/1918–00–9)—(2.64%), Quinclorac (128974/84087–01–4)—(7.91%).
228–594	228	Quincept Herbicide Ready to Use	2,4–D, dimethylamine salt (030019/2008–39–1)—(.331%), Dicamba (029801/1918–00–9)—(.034%), Quinclorac (128974/84087–01–4)—(.206%).
228–703	228	Quincept LT Herbicide Ready-to-Use	2,4–D (030001/94–75–7)—(.331%), Dicamba (029801/1918–00–9)—(.034%), Quinclorac (128974/84087–01–4)—(.137%).

TABLE 1—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name	Active ingredients
228–704	228	Quincept LT Herbicide Premium Lawn Weed Killer Concentrate.	2,4–D (030001/94–75–7)—(6.557%), Dicamba (029801/1918–00–9)—(.681%), Quinclorac (128974/84087–01–4)—(2.724%).
228–705	228	NUP–09066 Herbicide	2,4–D (030001/94–75–7)—(13.2%), Dicamba (029801/1918–00–9)—(1.38%), Quinclorac (128974/84087–01–4)—(5.5%).
228–706	228	Quincept LT MC	2,4–D (030001/94–75–7)—(13.2%), Dicamba (029801/1918–00–9)—(1.38%), Quinclorac (128974/84087–01–4)—(5.5%).
279–3372	279	FMC Mop Up	Boron sodium oxide (B8Na2O13), tetrahydrate (12280–03–4) (011103/12280–03–4)—(98%).
279–3384	279	Roach Kil Commercial	Boric acid (011001/10043–35–3)—(99%).
279–3385	279	DRAX Ant Kill Gel	Boric acid (011001/10043–35–3)—(5%).
279–3386	279	DRAX Ant Kil-PF	Boric acid (011001/10043–35–3)—(5%).
279–3387	279	Aerosol Boric Acid	Boric acid (011001/10043–35–3)—(20%).
279–3398	279	DRAX Roach Assault SWT	Boric acid (011001/10043–35–3)—(50%).
279–3399	279	DRAX Liquid Ant Killer II SWT	Boric acid (011001/10043–35–3)—(1%).
279–3400	279	DRAX Granular Bait with Boric Acid & Nylar	Boric acid (011001/10043–35–3)—(1%), Pyriproxyfen (129032/95737–68–1)—(.25%).
279–3402	279	DRAX Bait Station	Boric acid (011001/10043–35–3)—(5%).
279–3403	279	DRAX—PF Bait Station	Boric acid (011001/10043–35–3)—(5%).
279–3565	279	Edition BroadSpec Herbicide	Thifensulfuron (128845/79277–27–3)—(25%), Tribenuron-methyl (128887/101200–48–0)—(25%).
279–3576	279	Solida Herbicide	Rimsulfuron (129009/122931–48–0)—(25%).
352–938	352	Fexapan Plus Vaporgrip Technology	Dicamba, diglycolamine salt (128931/104040–79–1)—(42.8%).
499–535	499	LX417 Lambda-Cyhalothrin	Lambda-Cyhalothrin (128897/91465–08–6)—(9.7%).
4822–607	4822	Lauda	1-Decanaminium, N,N-dimethyl-N-octyl-, chloride (069165/32426–11–2)—(.072%), 1-Decanaminium, N-decyl-N,N-dimethyl-, chloride (069149/7173–51–5)—(.036%), 1-Octanaminium, N,N-dimethyl-N-octyl-, chloride (069166/5538–94–3).—(.036%), Alkyl* dimethyl benzyl ammonium chloride *(50%C14, 40%C12, 10%C16) (069105/68424–85–1)—(.096%).
42750–253	42750	Captan 4L ST	Captan (081301/133–06–2)—(38.75%).
67979–38	67979	BT11 X MIR162 X MIR604 and BT11 X MIR604 Corn.	Bacillus thuringiensis CryIA(b) delta-endotoxin and the genetic material necessary for its production (plasmid vector pZ01502) in corn, when used as a plant pesticide in all raw agricultural commodities of field corn, sweet corn and popcorn. (006461/)—(.001829%), Bacillus thuringiensis Vip3Aa20 protein encoded by vector pNOV1300 in event MIR162 corn (SYN–IR162–4), % dw (006599/)—(.0088%), Modified Cry3A protein and the genetic material necessary for its production (via elements of pZM26) in Event MIR604 corn (006509/)—(.002757%).
67979–39	67979	BT11 X MIR604 X TC1507 X 5307 and BT11 X MIR162 X MIR604 X TC1507 X 5307 5% Refuge Seed Blend Corn.	Bacillus Thuringiensis eCry3.1Ab protein and the genetic material necessary for its production (vector pSYN12274) in Event 5307 corn (SYN–05307–1) (016483/)—(.00261%), Bacillus thuringiensis Cry1F protein and the genetic material necessary for its production (plasmid insert PHI8999) in corn (006481/)—(.00122%), Bacillus thuringiensis CryIA(b) delta-endotoxin and the genetic material necessary for its production (plasmid vector pZ01502) in corn, when used as a plant pesticide in all raw agricultural commodities of field corn, sweet corn and popcorn. (006461/)—(.00495%), Bacillus thuringiensis Vip3Aa20 protein encoded by vector pNOV1300 in event MIR162 corn (SYN–IR162–4), % dw (006599/)—(.00431%), Modified Cry3A protein and the genetic material necessary for its production (via elements of pZM26) in Event MIR604 corn (006509/)—(.0006%).
71771–12	71771	PHC–91398	Ea peptide 91398 (005200/)—(1%).
71840–14	71840	Tricho Plus Biofungicide	Trichoderma asperelloides strain JM41R (119000/)—(5.5%).
71840–15	71840	Trichoderma Asperelloides Strain JM41R Technical.	Trichoderma asperelloides strain JM41R (119000/)—(100%).
89635–4	89635	KM1110 WDG	Metschnikowia fructicola NRRL Y–27328 (012244/)—(58.5%).
91234–369	91234	X1110.28	Chlorantraniliprole (090100/500008–45–7)—(47.85%).
93653–5	93653	ZS 2,4–D Technical	2,4–D (030001/94–75–7)—(98.5%).
AR–070008	279	Spartan 4F	Sulfentrazone (129081/122836–35–5)—(39.6%).
ID–180005	10163	Magister SC Miticide	Fenazaquin (044501/120928–09–8)—(18.79%).

TABLE 1—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name	Active ingredients
KS–150002	352	Dupont Realm Q Herbicide	Mesotrione (122990/104206–82–8)—(31.25%), Rimsulfuron (129009/122931–48–0)—(7.5%).
LA–150005	352	Dupont Realm Q Herbicide	Mesotrione (122990/104206–82–8)—(31.25%), Rimsulfuron (129009/122931–48–0)—(7.5%).
MN–120004	279	AIM EC	Carfentrazone-ethyl (128712/128639–02–1)—(22.3%).
OR–100009	279	Dupont Coragen Insect Control	Chlorantraniliprole (090100/500008–45–7)—(18.4%).
OR–130012	19713	Drexel Captan 4 Flowable Seed Protectant	Captan (081301/133–06–2)—(37.99%).
OR–170004	279	Dupont Verimark Insect Control	Cyantraniliprole (090098/736994–63–1)—(18.66%).
OR–180011	33906	Quintec	Quinoxyfen (055459/878790–59–1)—(22.58%).
OR–220008	68506	UVASYS	Sodium metabisulfite (111409/7681–57–4)—(36.5%).
OR–960025	10163	Beacon Herbicide	Primisulfuron-methyl (128973/86209–51–0)—(75%).
TN–140002	352	Dupont Realm Q Herbicide	Mesotrione (122990/104206–82–8)—(31.25%), Rimsulfuron (129009/122931–48–0)—(7.5%).
TX–180006	70506	Comite II	Propargite (097601/2312–35–8)—(69.6%).
TX–180007	70506	Terrazole 4EC	Etridiazole (084701/2593–15–9)—(44.3%).
TX–220004	71512	Tiafenacil 339SC Herbicide	Tiafenacil (012311/1220411–29–9)—(30%).
VA–150005	279	F6482 45DF Herbicide	Metribuzin (101101/21087–64–9)—(27%), Sulfentrazone (129081/122836–35–5)—(18%).
WI–190002	10163	Sonalan HFP	Ethalfluralin (113101/55283–68–6)—(35.4%)

TABLE 2—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT

Registration No.	Company No.	Product name	Active ingredient	Uses to be terminated
1021–1682	1021	Multicide Intermediate 2738	Cyphenothrin (129013/39515–40–7)—(13.34%), MGK 264 (057001/113–48–4)—(12.77%), Prallethrin (128722/23031–36–9)—(1%).	Human Article use.
1021–1770	1021	Evergreen Crop Protection EC 60–6.	Piperonyl butoxide (067501/51–03–6)—(60%), Pyrethrins (069001/8003–34–7)—(6%).	Residential space spray use.
39967–128	39967	N–2050–PG Antimicrobial	Dodecylguanidine hydrochloride (044303/13590–97–1)—(35%).	Sewage disposal lagoon use.
42750–230	42750	Captan Technical	Captan (081301/133–06–2)—(95.9%).	Seed treatment use.
85678–13	85678	Captan 4L	Captan (081301/133–06–2)—(37.7%).	Seed treatment use.
98985–6	98985	Ike's Pest Killer	Bifenthrin (128825/82657–04–3)—(7.9%).	Pet Kennels and Indoor use for Hornets and Yellow Jackets

Table 3 of this unit includes the names and addresses of record for the registrants of the products listed in Table 1 and Table 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 and Table 2 of this unit.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA company No.	Company name and address
4	Bonide Products, LLC, 6301 Sutliff Road, Oriskany, NY 13424.
100	Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box: 18300, Greensboro, NC 27419–8300.
228	NuFarm Americas, Inc., Agent Name: NuFarm Americas, Inc., 4020 Aerial Center Pkwy., Ste. 101, Morrisville, NC 27560.
279	FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104.
352	Corteva Agriscience, LLC, 9330 Zionsville Road, Indianapolis, IN 46268.
499	BASF Corporation, 26 Davis Drive, P.O. Box: 13528, Research Triangle Park, NC 27709–3528.
1021	McLaughlin Gormley King Company D/B/A MGK, 7325 Aspen Lane N, Minneapolis, MN 55428.
4822	S.C. Johnson & Son, Inc., 1525 Howe Street, Racine, WI 53403.
10163	Gowan Company, LLC, 370 S Main St., Yuma, AZ 85366.
19713	Drexel Chemical Company, P.O. Box: 13327, Memphis, TN 38113–0327.
33906	Nissan Chemical Corporation, Agent Name: Lewis & Harrison, LLC, 2461 South Clark Street, Suite 710, Arlington, VA 22202.
39967	Lanxess Corporation, 111 RIDC Park West Drive, Pittsburgh, PA 15275–1112.
42750	Albaugh, LLC, 1525 NE 36th Street, Ankeny, IA 50021.
67979	Syngenta Seeds, LLC—Field Crops—NAFTA, 9 Davis Drive, Research Triangle Park, NC 27709.
68506	Tessara (PTY) Ltd., Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th St. Ct. NW, Gig Harbor, WA 98332.
70506	MacDermid Agricultural Solutions, Inc., Agent Name: UPL NA, Inc., 630 Freedom Business Center, Suite 402, King Of Prussia, PA 19406.
71512	ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, OH 44077.
71771	Plant Health Care, Inc., Agent Name: Ramboll, 4245 North Fairfax Drive, Suite 700, Arlington, VA 22203.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS—Continued

EPA company No.	Company name and address
71840	BASF Corporation, 26 Davis Drive, P.O. Box: 13528, Research Triangle Park, NC 27709.
85678	RedEagle International, LLC, Agent Name: Wagner Regulatory Associates, Inc., 7217 Lancaster Pike, Suite A, P.O. Box: 640, Hockessin, DE 19707.
89635	Koppert Biological Systems, Inc., 1502 Old US 23, Howell, MI 48843.
91234	Atticus, LLC, Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332–9122.
93653	ZSChem USA, Inc., Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332.
98985	Ike's, LLC, Agent Name: Wagner Regulatory Associates, 7217 Lancaster Pike, Suite A, P.O. Box: 640, Hockessin, DE 19707.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use termination should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the requests for voluntary cancellation and/or amendments to terminate uses are granted, the Agency intends to publish the cancellation order in the **Federal Register**.

In any order issued in response to these requests for cancellation of product registrations and/or for amendments to terminate uses, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in Tables 1 and 2 of Unit II.

For: 352–938

For 352–98, Corteva, the registrant of the product subject to this cancellation order, did not request that EPA allow the continued sale, distribution, or use of existing stocks of this product. Additionally, Corteva confirmed that they ceased selling this product in 2021. Thus, all sale, distribution, and use of existing stocks of this product is prohibited, except for the sale or distribution of this product for export consistent with FIFRA section 17 (7 U.S.C. 136o) and for proper disposal.

For all other voluntary product cancellations, registrants will be permitted to sell and distribute existing stocks of voluntarily canceled products for 1 year after the effective date of the cancellation, which will be the date of publication of the cancellation order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products identified in Table 1 of Unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Once EPA has approved product labels reflecting the requested amendments to terminate uses, registrants will be permitted to sell or distribute products under the previously approved labeling for a period of 18 months after the date of **Federal Register** publication of the cancellation order, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the terminated uses identified in Table 2 of Unit II, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of canceled products and/or products whose labels include the terminated uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products and/or terminated uses.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 30, 2024.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2024–09887 Filed 5–6–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2024–0093; FRL–11876–01–OCSPP]

Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations and/or Amend Registrations To Terminate Certain Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by the registrants to voluntarily cancel their registrations of certain products and/or to amend their product registrations to terminate one or more uses. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrants withdraw its requests. If these requests are granted, any sale,

distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled and/or uses terminated only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before November 4, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2024–0093, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2707; email address: *green.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets.*

II. What action is the Agency taking?

This notice announces receipt by EPA of requests from registrants to cancel certain and/or terminate certain uses of pesticide product registrations. The affected products and the registrants making the requests are identified in tables 1–3 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order canceling and/or amending the affected registrations.

TABLE 1—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name	Active ingredients
44446–67	44446	Concept Hospital Disinfectant Deodorant	4-tert-Amylphenol (064101/80–46–6)—(.05%), Ethanol (001501/64–17–5)—(53%), o-Phenylphenol (NO INERT USE) (064103/90–43–7)—(.2%).
85588–13	85588	AgSurf MSM Herbicide	Metsulfuron (122010/74223–64–6)—(60%).

TABLE 2—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT

Registration No.	Company No.	Product name	Active ingredient	Uses to be terminated
53883–197	53883	Lambda 0.5% Concentrate	lambda-Cyhalothrin (128897/91465–08–6)—(.5%).	Lawn & turf use in residential settings.

Table 3 of this unit includes the name and addresses of record for the registrants of the products listed in table 1 and table 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in table 1 and table 2 of this unit.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA company No.	Company name and address
44446	QuestSpecialty Corporation, P.O. Box: 624, Brenham, TX 77834.
53883	Control Solutions, Inc., 5903 Genoa Red Bluff Road, Pasadena, TX 77507.
85588	AgSurf Corporation, 9805 Statesville Road, Suite 6309, Charlotte, NC 28269.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section

6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants have not requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 180-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use termination should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the requests for voluntary cancellation and/or amendments to terminate uses are granted, the Agency intends to publish the cancellation order in the **Federal Register**.

In any order issued in response to these requests for cancellation of a product registration and/or for an amendment to terminate uses, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in tables 1 and 2 of unit II.

For: 85588–13

For *85588–13,* AgSurf Corporation, the registrant of the product subject to this cancellation notice, requests an existing stocks provision allowing the continued sale and distribution of the affected product until 18 months after the cancellation is published in the **Federal Register**.

For all other voluntary product cancellations, registrants will be permitted to sell and distribute existing stocks of voluntarily canceled products for 1 year after the effective date of the cancellation, which will be the date of publication of the cancellation order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products identified in table 1 of unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Once EPA has approved product labels reflecting the requested amendments to terminate uses, registrants will be permitted to sell or distribute products under the previously approved labeling for a period of 18 months after the date of **Federal Register** publication of the cancellation order, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the terminated uses identified in table 2 of unit II, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of canceled products and/or products whose labels include the terminated uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products and/or terminated uses.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 30, 2024.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2024–09885 Filed 5–6–24; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2024–6010]

Agency Information Collection Activities: Submission to the Office of Management and Budget for Review and Approval; Comment Request; Export-Import Bank Report of Premiums Payable for Exporters Only

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Export-Import Bank of the United States (EXIM), pursuant to the Export-Import Bank Act of 1945, as amended, facilitates the finance of the export of U.S. goods and services. As part of its continuing effort to reduce paperwork and respondent burden, EXIM invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the paperwork Reduction Act of 1995.

DATES: Comments must be received on or before July 8, 2024 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 92–29), by email to Cristina Conti *Conti@exim.gov,* or by mail to Cristina Conti, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571.

FOR FURTHER INFORMATION CONTACT: To request additional information please contact Cristina Conti, *Cristina.conti@exim.gov,* 202–565–3804.

SUPPLEMENTARY INFORMATION: The ''Report of Premiums Payable for Exporters Only'' form is used by exporters to report and pay premiums on insured shipments to various foreign buyers under the terms of the policy and to certify that premiums have been correctly computed and remitted. Individual transactions that an exporter may have with the same foreign borrower can be sub-totaled and entered as a single line item for the specific month provided the length of payment term is identical. The use of sub-totals reduces the administrative burden on the exporter. The 'Report of Premiums Payable for Exporters Only' is used by the Bank to determine the eligibility of the shipment(s) and to calculate the premium due to Ex-Im Bank for its support of the shipment(s) under its insurance program.

No changes are being made to the form in use.

The application tool can be reviewed at *https://img.exim.gov/s3fs-public/forms/eib92-29.pdf.*

Title and Form Number: EIB 92–29 Export-Import Bank Report of Premiums Payable for Exporters Only.

OMB Number: 3048–0017.

Type of Review: Regular.

Need and Use: The ''Report of Premiums Payable for Exporters Only'' form is used by exporters to report and pay premiums on insured shipments to various foreign buyers under the terms of the policy and to certify that premiums have been correctly computed and remitted. The collection provides EXIM staff with the information necessary to monitor the borrower's payments for exported goods covered under its short and medium-term export credit insurance policies. It also alerts EXIM staff of defaults, so they can manage the portfolio in an informed manner.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 2,000.

Estimated Time per Respondent: 15 minutes.

Annual Burden Hours: 6,000 hours.

Frequency of Reporting or Use: Monthly.

Dated: May 1, 2024.

Kalesha Malloy,

IT Specialist.

[FR Doc. 2024–09860 Filed 5–6–24; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1151; FR ID 217642]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before June 6, 2024.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–1151.

Title: Sections 1.1411, 1.1412, 1.1415, and 1.1416 Pole Attachment Access and Dispute Resolution Requirements.

Form Number: FCC Form 5653.

Type of Review: Revision of a currently-approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 1,380 respondents; 165,009 responses.

Estimated Time per Response: 0.25—5 hours.

Frequency of Response: On-occasion reporting requirement, recordkeeping requirement, and third-party disclosure requirement.

Obligation to Respond: Mandatory or required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 224.

Total Annual Burden: 120,980 hours.

Total Annual Cost: $1,800.

Needs and Uses: The Commission is requesting Office of Management and Budget (OMB) approval for a revision to a currently approved information collection. In *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17–84, Fourth Report and Order, FCC 23–109 (rel. December 15, 2023) (Order), the Commission adopted rules that implement the pole attachment requirements in section 224 of the Communications Act of 1934, as amended. The Order substantially revised 47 CFR 1.1411, redesignated existing 47 CFR 1.1415 as 47 CFR 1.1416, and added a new 47 CFR 1.1415.

Section 1.1411. In the Order, the Commission adopted regulations requiring utilities to share information about their poles with prospective telecommunications and cable attachers. The Commission created this requirement to help improve the attachment process and potentially reduce disputes, thus facilitating broadband deployment. Specifically, the Order requires utilities to provide to potential attachers, upon request, the information contained in their most recent cyclical pole inspection reports, or any intervening, periodic reports created before the next cyclical inspection, for the poles covered by a submitted attachment application, including whether any of the affected poles have been ''red tagged'' by the utility for replacement and the scheduled replacement date or timeframe (if any). For the purposes of this new transparency requirement, a cyclical pole inspection report is any report that a utility creates in the normal course of its business that sets forth the results of the routine inspection of its poles during the utility's normal pole inspection cycle, while a periodic pole inspection report is any report that a utility creates in the normal course of its business that sets forth the results of the inspection of any of its poles outside the utility's normal pole inspection cycle.

When asking for information about the status of a utility's poles for a

planned buildout, the attacher must submit its information request no earlier than contemporaneously with an attachment application. The utility will have ten business days to respond to the request. Where an attacher amends its application based on the information it receives from the utility, the utility will have the option to restart the 45-day period for responding to the application on the merits and conducting the required make-ready survey. Regardless of whether the utility elects to restart the 45-day response period, any additional survey costs necessitated by the amended application, such as a second survey after a survey for the original application has been completed, will be borne by the new attacher consistent with the new attacher's obligation to pay for make-ready costs associated with its application.

The Commission also required utilities to retain copies, in whatever form they were created, of any such cyclical or periodic pole inspection reports they conduct in the normal course of business, until such time as the utility completes a superseding cyclical pole inspection report covering the poles included in the attachment application. The Commission reiterated that utilities are required to provide only the information they already possess and track in the normal course of conducting pole inspections at the time of the attacher's request for data. The Commission did not require utilities to collect or create new information for the purpose of responding to such requests or to provide all information they may possess on the affected poles outside their pole inspection reports. The Commission found that adopting this limited requirement achieves a balance between a potential attacher's need for more information about the poles that it plans to use as part of a broadband buildout and the utility's interest in minimizing the burden of mandatory disclosures.

Section 1.1415. To expedite the resolution of pole attachment disputes that impede or delay active broadband deployment projects, the Commission established the Rapid Broadband Assessment Team (RBAT), which will consist of one or more staff from the Commission's Enforcement Bureau and one or more staff from the Commission's Wireline Competition Bureau. The Commission created the RBAT in an effort to make the Commission's pole attachment dispute resolution process more responsive and adaptable with the goal of facilitating broadband deployment. The Order charged the RBAT with expediting the resolution of such disputes by swiftly engaging key stakeholders, gathering relevant information, distilling issues in dispute, and recommending to the parties, where appropriate, an abbreviated mediation process, placement of a complaint (or portion of a complaint) on the Commission's Accelerated Docket based on consideration of specified criteria, and/or any other action that the RBAT determines will help the parties resolve their dispute.

To request RBAT review and assessment of a dispute that a party to the dispute contends is impeding or delaying deployment of broadband facilities, the party must first notify the Chief of the Enforcement Bureau's Market Disputes Resolution Division (MDRD) of the request by phone and in writing. The MDRD Chief will direct the party to FCC Form 5653—Request for RBAT Review and Assessment—on the MDRD website and to instructions for completing and electronically transmitting the form to the RBAT. The form will elicit information relevant to the scope and nature of the dispute, and to whether the dispute is appropriate for expedited mediation and/or placement on the Accelerated Docket. The information submitted by a party on the FCC Form 5653 will assist the RBAT in efficiently reviewing and assessing the party's dispute and in providing guidance on the most effective means of resolving it. The RBAT also may request that one or both parties provide the RBAT with documentation or other information relevant to the dispute. After reviewing the parties' submissions, the RBAT will provide guidance and advice to the parties on the most effective means of resolving their dispute, including staff-supervised mediation, use of the Accelerated Docket, and/or other action.

Should the RBAT recommend staff-supervised mediation, it shall be conducted pursuant to 47 CFR 1.737, the requirements of which may be modified or waived as appropriate in this context or as needed in light of the facts or circumstances of a particular case. In the event that the parties are unable to settle their dispute, and a prospective complainant seeks placement of its complaint on the Accelerated Docket, the RBAT will decide whether the complaint or a portion of the complaint is suitable for inclusion on the Accelerated Docket based on a totality of the factors listed in 47 CFR 1.1415(e).

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–09839 Filed 5–6–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1162; FR ID 218294]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before June 6, 2024.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on

the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–1162.

Title: Closed Captioning of Video Programming Delivered Using internet Protocol, and Apparatus Closed Caption Requirements.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or Household, Businesses or other for-profit, Not-for-profit institutions, State, local, or tribal government, Federal Government.

Number of Respondents and Responses: 1,172 respondents; 3,341 responses.

Estimated Time per Response: 0.084–10 hours.

Frequency of Response: One time and on occasion reporting requirements; Recordkeeping requirement; Third party disclosure requirement.

Obligation to Respond: Mandatory; Required to obtain or retain benefits. The statutory authority for this collection is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617.

Total Annual Burden: 9,197 hours.

Total Annual Cost: $95,700.

Needs and Uses: The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) directed the Commission to revise its regulations to mandate closed captioning on video programming delivered via internet Protocol (IP) that was published or exhibited on television with captions after the effective date of the regulations. Accordingly, the Commission requires video programming owners (VPOs) to send program files to video programming distributors and providers (hereinafter VPDs) with required captions, and it requires VPDs to enable the rendering or pass through of all required captions to the end user. The CVAA also directed the Commission to revise its regulations to mandate that all apparatus designed to receive, play back, or record video programming be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming, except that apparatus that use a picture screen that is 13 inches or smaller and recording devices must comply only if doing so is achievable. These rules are codified at 47 CFR 79.4 and 79.100–79.104.

The information collection requirements consist of:

(a) Mechanism for information about video programming subject to the IP closed captioning requirements.

Pursuant to 47 CFR 79.4(c)(1)(ii) and (c)(2)(ii) of the Commission's rules, VPOs and VPDs must agree upon a mechanism to make information available to VPDs about video programming that becomes subject to the requirements of 47 CFR 79.4 on an ongoing basis. VPDs must make a good faith effort to identify video programming that must be captioned when delivered using IP using the agreed upon mechanism.

For example, VPOs and VPDs may agree on a mechanism whereby the VPOs provide captions or certifications that captions are not required, and update those certifications and provide captions when captions later become required. A VPD may rely in good faith on a certification by a VPO that the programming need not be captioned if: (1) the certification includes a clear and concise explanation of why captions are not required; and (2) the VPD is able to produce the certification to the Commission in the event of a complaint. VPOs may provide certifications for specific programming or a more general certification, for example, for all programming covered by a particular contract.

VPDs may seek Commission determinations that other proposed mechanisms provide adequate information for them to rely on in good faith by filing an informal request and providing sufficient information for the Commission to make such determinations.

(b) Contact information for the receipt and handling of written closed captioning complaints.

Pursuant to 47 CFR 79.4(c)(2)(iii), VPDs must make their contact information available to end users for the receipt and handling of written IP closed captioning complaints. The required contact information includes the name of a person with primary responsibility for IP captioning issues and who can ensure compliance with these rules, as well as the person's title or office, telephone number, fax number, postal mailing address, and email address. VPDs must keep this information current and update it within 10 business days of any change. The Commission expects that such contact information will be prominently displayed in a way that it is accessible to all end users. A general notice on the VPD's website with such contact information, if provided, must be provided in a location that is conspicuous to viewers.

(c) Petitions for exemption based on economic burden.

Pursuant to 47 CFR 79.4(d), a VPO or VPD may petition the Commission for a full or partial exemption from the closed captioning requirements for IP-delivered video programming based upon a showing that they would be economically burdensome. Petitions for exemption must be supported with sufficient evidence to demonstrate economic burden (significant difficulty or expense). The Commission will consider four specific factors when determining economic burden and any other factors the petitioner deems relevant, along with any available alternatives that might constitute a

reasonable substitute for the closed captioning requirements. The Commission will evaluate economic burden with regard to the individual outlet. Petitions and subsequent pleadings must be filed electronically.

The Commission will place such petitions on public notice. Comments or oppositions to the petition may be filed electronically within 30 days after release of the public notice of the petition, and must include a certification that the petitioner was served with a copy. The petitioner may reply to any comments or oppositions filed within 20 days after the close of the period for filing comments or oppositions, and replies must include a certification that the commenting or opposing party was served with a copy. Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements. Petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(d) Complaints alleging violations of the closed captioning rules for IP-delivered video programming.

Pursuant to 47 CFR 79.4(e), a written complaint alleging a violation of the closed captioning rules for IP-delivered video programming may be filed with the Commission or with the VPD responsible for enabling the rendering or pass through of the closed captions for the video programming. Complaints must be filed within 60 days after the date the complainant experienced a problem with captioning. Complaints should (but are not required to) include certain information.

If the complaint is filed first with the VPD, the VPD must respond in writing to the complainant within 30 days after receipt of a closed captioning complaint. If a VPD fails to respond timely, or the response does not satisfy the consumer, the complainant may re-file the complaint with the Commission within 30 days after the time allotted for the VPD to respond. If a consumer re-files the complaint with the Commission (after filing with the VPD) and the complaint satisfies the requirements, the Commission will forward the complaint to the named VPD, as well as to any other VPD and/or VPO that Commission staff determines may be involved, who then must respond in writing to the Commission and the complainant within 30 days after receipt of the complaint from the Commission.

If the complaint is filed first with the Commission and the complaint satisfies the requirements, the Commission will forward the complaint to the named VPD and/or VPO, and to any other VPD and/or VPO that Commission staff determine may be involved, who must respond in writing to the Commission and the complainant within 30 days after receipt of the complaint from the Commission. In response to a complaint, a VPD and/or VPO must provide the Commission with sufficient records and documentation. The Commission will review all relevant information provided by the complainant and the subject VPDs and/or VPOs, as well as any additional information the Commission deems relevant from its files or public sources. The Commission may request additional information from any relevant entities when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission rules. When the Commission requests additional information, parties to which such requests are addressed must provide the requested information in the manner and within the time period the Commission specifies.

(e) Requests for Commission determination of technical feasibility of apparatus closed caption requirements.

Pursuant to 47 CFR 79.103(a), as of January 1, 2014, all digital apparatus designed to receive or play back video programming that uses a picture screen of any size must be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming, if technically feasible. If new apparatus or classes of apparatus for viewing video programming emerge on which it would not be technically feasible to include closed captioning, parties may raise that argument as a defense to a complaint or, alternatively, file a request under 47 CFR 1.41 for a Commission determination of technical feasibility before manufacturing or importing the product.

(f) Requests for Commission determination of achievability of apparatus closed caption requirements.

Pursuant to 47 CFR 79.103(a), as of January 1, 2014, all digital apparatus designed to receive or play back video programming that use a picture screen less than 13 inches in size must be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming, only if doing so is achievable. In addition, pursuant to 47 CFR 79.104(a), as of January 1, 2014, all apparatus designed to record video programming must enable the rendering or the pass through of closed captions such that viewers are able to activate and de-activate the closed captions as the video programming is played back, only if doing so is achievable.

Manufacturers of such apparatus may petition the Commission, pursuant to 47 CFR 1.41, for a full or partial exemption from the closed captioning requirements before manufacturing or importing the apparatus or may assert as a response to a complaint that these requirements, in full or in part, are not achievable. Pursuant to 47 CFR 79.103(b)(3), such a petition or response must be supported with sufficient evidence to demonstrate that compliance is not achievable (meaning with reasonable effort or expense) and the Commission will consider four specific factors when making such determinations.

(g) Petitions for purpose-based waivers of apparatus closed caption requirements.

Manufacturers seeking certainty prior to the sale of a device may petition the Commission, pursuant to 47 CFR 79.103(b)(4), for a full or partial waiver of the closed captioning requirements based on one of the following provisions:

(i) The apparatus is primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or

(ii) The apparatus is designed for multiple purposes, capable of receiving or playing back video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.

(h) Complaints alleging violations of the apparatus closed caption requirements.

Consumers may file written complaints alleging violations of the Commission's rules, 47 CFR 79.101–79.104, requiring apparatus designed to receive, play back, or record video programming to be equipped with built-in closed caption decoder circuitry or capability designed to display closed captions. A written complaint filed with the Commission must be transmitted to the Consumer and Governmental Affairs Bureau through the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or facsimile. Such complaints should include certain information about the complainant and the alleged violation. The Commission may forward such complaints to the named manufacturer or provider, as well as to any other entity that Commission staff determines may be involved, and may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or

adjudicate potential violations of Commission rules.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–09944 Filed 5–6–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0082; –0084]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collections described below (OMB Control No. 3064–0082; –0084).

DATES: Comments must be submitted on or before July 8, 2024.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Regulatory Counsel, MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street NW), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manny Cabeza, Regulatory Counsel, 202–898–3767, *mcabeza@fdic.gov,* MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collection of information:

1. *Title:* Recordkeeping, Disclosure and Reporting Requirements in Connection with Regulation Z.

OMB Number: 3064–0082.

Form Number: None.

Affected Public: FDIC-Supervised Institutions.

Burden Estimate:

TABLE 1—SUMMARY OF ESTIMATED ANNUAL IMPLEMENTATION BURDEN

[OMB No. 3064–0082]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
Open-End Credit Products: • Not Home-Secured Open-End Credit Plans ○ Credit and Charge Card Provisions					
Timely Settlement of Estate Debts Written Policies and Procedures, 12 CFR 1026.11(c)(1) (Mandatory).	Recordkeeping (On Occasion)	8	1	08:00	64
Ability to Pay Written Policies and Procedures, 12 CFR 1026.51(a)(ii) (Mandatory).	Recordkeeping (On Occasion)	8	1	08:00	64
Mortgage Products (Open and Closed-End): • Valuation Independence ○ Mandatory Reporting					
Implementation of Policies and Procedures, 12 CFR 1026.42(g) (Mandatory).	Recordkeeping (On Occasion)	8	1	20:00	160
Total Annual Implementation Burden (Hours).					288

Source: FDIC.

Note: The estimated annual IC time burden is the product, rounded to the nearest hour, of the estimated annual number of responses and the estimated time per response for a given IC. The estimated annual number of responses is the product, rounded to the nearest whole number, of the estimated annual number of respondents and the estimated annual number of responses per respondent. This methodology ensures the estimated annual burdens in the table are consistent with the values recorded in OMB's consolidated information system.

TABLE 2—SUMMARY OF ESTIMATED ANNUAL ONGOING BURDEN

[OMB No. 3064–0082]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
Open-End Credit Products: • Not Home-Secured Open-End Credit Plans ○ General Disclosure Rules for Not Home-Secured Open-End Credit Plans					

TABLE 2—SUMMARY OF ESTIMATED ANNUAL ONGOING BURDEN—Continued

[OMB No. 3064–0082]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Credit and Charge Card Applications and Solicitations, 12 CFR 1026.60 (Mandatory).	Disclosure (Annual)	478	1	08:00	3,824
2. Account Opening Disclosures, 12 CFR 1026.6(b) (Mandatory).	Disclosure (Annual)	478	1	12:00	5,736
3. Periodic Statements, 12 CFR 1026.7(b) (Mandatory).	Disclosure (Monthly)	478	12	08:00	45,888
4. Annual Statement of Billing Rights, 12 CFR 1026.9(a)(1) (Mandatory).	Disclosure (Annual)	478	1	08:00	3,824
5. Alternative Summary Statement of Billing Rights, 12 CFR 1026.9(a)(2) (Voluntary).	Disclosure (Monthly)	478	12	08:00	45,888
6. Change in Terms Disclosures, 12 CFR 1026.9(b) through (h) (Mandatory).	Disclosure (Annual)	478	1	08:00	3,824
○ Credit and Charge Card Provisions					
7. Timely Settlement of Estate Debts, 12 CFR 1026.11(c)(2) (Mandatory).	Disclosure (On Occasion)	478	61	00:05	2,430
8. Ability to Pay, 12 CFR 1026.51 (Mandatory).	Recordkeeping (Annual)	478	1	12:00	5,736
9. College Student Credit Annual Report, 12 CFR 1026.57(d) (Mandatory).	Reporting (Annual)	478	1	08:00	3,824
10. Submission of Credit Card Agreements, 12 CFR 1026.58(c) (Mandatory).	Reporting (Quarterly)	478	4	03:00	5,736
11. Internet Posting of Credit Card Agreements, 12 CFR 1026.58(d) (Mandatory).	Disclosure (Quarterly)	478	4	06:00	11,472
12. Individual Credit Card Agreements, 12 CFR 1026.58(e) (Mandatory).	Disclosure (On Occasion)	478	14	00:15	1,673
• Home Equity Open-End Credit Plans (HELOC) ○ General Disclosure Rules for HELOC's					
13. Application Disclosures, 12 CFR 1026.40 (Mandatory).	Disclosure (Annual)	2,189	1	12:00	26,268
14. Account Opening Disclosures, 12 CFR 1026.6(a) (Mandatory).	Disclosure (Annual)	2,189	1	12:00	26,268
15. Periodic Statements, 12 CFR 1026.7(a) (Mandatory).	Disclosure (Annual)	2,189	1	08:00	17,512
16. Annual Statement of Billing Rights, 12 CFR 1026.9(a)(1) (Mandatory).	Disclosure (Annual)	2,189	1	08:00	17,512
17. Alternative Summary Statement of Billing Rights, 12 CFR 1026.9(a)(2) (Mandatory).	Disclosure (Annual)	2,189	1	08:00	17,512
18. Change in Terms Disclosures, 12 CFR 1026.9(b) through (h) (Mandatory).	Disclosure (Annual)	2,189	1	08:00	17,512
19. Notice to Restrict Credit, 12 CFR 1026.9(c)(1)(iii); 1026.40(f)(3)(i) and (vi) (Mandatory).	Disclosure (Annual)	2,189	1	02:00	4,378
• All Open-End Credit Plans					
20. Error Resolution, 12 CFR 1026.13 (Mandatory).	Disclosure (On Occasion)	2,265	937	00:01	35,372
Closed-End Credit Products: • General Rules for Closed-End Credit					
21. Other than Real Estate, Home-Secured and Private Education Loans, 12 CFR 1026.17 and 1026.18 (Mandatory).	Disclosure (Annual)	2,551	1	12:00	30,612
• Closed-End Mortgages					

TABLE 2—SUMMARY OF ESTIMATED ANNUAL ONGOING BURDEN—Continued

[OMB No. 3064–0082]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
○ Application and Consummation					
22. Loan Estimate, 12 CFR 1026.19(e); and 1026.37 (Mandatory).	Disclosure (Annual)	2,815	1	08:00	22,520
23. Closing Disclosure, 12 CFR 1026.19(f); and 1026.38 (Mandatory).	Disclosure (Annual)	2,815	1	08:00	22,520
24. Record Retention of Disclosures, 12 CFR 1026.19(e), (f); 1026.37; and 1026.38 (Mandatory).	Recordkeeping (Annual)	2,815	1	00:18	845
○ Post-Consummation Disclosures					
25. Interest Rate and Payment Summary, 12 CFR 1026.18(s) (Mandatory).	Disclosure (Annual)	2,815	1	40:00	112,600
26. No Guarantee to Refinance Statement, 12 CFR 1026.18(t) (Mandatory).	Disclosure (Annual)	2,815	1	08:00	22,520
27. ARMs Rate Adjustments with Payment Change Disclosures, 12 CFR 1026.20(c) (Mandatory).	Disclosure (Annual)	2,815	1	01:30	4,223
28. Initial Rate Adjustment Disclosure for ARMs, 12 CFR 1026.20(d) (Mandatory).	Disclosure (Annual)	2,815	1	02:00	5,630
29. Escrow Cancellation Notice, 12 CFR 1026.20(e) (Mandatory).	Disclosure (Annual)	2,815	1	08:00	22,520
30. Periodic Statements, 12 CFR 1026.41 (Mandatory).	Disclosure (Annual)	2,815	1	08:00	22,520
○ Ability to Repay Requirements					
31. Minimum Standards, 12 CFR 1026.43(c) through (f) (Mandatory).	Recordkeeping (On Occasion)	2,815	1166	00:15	820,573
32. Prepayment Penalties, 12 CFR 1026.43(g) (Mandatory).	Disclosure (On Occasion)	2,815	45	00:12	25,335
Mortgage Products (Open and Closed-End): • Mortgage Servicing Disclosures ○ Payoff Statements					
33. Payoff Statements, 12 CFR 1026.36(c)(3) (Mandatory).	Disclosure (Annual)	2,829	1	08:00	22,632
○ Notice of Sale or Transfer					
34. Notice of Sale or Transfer, 12 CFR 1026.39 (Mandatory).	Disclosure (Annual)	2,829	1	08:00	22,632
• Valuation Independence ○ Mandatory Reporting					
35. Reporting Appraiser Noncompliance, 12 CFR 1026.42(g) (Mandatory).	Reporting (On Occasion)	2,829	1	00:10	472
Reverse and High-Cost Mortgages: • Reverse Mortgages ○ Reverse Mortgage Disclosures					
36. Reverse Mortgage Disclosures, 12 CFR 1026.31(c)(2) and 1026.33 (Mandatory).	Disclosure (Annual)	1	1	24:00	24
• High-Cost Mortgage Loans ○ HOEPA Disclosures and Notice					
37. HOEPA Disclosures and Notice, 12 CFR 1026.32(c) (Mandatory).	Disclosure (Annual)	2,815	1	00:14	657
Private Education Loans: • Initial Disclosures					

TABLE 2—SUMMARY OF ESTIMATED ANNUAL ONGOING BURDEN—Continued

[OMB No. 3064–0082]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
○ Application and Solicitation Disclosures					
38. Application or Solicitation Disclosures, 12 CFR 1026.47(a) (Mandatory).	Disclosure (Annual)	2,755	1	60:00	165,300
○ Approval Disclosures					
39. Approval Disclosures, 12 CFR 1026.47(b) (Mandatory).	Disclosure (Annual)	2,755	1	60:00	165,300
○ Final Disclosures					
40. Final Disclosures, 12 CFR 1026.47(c) (Mandatory).	Disclosure (Annual)	2,755	1	60:00	165,300
Advertising Rules • All Credit Types ○ Open-End Credit					
41. Open-End Credit, 12 CFR 1026.16 (Mandatory).	Disclosure (Annual)	2,265	1	00:20	755
○ Closed-End Credit					
42. Closed-End Credit, 12 CFR 1026.24 (Mandatory).	Disclosure (Annual)	2,856	1	00:20	952
Record Retention: • Evidence of Compliance					
43. Regulation Z in General, 12 CFR 1026.25 (Mandatory).	Recordkeeping (Annual)	2,857	1	00:18	857
Total Annual Ongoing Burden (Hours).					1,959,488

Source: FDIC.

Note: The estimated annual IC time burden is the product, rounded to the nearest hour, of the estimated annual number of responses and the estimated time per response for a given IC. The estimated annual number of responses is the product, rounded to the nearest whole number, of the estimated annual number of respondents and the estimated annual number of responses per respondent. This methodology ensures the estimated annual burdens in the table are consistent with the values recorded in OMB's consolidated information system.

General Description of Collection: Consumer Financial Protection Bureau (CFPB) Regulation Z—12 CFR 1026 implements the Truth in Lending Act (15 U.S.C. 1601, *et seq.*) and certain provisions of the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*). This regulation prescribes uniform methods for computing the cost of credit, the disclosure of credit terms and costs, the resolution of errors and imposes various other recordkeeping, reporting and disclosure requirements. The FDIC has enforcement authority on the requirements of the CFPB's Regulation over the financial institutions it supervises. This information collection captures the recordkeeping, reporting, and disclosure burdens of Regulation Z on FDIC-supervised institutions. To arrive at the estimated annual burden the FDIC assessed the number of potential respondents to the information collection by identifying the number of FDIC-supervised institutions who reported activity that would be within the scope of the information collection requirements according to data from the most recent Call Report. Additionally, the FDIC estimated the frequency of responses to the recordkeeping, reporting, or disclosure requirements by assessing the dollar volume of activity that would be within the scope of the information collection. In some instances, the FDIC used information provided by other sources to estimate the magnitude and scope of activity attributable to FDIC-supervised institutions when more immediate information sources did not exist.

The estimated annual burden, in hours, is the product of the estimated number of respondents per year, estimated number of responses per respondent per year, and estimated hours per response, as summarized in Table 1 for the implementation burden and in Table 2 for the ongoing burden, below. The total estimated annual burden for this Information Collection Request (ICR) is 1,959,766 hours (288 hours estimated implementation burden, plus 1,959,488 hours estimated ongoing burden), which is a decrease of 71,838 hours from the 2021 estimate. As the estimated time per response remained the same from the 2021 ICR, the change in the total estimated annual burden hours is attributable to the decrease in the estimated number of respondents in Table 2.

2. *Title:* Account Based Disclosures in Connection with Consumer Financial Protection Bureau Regulations E and DD and Federal Reserve Regulation CC.

OMB Number: 3064–0084.

Form Number: None.

Affected Public: FDIC-Supervised Institutions.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0084]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
CFPB Regulation E—12 CFR Part 1005					
1. Initial Disclosures: General, 12 CFR 1005.7(b) (Mandatory).	Disclosure (On Occasion)	2,871	83	00:01.5	5,957
2. Initial Disclosures: Payroll Cards, 12 CFR 1005.18(c)(1) (Mandatory).	Disclosure (On Occasion)	6	5,000	00:01.5	750
3. Initial Disclosures: Change in Terms, 12 CFR 1005.8(a) (Mandatory).	Disclosure (On Occasion)	2,871	113	00:01	5,407
4. Error Resolution Rules: General, 12 CFR 1005.8(b), 12 CFR 1005.11 (Mandatory).	Disclosure (On Occasion)	2,871	3	00:30	4,307
5. Error Resolution Rules: Payroll Cards, 12 CFR 1005.18 (Mandatory).	Disclosure (On Occasion)	6	8	00:30	24
6. Prepaid Accounts: New Products—Short Form Disclosure, 12 CFR 1005.18(b)(2), 12 CFR 1005.15(c) (Mandatory).	Disclosure (On Occasion)	2	24.33	40:00	1,960
7. Prepaid Accounts: New Products—Long Form Disclosure, 12 CFR 1005.18(b)(4), 12 CFR 1005.15(c) (Mandatory).	Disclosure (On Occasion)	2	24.33	08:00	392
8. Prepaid Accounts: Implementation—Short Form Additional Fee Type Disclosure, 12 CFR 1005.18(b)(2)(ix) (Mandatory).	Disclosure (On Occasion)	1	1	04:00	4
9. Prepaid Accounts: Implementation—Access to Prepaid Account Information, 12 CFR 1005.18(c)(5), 12 CFR 1005.15(d) (Mandatory).	Recordkeeping (On Occasion)	1	1	24:00	24
10. Prepaid Accounts: Implementation—Error Resolution, 12 CFR 1005.18(e)(2), 12 CFR 1005.11 (Mandatory).	Recordkeeping (On Occasion)	1	1	08:00	8
11. Prepaid Accounts: Implementation—Submission of Agreements, 12 CFR 1005.19(b) (Mandatory).	Reporting (On Occasion)	1	1	01:00	1
12. Prepaid Accounts: Ongoing—Short Form Additional Fee Type Disclosure, 12 CFR 1005.18(b)(2)(ix) (Mandatory).	Disclosure (Annual)	15	1	00:30	8
13. Prepaid Accounts: Ongoing—Access to Prepaid Account Information, 12 CFR 1005.18(c)(5), 12 CFR 1005.15(d) (Mandatory).	Recordkeeping (Annual)	15	1	00:30	8
14. Prepaid Accounts: Ongoing—Error Resolution, 12 CFR 1005.18(e)(2), 12 CFR 1005.11 (Mandatory).	Recordkeeping (Annual)	15	1	00:30	8
15. Prepaid Accounts: Ongoing—Submission of Agreements, 12 CFR 1005.19(b) (Mandatory).	Reporting (Annual)	15	1	00:30	8
16. Gift Cards/Certificates: Implementation—Exclusion Policies and Procedures, 12 CFR 1005.20(b)(2) (Mandatory).	Recordkeeping (On Occasion)	2	1	20:00	40
17. Gift Cards/Certificates: Implementation—Policies & Procedures 12 CFR 1005.20(e)(1) (Mandatory).	Recordkeeping (On Occasion)	2	1	20:00	40
18. Gift Cards/Certificates: Ongoing—Exclusion Policies and Procedures, 12 CFR 1005.20(b)(2) (Mandatory).	Recordkeeping (Annual)	12	1	00:15	3
19. Gift Cards/Certificates: Ongoing—Policies & Procedures 12 CFR 1005.20(e)(1) (Mandatory).	Recordkeeping (Annual)	12	1	00:15	3

SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued

[OMB No. 3064–0084]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
20. Remittances: Implementation—Policies & Procedures for Error Resolution and Retention of Documentation 12 CFR 1005.33(g), 12 CFR 1005.13 (Mandatory).	Recordkeeping (On Occasion)	1	1	08:00	8
21. Remittances: Ongoing—Policies & Procedures for Error Resolution and Retention of Documentation 12 CFR 1005.33(g), 12 CFR 1005.13 (Mandatory).	Recordkeeping (Annual)	122	1	00:30	61
22. Remittance Transfer Disclosures 12 CFR 1005.31 (Mandatory).	Disclosure (Monthly)	122	12	08:00	11,712
23. Error Resolution for Remittance Transfers 12 CFR 1005.33 (Mandatory).	Disclosure (Monthly)	122	12	04:30	6,588
24. Remittance Transfers Scheduled before date of transfer 12 CFR 1005.36 (Mandatory).	Disclosure (Annual)	122	1	08:00	976
CFPB Regulation DD—12 CFR Part 1030					
25. Account disclosures (Upon Request and New Accounts), 12 CFR 1030.4 (Mandatory).	Disclosure (On Occasion)	2,871	170	00:01.5	12,202
26. Change in Terms, 12 CFR 1030.5 (Mandatory).	Disclosure (On Occasion)	2,871	380	00:01	18,183
27. Prematurity (renewal) Notices to Consumers, 12 CFR 1030.5 (Mandatory).	Disclosure (On Occasion)	2,871	340	00:01	16,269
28. Disclosures on Periodic Statements, 12 CFR 1030.6 (Mandatory).	Disclosure (Monthly)	2,871	12	04:00	137,808
29. Advertising, 12 CFR 1030.8 (Mandatory).	Disclosure (Monthly)	2,871	12	00:30	17,226
Federal Reserve Board Regulation CC—12 CFR Part 229					
30. Specific Availability Policy Disclosure (Initial Notice, Upon Request, Upon Change in Policy), 12 CFR 229.16, 12 CFR 229.17, 12 CFR 229.18(d) (Mandatory).	Disclosure (On Occasion)	2,936	140	00:01	6,851
31. Case-by-case Hold Notice to Consumers, 12 CFR 229.16(c) (Mandatory).	Disclosure (On Occasion)	2,936	717	00:03	105,256
32. Notice of Exceptions to Hold Policy, (12 CFR 229.13(g)) (Mandatory).	Disclosure (On Occasion)	2,936	247	00:03	36,260
33. Notice posted where consumers make deposits (Incl. ATMs), 12 CFR 229.18(b), 12 CFR 229.18(c) (Mandatory).	Disclosure (On Occasion)	2,936	1	00:15	734
34. Notice to consumers of changes in policy, 12 CFR 229.18(e) (Mandatory).	Disclosure (On Occasion)	2,936	170	00:01	8,319
35. Annual notice of new ATMs, 12 CFR 229.18(e) (Mandatory).	Disclosure (Annual)	2,936	1	05:00	14,680
36. Notice of nonpayment—notice to depository bank, 12 CFR 229.33(a) and 12 CFR 229.33(d) (Mandatory).	Disclosure (On Occasion)	2,936	2211	00:01	108,192
37. Response to consumer's recredit claim (validation, denial, reversal), 12 CFR 229.54(e) (Mandatory).	Disclosure (On Occasion)	2,936	12	00:15	8,808
38. Bank's claim against an indemnifying bank, 12 CFR 229.55 (Mandatory).	Reporting (On Occasion)	2,936	5	00:15	3,670
39. Consumer awareness disclosure, 12 CFR 229.57 (Mandatory).	Disclosure (On Occasion)	2,936	170	00:01	8,319

SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued

[OMB No. 3064–0084]

Information collection (IC) (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
40. Reg CC Consumer Burden—Expedited recredit claim notice, 12 CFR 229.54(a) and 12 CFR 229.54(b)(2) (Mandatory).	Reporting (On Occasion)	2,936	8	00:15	5,872
Total Annual Burden (Hours):					546,946

Source: FDIC.
Note: The estimated annual IC time burden is the product, rounded to the nearest hour, of the estimated annual number of responses and the estimated time per response for a given IC. The estimated annual number of responses is the product, rounded to the nearest whole number, of the estimated annual number of respondents and the estimated annual number of responses per respondent. This methodology ensures the estimated annual burdens in the table are consistent with the values recorded in OMB's consolidated information system.

General Description of Collection: Regulations E & DD (Consumer Financial Protection Bureau's Regulations) and Regulation CC (the Federal Reserve's Regulation) ensure adequate disclosures regarding accounts, including electronic fund transfer services, availability of funds, and fees and annual percentage yield for deposit accounts. Generally, the Regulation E disclosures are designed to ensure consumers receive adequate disclosure of basic terms, costs, and rights relating to electronic fund transfer (EFT) services provided to them so that they can make informed decisions. Institutions offering EFT services must disclose to consumers certain information, including: Initial and updated EFT terms, transaction information, the consumer's potential liability for unauthorized transfers, and error resolution rights and procedures. Like Regulation E, Regulation CC contains consumer protection disclosure requirements. Specifically, Regulation CC requires depository institutions to make funds deposited in transaction accounts available within specified time periods, disclose their availability policies to customers, and begin accruing interest on such deposits promptly. The disclosures are intended to alert customers that their ability to use deposited funds may be delayed, prevent unintentional (and costly) overdrafts, and allow customers to compare the policies of different institutions before deciding at which institution to deposit funds. Depository institutions must also provide an awareness disclosure regarding substitute checks. The regulation also requires notice to the depositary bank and to a customer of nonpayment of a check. Regulation DD also has similar consumer protection disclosure requirements that are intended to assist consumers in comparing deposit accounts offered by institutions, principally through the disclosure of fees, the annual percentage yield, and other account terms. Regulation DD requires depository institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, and when changes in terms occur.

Depository institutions that provide periodic statements are required to include information about fees imposed, interest earned, and the annual percentage yield (APY) earned during those statement periods. It also contains rules about advertising deposit accounts. This Information Collection Request (ICR) is being revised as a result of the addition of five (5) new information collection requirements contained in CFPB's Regulation E, Subpart B. The estimated annual burden, in hours, is the product of the estimated number of respondents per year, estimated number of responses per respondent per year, and estimated hours per response, as summarized in the Table above. The total estimated annual burden for this ICR is 546,946 hours, which is a decrease of 45,875 hours from our estimate in the 2021 memo (592,821 hours). This decrease can be explained largely by a decline in the number of FDIC-supervised IDIs from December 31, 2020 (the period used in the previous OMB renewal) to December 31, 2023. This decrease is attenuated by the inclusion of five ICs pertaining to recordkeeping and disclosure requirements associated with remittance transfers in Subpart B of CFPB Regulation E.

The estimated annual burden and change in burden, broken down by each Regulation (E, DD, and CC), is as follows:

Regulation	2021 Total annual burden (hours)	2024 Total annual burden (hours)	Change (hours)
CFPB Regulation E	28,950	38,297	+ 9,347
CFPB Regulation DD	223,594	201,688	−21,906
FRB Regulation CC	340,277	306,961	−33,316
Total Annual Burden	592,821	546,946	−45,875

Request for Comment

Comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the

use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on May 1, 2024.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–09856 Filed 5–6–24; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update listing of financial institutions in liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institution effective as of the Date Closed as indicated in the listing.

SUPPLEMENTARY INFORMATION: This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992, issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation website at *www.fdic.gov/bank/individual/failed/banklist.html,* or contact the Chief, Receivership Oversight at *RO@fdic.gov* or at Division of Resolutions and Receiverships, FDIC, 600 North Pearl Street, Suite 700, Dallas, TX 75201.

INSTITUTIONS IN LIQUIDATION

[in alphabetical order]

FDIC ref. No.	Bank name	City	State	Date closed
10546	Republic First Bank dba Republic Bank	Philadelphia	PA	04/26/2024

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on May 1, 2024.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–09840 Filed 5–6–24; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS24–11]

Appraisal Subcommittee; Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of special closed meeting.

Description: In accordance with section 1104(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) met for a Special Closed Meeting on this date.

Location: Virtual meeting via Webex.

Date: May 1, 2024.

Time: 11:15 a.m. ET.

Action and Discussion Item

Personnel Matter

The ASC convened a Special Closed Meeting to discuss a personnel matter pursuant to section 1104(b) of title XI (12 U.S.C. 3333(b)). No action was taken by the ASC.

James R. Park,

Executive Director.

[FR Doc. 2024–09882 Filed 5–6–24; 8:45 am]

BILLING CODE 6700–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10 a.m., Tuesday, May 14, 2024.

PLACE: The Richard V. Backley Hearing Room, Room 511, 1331 Pennsylvania Avenue NW, Suite 504 North, Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Crimson Oak Grove Resources, LLC,* Docket Nos. SE 2021–0112, et al. (Issues include whether the Judge erred in denying motions to settle based on his conclusion that the Secretary of Labor had failed to provide sufficient information to support the vacating of citations.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Phone Number for Listening to Meeting: 1–(866) 236–7472. Passcode: 678–100.

Authority: 5 U.S.C. 552b.

Dated: May 3, 2024.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2024–10089 Filed 5–3–24; 4:15 pm]

BILLING CODE 6735–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2 p.m., Tuesday, May 14, 2024.

PLACE: The Richard V. Backley Hearing Room, Room 511, 1331 Pennsylvania Avenue NW, Suite 504 North, Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Knight Hawk Coal, LLC,* Docket No. LAKE 2021–0160 (Issues include whether the Secretary of Labor has unreviewable discretion to remove a significant and substantial designation from a contested

citation without the Commission's approval under section 110(k) of the Mine Act.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Phone Number for Listening to Meeting: 1–(866) 236–7472. Passcode: 678–100.

Authority: 5 U.S.C. 552b.

Dated: May 3, 2024.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2024–10091 Filed 5–3–24; 4:15 pm]

BILLING CODE 6735–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments 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 22, 2024.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Head of Bank Applications) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *Liberty Strategic Capital (CEN) Holdings, LLC; Liberty 77 Capital L.P., as the investment manager of Liberty Strategic Capital (CEN) Holdings, LLC; Liberty 77 Capital Partners L.P., the general partner of Liberty 77 Capital L.P.; Liberty Capital L.L.C., the general partner of Liberty 77 Capital Partners L.P.; STM Partners LLC, which indirectly controls Liberty Strategic Capital (CEN) Holdings, LLC, and Liberty 77 Capital L.P.; and Steven T. Mnuchin, the President of STM Partners LLC and managing partner of Liberty 77 Capital, L.P, all of Washington, DC;* each individually and together as a group acting in concert, to acquire voting shares of New York Community Bancorp, Inc., and thereby indirectly acquire voting shares of Flagstar Bank, National Association, both of Hicksville, New York.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09954 Filed 5–6–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

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 question whether the proposal complies with the standards of section 4 of the BHC 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.

Unless otherwise noted, comments regarding the 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 22, 2024.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *United Bank Corporation, Barnesville, Georgia;* to engage de novo in extending credit and servicing loans pursuant to section 225.28(b)(1) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09955 Filed 5–6–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or

bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments 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 June 6, 2024.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *The United Bank Corporation Employee Stock Ownership Plan Trust, Barnesville, Georgia;* to become a bank holding company by acquiring 30 percent of the voting shares of United Bank Corporation, Barnesville, Georgia, and thereby indirectly acquiring shares of United Bank, Zebulon, Georgia.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09948 Filed 5–6–24; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice-MG–2024–01; Docket No.2024–0002; Sequence No.19]

Office of Federal High-Performance Green Buildings; Green Building Advisory Committee; Notification of Upcoming Public Meetings

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, this notice provides the agenda for a series of web-based meetings of the Green Building Advisory Committee's, (the Committee), Federal Buy Clean Implications Task Group (the Task Group).

The meetings are open to the public to observe; online attendees are required to register in advance to attend as instructed below.

DATES: The Committee's Federal Buy Clean Act Implications Task Group will hold a series of web-based meetings on alternate Thursdays from May 23, 2024, through February 27, 2025, from 3:00 p.m. to 4:00 p.m., Eastern Time (ET).

FOR FURTHER INFORMATION CONTACT: Mr. Michael Bloom, Designated Federal Officer, Office of Federal High-Performance Green Buildings, Office of Government-wide Policy, GSA, 1800 F Street NW, (Mail-code: MG), Washington, DC 20405, at *gbac@gsa.gov* or 312–805–6799. Additional information about the Committee, including meeting materials and agendas, will be made available on-line at *https://www.gsa.gov/gbac.*

SUPPLEMENTARY INFORMATION:

Procedures for Attendance and Public Comment

To register to observe any or all of these meetings, please send the following information via email to *gbac@gsa.gov:* your first and last name, organization and email address and whether you would like to provide public comment.

Requests to observe the full series of Task Group meetings must be received by 5:00 p.m. ET, on Tuesday, May 21, 2024. After that time, requests to observe ongoing Task Group meetings must be received by 5:00 p.m. ET on the Tuesday before the meeting in question. Since Task Group meetings are conducted as a series, it will be most useful to observe all or most of them from the start.

For all online meetings, web meeting attendance information will be provided following registration. Time will be provided at all meetings for public comment wherever possible.

GSA will be unable to provide technical assistance to any listener experiencing technical difficulties. Testing access to the web meeting site before the calls is recommended. To request an accommodation, such as closed captioning, or to ask about accessibility, please contact Mr. Bloom at *gbac@gsa.gov* at least five business days prior to the meeting to give GSA as much time as possible to process the request.

Background

The Administrator of GSA established the Committee on June 20, 2011 (**Federal Register**/Vol. 76, No. 118) pursuant to Section 494 of the Energy Independence and Security Act of 2007 (EISA, 42 U.S.C. 17123). Under this authority, the Committee provides independent policy advice and recommendations to GSA to advance federal building innovations in planning, design, and operations to reduce costs, enable agency missions, enhance human health and performance, and minimize environmental impacts.

Federal Buy Clean Implications Task Group

The Federal Buy Clean Implications Task Group will continue the Committee's work on the topic of Building Decarbonization by assessing the impact of the Federal Buy Clean Initiative within the broader scope of the Inflation Reduction Act, focusing on its influence on procurement practices and material selection in Federal Buildings.

The purpose of these web-based meetings is for the Task Group to develop consensus recommendations for submission to the full Committee. The Committee will, in turn, deliberate on the Task Group recommendations and decide whether to proceed with formal advice to GSA based upon them.

Brian Gilligan,

Acting Federal Director, Office of Federal High-Performance Green Buildings, General Services Administration.

[FR Doc. 2024–09875 Filed 5–6–24; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–0943; Docket No. CDC–2024–0033]

Proposed Data Collections Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Data Collection for the Residential Care Community and Adult Day Services Center Components of the National Post-Acute and Long-Term Care Study. The purpose is to collect data for the residential care community and adult day services center components for the 2024 wave of the National Post-Acute and Long-Term Care Study.

DATES: Written comments must be received on or before July 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0033 by either of the following methods:

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

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all public comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected;

4. Minimize the burden of the collection of information on those who respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Data Collection for the Residential Care Community and Adult Day Service Center Components of the National Post-acute and Long-term Care Study (OMB Control No. 0920–0943 Exp. 7/31/2025)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on health resources . . . [and] utilization of health care, including extended care facilities, and other institutions. NCHS seeks approval to collect data for the residential care community (RCC) and adult day services center (ADSC) components of the 7th National Post-Acute and Long-Term Care Study (NPALS). A two-year clearance is requested.

Details on the complete study design include the following. The NPALS is designed to: (1) broaden NCHS' ongoing coverage of paid, regulated long-term care (LTC) providers; (2) present alongside existing administrative data on LTC providers and service users (*i.e.,* Centers for Medicare and Medicaid Services (CMS) data on inpatient rehabilitation facilities and patients, long-term care hospitals and patients, nursing homes and residents, home health agencies and patients, and hospices and patients); (3) update data more frequently on LTC providers and service users for which nationally representative administrative data do not exist; and (4) enable comparisons across LTC sectors and timely monitoring of supply and use of these sectors over time.

Data will be collected from two types of LTC providers in the 50 states and the District of Columbia: 11,600 RCCs and 5,500 ADSCs. Data were collected in 2012, 2014, 2016, 2018, 2020, and 2022. The data to be collected in 2024 include the basic characteristics, services, staffing, and practices of RCCs and ADSCs, and aggregate-level distributions of the demographics, selected health conditions and health care utilization, physical functioning, and cognitive functioning of RCC residents and ADSC participants. Expected users of data from this collection effort include, but are not limited to CDC; other Department of Health and Human Services (DHHS) agencies, such as the Office of the Assistant Secretary for Planning and Evaluation, The Administration for Community Living, and the Agency for Healthcare Research and Quality; associations, such as LeadingAge, National Center for Assisted Living, American Seniors Housing Association, Argentum, and National Adult Day Services Association; universities; foundations; and other private sector organizations such as the Alzheimer's Association and the AARP Public Policy Institute.

Expected burden from data collection for eligible cases is 30 minutes per respondent. An estimated 5% of RCC and ADSC respondents will have an additional five minutes of burden to complete a data retrieval call. We calculated the burden based on a 100% response rate. CDC requests OMB

approval for an estimated 4,311 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
RCC Director/Designated Staff Member.	RCC Questionnaire	5,800	1	30/60	2,900
ADSC Director/Designated Staff Member.	ADSC Questionnaire	2,750	1	30/60	1,375
RCC/ADSC Director/Designated Staff Member.	Data retrieval call	428	1	5/60	36
Total					4,311

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. 2024–09854 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–0212; Docket No. CDC–2024–0035]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled the National Hospital Care Survey (NHCS). The goal of the project is to assess patient care in hospital-based settings and to describe patterns of health care delivery and utilization in the United States.

DATES: CDC must receive written comments on or before July 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0035 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

National Hospital Care Survey (NHCS) (OMB Control No. 0920–0212, Exp. 12/31/2024)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States. This three-year clearance request for National Hospital Care Survey (NHCS) includes the collection of all inpatient and ambulatory Uniform Bill–04 (UB–04) claims data or electronic health record (EHR) data as well as the collection of hospital-level information via a questionnaire from a sample of 608 hospitals.

The National Ambulatory Medical Care Survey (NAMCS) was conducted intermittently from 1973 through 1985,

and annually since 1989. The survey is conducted under authority of Section 306 of the Public Health Service Act (42 U.S.C. 242k). The National Hospital Discharge Survey (NHDS) (OMB No. 0920–0212, Exp. Date 01/31/2019), conducted continuously between 1965 and 2010, was the Nation's principal source of data on inpatient utilization of short-stay, non-institutional, non-Federal hospitals, and was the principal source of nationally representative estimates on the characteristics of inpatients including lengths of stay, diagnoses, surgical and non-surgical procedures, and patterns of use of care in hospitals in various regions of the country. In 2011, NHDS was granted approval by OMB to expand its content and to change its name to the National Hospital Care Survey (NHCS).

In May 2011, recruitment of sampled hospitals for the NHCS began. Hospitals in the NHCS are asked to provide data on all inpatients from their UB–04 administrative claims, or EHRs. Hospital-level characteristics and information about telemedicine usage in the healthcare setting are collected through an Annual Hospital Interview. NHCS will continue to provide the same national health-care statistics on hospitals that NHDS provided. Additionally, NHCS collects more information at the hospital level (*e.g.,* volume of care provided by the hospital), which allow for analyses on the effect of hospital characteristics on the quality of care provided. NHCS data collected from UB–04 administrative claims and EHRs include all inpatient discharges, not just a sample. The confidential collection of personally identifiable information (PII) allows NCHS to link episodes of care provided to the same patient in the ED and/or OPD and as an inpatient, as well as link patients to the National Death Index (NDI) to measure post-discharge mortality, and Medicare and Medicaid data to leverage comorbidities. The availability of patient identifiers also makes analysis on hospital readmissions possible. This comprehensive collection of data makes future opportunities for surveillance possible, including analyzing trends and incidence of opioid misuse, acute myocardial infarction, heart failure and stroke, as well as trends and point prevalence of health care acquired infections and antimicrobial use.

Beginning in 2013, in addition to inpatient hospital data, hospitals participating in NHCS were asked to provide data on the utilization of health care services in their ambulatory settings (*e.g.,* EDs and OPDs). Due to low response rates and a high level of missing data, OPD data were not collected in the last approval period (2022, 2023 and 2024). Collection of OPD may resume in future years.

Data collected through NHCS are essential for evaluating the health status of the population, for the planning of programs and policy to improve health care delivery systems of the Nation, for studying morbidity trends, and for research activities in the health field.

Changes to the data collection survey include the removal of COVID–19 questions from the Annual Hospital Interview (AHI). The burden hours have been reduced due to a decrease in the sample size. The new total annualized burden is 5,826 hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)	Total burden (in hours)
Hospital DHIM or DHIT	Initial Hospital Intake Questionnaire	123	1	1	123
Hospital CEO/CFO	Recruitment Survey Presentation	30	1	1	30
Hospital DHIM or DHIT	Prepare and transmit UB–04 or State File for Inpatient and Ambulatory (monthly).	356	12	1	4,272
Hospital DHIM or DHIT	Prepare and transmit EHR for Inpatient and Ambulatory (quarterly).	200	4	1	800
Hospital CEO/CFO	Annual Hospital Interview	601	1	1	601
Total					5,826

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. 2024–09855 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day–24–24FA; Docket No. CDC–2024–0032]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on an information collection project titled Human-Centered Design Effort on Bringing Guidelines to the Digital Age. This information collection will allow CDC to understand pain points in developing solutions that help develop and implement guidelines that leverage technology to improve patient care.

DATES: CDC must receive written comments on or before July 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0032 by either of the following methods:

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

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov*.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Human-Centered Design Effort on Bringing Guidelines to the Digital Age—Existing Collection in Use Without an OMB Control Number—Office of Public Health Data, Surveillance, and Technology (OPHDST), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Given the increased demand to improve clinical guideline development and implementation, a new approach that began with an initiative on Adapting Clinical Guidelines for the Digital Age has been expanded by Guidelines International Network (GIN) North America to implement a future state of guideline development and implementation that leverages advancements in technology. To identify pain points in the process, CDC plans to engage individuals from multiple perspectives in guideline development and implementation in discussion. CDC requests approval for an Existing Collection in Use Without an OMB Control Number for a data collection titled Human-Centered Design Effort on Bringing Guidelines to the Digital Age.

CDC will use semi-structured interviews to collect data for this study. The interviews will explore insights about guideline development and implementation as well as pain points in this process. Data will be used to inform the structure of a human-centered design workshop where participants use the pain points identified as starting points for designing solutions. Burden estimates include the time for respondents to be participate in semi-structured interviews. CDC requests OMB approval for an estimated 33 annual burden 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 hours)	Total burden (in hours)
Clinicians	Clinician Conversation Guide	5	1	1	5
EHR Vendors	EHR Vendor Conversation Guide	2	1	1	2
Guideline Developers	Guideline Developer Conversation Guide.	8	1	1	8
Informaticists	Informaticist Conversation Guide	4	1	1	4
Implementers	Implementer Conversation Guide	9	1	1	9
Insurers	Insurer Conversation Guide	1	1	1	1
Patient/Patient Advocate	Patient/Patient Advocate Conversation Guide.	4	1	1	4
Total					33

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. 2024–09852 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–1355; Docket No. CDC–2024–0022]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Evaluation of the Division of Overdose Prevention Technical Assistance Center. This data collection allows CDC to collect information from partner organizations regarding feedback on their experiences receiving technical assistance.

DATES: CDC must receive written comments on or before July 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0022 by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Evaluation of the Division of Overdose Prevention Technical Assistance Center (OMB Control No., 0920–1355, Exp. 11/30/202)—Revision—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is submitting a Revision request for the currently approved Evaluating the Overdose Data to Action TA Hub (OMB Control No. 0920–1355, Exp. Date 11/30/2024) for three years. CDC requests a three-year OMB approval to support the evaluation of technical assistance (TA) provided for the Overdose Data to Action (OD2A) in States (S) and OD2A: Limiting Overdose through Collaborative Actions in Localities (LOCAL) programs. OD2A–S and OD2A: LOCAL are cooperative agreements funded in 2023 to focus on comprehensive and interdisciplinary opioid overdose prevention efforts in 49 state health departments, 39 localities, Puerto Rico, and Washington, DC. Each program consists of two required components—a surveillance component and a prevention component. OD2A recipients implement a combination of activities across nine state strategies and eight local strategies within these components in order to gain access to high quality, complete, and timelier data on opioid prescribing and overdoses and to use those data to inform prevention and response efforts in their jurisdictions.

In the previously approved iteration of this data collection, the information collected surrounding OD2A (version 1.0) recipient feedback on their experiences receiving TA proved invaluable in the process of improving TA delivery and overall providing more useful TA. The feedback provided in the original data collection instruments was also used to improve the TA Strategy of the updated iterations of OD2A (including OD2A–S and OD2A: LOCAL) and their recipients. With the information that was collected in the previously approved ICR, CDC can more effectively deliver TA to an almost-doubled recipient group across two programs instead of one and ensure that continuous improvement in TA is occurring. Further information gathering through the two new instruments proposed in this ICR (the Implementation Feedback Form and the Focus Group script), will even more acutely enhance TA perspectives and needs to effectively and responsibly utilize the DOP TA Center resource.

Training and technical assistance (TA) is essential to building knowledge and strengthening the capacity of recipients to implement and evaluate OD2A program strategies. CDC will develop and deploy a TA hub (hereafter referred to as the DOP TA Center) to deliver comprehensive technical assistance and training to support the successful implementation and evaluation of surveillance and prevention activities. The DOP TA Center is designed to enhance the efficiency, coordination, and

effectiveness of TA efforts by streamlining and centralizing the provision of overdose surveillance and prevention TA. TA to OD2A recipients is divided into four different levels with multiple modes of TA delivery and involves a wide range of TA providers including CDC staff, internal and external subject matter experts (SMEs) and program partners as well as Tanaq and ICF staff. The four TA levels below are used to direct the process for engaging stakeholders to support program recipients and triage appropriate resources to support their needs.

CDC requests OMB approval for an estimated 388 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
OD2A (OD2A in States and OD2A: LOCAL) Recipients.	Individual TA Feedback Form	618	2	5/60	103
	Universal TA Feedback Form	617	2	5/60	103
	Implementation Feedback Survey	18	1	15/60	4.5
	Annual Technical Assistance Survey	162	1	10/60	27
	Email invitation for Annual	900		2/60	30
	Focus Group Session Script	100	1	1	100
	Focus Groups Email invitation	600	1	2/60	20
Total					388

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. 2024–09843 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–24FI; Docket No. CDC–2024–0036]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Comprehensive Evaluations of the Division for Heart Disease and Stroke Prevention Programs (WISEWOMAN, National CVH Program, Innovative CVH Program). The purpose of the data collection is to evaluate the implementation of evidence-based strategies within these programs, measure their impact on cardiovascular disease (CVD) prevention and management, and to identify strategies that are most effective in reaching populations disproportionately affected by CVD.

DATES: CDC must receive written comments on or before July 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0036 by either of the following methods:

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

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected;

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Comprehensive Evaluations of the Division for Heart Disease and Stroke Prevention Programs (WISEWOMAN, National CVH Program, Innovative CVH Program)—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) Division for Heart Disease and Stroke Prevention (DHDSP) are submitting this new three-year information collection request (ICR) for an evaluation of three recently launched cooperative agreements: Well-Integrated Screening of Women Across the Nation (WISEWOMAN), The National Cardiovascular Health Program (The National CVH Program), and The Innovative Cardiovascular Health Program (The Innovative CVH Program).

The WISEWOMAN program supports the early detection and treatment of hypertension in low-income, uninsured, and underinsured participants, ages 35–64. The National CVH Program implements evidence-based strategies to manage CVD in populations impacted by the high prevalence of CVD, exacerbated by health inequities and disparities, emphasizing hypertension and high cholesterol control among adults aged 18–85. The Innovative CVH Program focuses on implementing innovative evidence-based strategies to assess and address the health disparities and inequities in communities at highest risk (defined as census tracts with a crude hypertension prevalence of 53% or higher), where there is a particular need for equity-focused health system interventions to prevent, detect, control, and manage hypertension and high cholesterol. These three programs build upon CDC's previous work to identify promising CVD prevention and management practices and fund various organizations, including State and County governments, American Indian or Alaska Native tribal governments, non-government organizations, institutions of higher education, to implement evidence-based strategies in their jurisdictions. Since the programs are a substantial investment of federal funds, comprehensive evaluations are important to demonstrate the types of interventions being implemented and what is being accomplished using these funds.

The comprehensive evaluation of these programs includes process and outcome evaluations, and a cross-program analysis to assess the unique contributions of each program towards evidence-based strategies, health equity advancement, and health system transformation over the five program years. The evaluation aims to describe the implementation of the programs, assess the extent to which short-term, intermediate, and long-term outcomes have been met, and estimate the costs involved in implementing the programs. The comprehensive evaluation is designed to complement the evaluations already being conducted by program recipients. The data collection focuses on obtaining qualitative and cost information at the organizational and community levels about strategy implementation, facilitators and barriers, and other contextual information that affects program implementation and participant outcomes. Data collection activities of the comprehensive evaluation include qualitative interviews for evaluability assessments, exploratory assessments, and cost data collected for a cost study. During the qualitative data collection, semi-structured interviews will be conducted with recipients, their partnering sites, and Learning Collaborative members, providing a multifaceted view of the program's implementation and outcomes. Cost data will be used to estimate the implementation costs and value of resources invested by program recipients and their partners. Cost data will be collected through a spreadsheet-based cost inventory tool, key informant interviews, and document reviews. There are no costs to respondents except their time. Data collection tools are crafted to ensure relevance and capture essential information needed to evaluate the effectiveness and impact of the program strategies, while minimizing respondent burden.

The findings from the data collection will provide tailored, action-oriented, and timely recommendations for program improvement throughout the program period. Findings will foster documentation and sharing of lessons learned, contribute to the evidence base, and support replication and scaling of promising program strategies. Without collection of evaluative data, CDC will not be able to capture critical information needed to continuously improve programmatic efforts and clearly demonstrate the responsible use of federal funds.

CDC requests OMB approval for an estimated 2,054 annual burden hours. There is no cost to respondents other than their time to participate.

Estimated Annualized Burden Hours:

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Recipients	Evaluability Assessment Nomination Form_NCHP_ICHP.	72	1	0.5	36
	Evaluability Assessment Nomination Form_WW.	35	1	0.5	17.5
	Eval Assessment CCL Recipient Interview Guide NCHP_ICHP.	18	1	1.5	27
	Eval Assessment CQM Recipient Interview Guide NCHP_ICHP.	18	1	1.5	27
	Eval Assessment TBC Recipient Interview Guide NCHP_ICHP.	18	1	1.5	27
	Eval Assessment CCL Recipient Interview Guide WW.	8	1	1.5	12
	Eval Assessment CQM Recipient Interview Guide WW.	8	1	1.5	12
	Eval Assessment TBC Recipient Interview Guide WW.	8	1	1.5	12
	Ex Assessment CCL Recipient Interview Guide_WW.	4	1	1.5	6

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
	Ex Assessment CQM Recipient Interview Guide_WW.	4	1	1.5	6
	Ex Assessment TBC Recipient Partner Interview Guide_WW.	4	1	1.5	6
	Ex Assessment CCL Recipient Interview Guide NCHP_ICHP.	9	1	1.5	13.5
	Ex Assessment CQM Recipient Interview Guide NCHP_ICHP.	9	1	1.5	13.5
	Ex Assessment TBC Recipient Interview Guide NCHP_ICHP.	9	1	1.5	13.5
	Cost Study Interview Guide_Recipient.	165	1	1	165
	Comprehensive Evaluation Resource Use and Cost Inventory Tool_Recipient.	110	1	2.5	275
	Eval Assessment CCL Partner Interview Guide NCHP_ICHP.	18	1	1.5	27
	Eval Assessment CQM Partner Interview Guide NCHP_ICHP.	18	1	1.5	27
	Eval Assessment TBC Partner Interview Guide NCHP_ICHP.	18	1	1.5	27
	Eval Assessment CCL Partner Interview Guide WW.	8	1	1.5	12
	Eval Assessment CQM Partner Interview Guide WW.	8	1	1.5	12
	Eval Assessment TBC Partner Interview Guide WW.	8	1	1.5	12
	Ex Assessment CCL Partner Interview Guide_WW.	4	1	1.5	6
	Ex Assessment CQM Partner Interview Guide_WW.	4	1	1.5	6
	Ex Assessment TBC Partner Interview Guide_WW.	4	1	1.5	6
	Ex Assessment CCL Partner Interview Guide NCHP_ICHP.	9	1	1.5	13.5
	Ex Assessment CQM Partner Interview Guide NCHP_ICHP.	9	1	1.5	13.5
	Ex Assessment TBC Partner Interview Guide NCHP_ICHP.	9	1	1.5	13.5
	Comprehensive Evaluation Resource Use and Cost Inventory Tool_Partner.	330	1	2.5	825
	Cost Study Interview Guide_Partner	330	1	1	330
Learning Collaborative	Eval Assessment LC Interview Guide_NCHP_ICHP.	36	1	1	36
	Ex Assessment LC Interview Guide NCHP_ICHP.	18	1	1	18
Totals					2054

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. 2024–09857 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-24-24EZ; Docket No. CDC–2024–0031]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Assessing Sexual and Gender Minority (SGM) Occupational Well-Being from The PRIDE Study. This project aims to describe the SGM workforce population, their health and well-being experiences,

and their work-related health and well-being determinants and outcomes.

DATES: CDC must receive written comments on or before July 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0031 by either of the following methods:

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

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Assessing Sexual and Gender Minority Occupational Well-Being from The PRIDE Study—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Persons who are lesbian, gay, bisexual, transgender, queer, intersex, or another sexual orientation/gender identity (LGBTQIA+), also known as sexual and gender minority (SGM) persons, comprise a notable and rapidly growing percentage of the U.S. working population. Yet they are often overlooked in terms of health research and policies offering health assurances and safety protections at work. Currently, there is no national dataset or data system that provides detailed health experiences and well-being information on SGM workers. The Population Research in Identity and Disparities for Equality (PRIDE) Study is a national SGM community health survey conducted by The University of California, San Francisco (UCSF) and Stanford University and the first national, longitudinal cohort study of comprehensive SGM physical, mental, and social health that studies how being LGBTQIA+ influences health. The proposed project will enable The PRIDE Study to collect, for the first time, information on the health and well-being experiences of SGM workers, and for NIOSH to use these findings to characterize the U.S. SGM workforce, their health experiences, and factors potentially associated with their work-related health outcomes. Primary data will be collected from The PRIDE Study's ongoing participant cohort, using a survey to collect information through The PRIDE Study's online digital survey platform. The survey will be a modified version of NIOSH's Worker Well-Being Questionnaire (WellBQ) to include work and health experience information specific to SGM workers. Results will be used to establish descriptive baseline health information on U.S. SGM workers, describe factors that may be associated with SGM worker health and well-being outcomes, and improve the capabilities of The PRIDE Study, a population health assessment tool, to better assess the work-related health experiences of the SGM workforce.

CDC requests OMB approval for an estimated 1,015 annual burden hours. There are no costs to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
PRIDE Study participants	Sexual and Gender Minority Occupational Well-Being Questionnaire.	3,044	1	20/60	1,015
Total					1,015

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. 2024–09842 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–24–1071]

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 ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' 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 January 23, 2024 to obtain comments from the public and affected agencies. CDC received two comments 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

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery (OMB Control No. 0920–1071, Exp. 5/31/2024)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Executive Order 12862 directs federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, the National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC) (hereafter the ''Agency'') seeks to obtain OMB approval of a Generic Clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

This Revision includes a request to increase the burden allotment from the previously approved 3,850 hours to 5,000 hours. CDC's use of this Generic has continued to increase since 2015. Increasing the burden would help the Agency continue to garner customer and stakeholder feedback to improve service delivery. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of collection	Number of respondents	Annual frequency per response	Hours per response	Total hours
Online Surveys	3800	1	30/60	1900
Focus Groups	800	1	2	1600
In-person Surveys	1000	1	30/60	500
Usability testing	1500	1	30/60	750
Customer comment cards	1000	1	15/60	250

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. 2024–09851 Filed 5–6–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for Office of Management and Budget Review; Proposed Information Collection Activity; Generic Clearance for Financial Reports Used for ACF Non-Discretionary Grant Programs (Office of Management and Budget #: 0970–0510)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

AGENCY: Administration for Children and Families, Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) proposes to extend approval of the existing overarching generic clearance for Financial Reports used for ACF Non-discretionary Grant Programs (OMB #0970–0510) as well as all information collections currently approved under the overarching generic. There are no changes to the proposed types of information collection or uses of data as described in the overarching generic. The title of the collection has been updated from *ACF Mandatory Grant Programs* to *ACF Non-Discretionary Grant Programs.* This request also includes updates to three of the collections approved under this generic (GenICs): the Child Care and Development Fund (CCDF) ACF–696 Financial Report for States and Territories, the CCDF ACF–696T Financial Report for Tribal Grantees, and the Child Support Services Program Financial Reporting Forms (OCSS–34 and OCSS–396). Finally, burden estimates for the next 3 years have been adjusted based on use to date.

DATES: *Comments due June 6, 2024.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

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. You can also obtain copies of the proposed collection of information by emailing *OPREinfocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF programs require detailed financial information from their grantees that allows ACF to monitor various specialized cost categories within each program, to closely manage program activities, and to have sufficient financial information to enable periodic thorough and detailed audits.

The information included on the standard Federal Financial Report Form (SF–425; OMB #4040–0014) provides only minimal, bare-bones, non-program specific financial information insufficient for these purposes. This generic clearance allows ACF programs to efficiently develop and receive approval for financial reports that are tailored to specific funding recipients and the associated needs of the program. This umbrella generic is a mechanism that is available to all ACF non-discretionary grant programs to obtain OMB approval of financial forms. Currently only a small number of ACF's non-discretionary grant program financial forms are covered under this umbrella; it does *not* cover all ACF non-discretionary grant program financial forms.

Program offices use the information collected under this generic information collection to:

- Monitor program operations and prepare technical assistance and guidance as needed.
- Assess the effect of program changes and make informed decisions.
- Assist in the computation of the grant awards issued to each program's grantees.
- Assist in the computation of the Child Support Services program's annual incentive payments.
- Determine that child support collections are being properly distributed (Child Support Services Program only).
- Ensure funding recipients are meeting funding requirements established by Congress.
- Produce annual financial and statistical reports as may be required by Congress and respond to periodic detailed inquiries from Congress.

ACF may require an information collection approved under this generic from funding recipients to obtain or retain benefits.

Prior to a new form being submitted for review under this umbrella generic, ACF will publish a notice in the **Federal Register** announcing the agency's intention to request an OMB review of the form and providing a 14-day period for public comment on that specific request. ACF will review any comments received and address them as appropriate. ACF will provide a copy of any comments received and will provide a description of how comments were considered in the submission form, along with the request package for the individual collection. ACF will then follow standard OMB requirements for a generic information collection and submit a generic information collection request for each individual data collection activity under this generic clearance. Each request will include the individual form(s) and instructions, a summary of any comments received, and a short overview of the proposed purpose and use of the data collected. ACF requests OMB to review requests within 10 days of submission.

This request includes the extension of multiple GenICs and requests updates to three of these GenICs through this revision process.

- *CCDF ACF–696 Financial Report for States and Territories:* ACF proposes minor updates to the ACF–696 form that include the removal of ''CCDX2'' which is a subaccount code not used by ACF; the removal of Column F for ''Discretionary Disaster Relief Funds Construction and Major Renovation Grant Document Number CCDY'' which is a program not funded by ACF; the removal of line 9(a) ''was the state or territory unable to obligate at least 50% of the CCDF stabilization grants by December 11, 2021?'' because this question relates to a subaccount for a program set to close by 9/30/2024; and the removal of the reallotted funds selection for COVID supplemental funds since the deadline to request reallotted funds for these subaccount awards is in the past. The instructions for this form were updated to account for the described changes, to clarify existing instructions, and to update language to reflect current Office of Child Care and Office of Grants Management policies and program instruction to recipients.
- *CCDF ACF–696T Financial Report for Tribal Grantees:* ACF proposes minor updates to the ACF–696 form that include the removal of ''CCDX2'' which is a subaccount code not used by ACF;

the removal of Column F for ''Discretionary Disaster Relief Funds Construction and Major Renovation Grant Document Number CCDY'' which is a program not funded by ACF; the renaming of line 13a ''total federal unliquidated'' to ''total federal obligations (not yet liquidated) (excluding construction/major renovation'' to clarify what amount should be reported on this line; the addition of line 13b. ''total federal obligations Into yet liquidated) for construction/major renovation'' to distinguish between CCDF activities and activities for the construction or major renovation of CCDF projects; the removal of line 14(a) ''was the tribal lead agency unable to obligate at least 50% of the CCDF stabilization grants by December 11, 2021? '' because this question relates to a subaccount for a program set to close by 9/30/2024; and the removal of the reallotted funds selection for COVID supplemental funds since the deadline to request reallotted funds for these subaccount awards is in the past. The instructions for this form were updated to account for the described changes, to clarify existing instructions, and to update language to reflect current Office of Child Care and Office of Grants Management policies and program instruction to recipients.

- *Child Support Services Program Financial Reporting Forms (OCSS–34 and OCSS–396):* The title of these forms was updated to reflect the change in name of the program office from the Office of Child Support Enforcement to the Office of Child Support Services. References to the name within the forms and instructions were also updated.

Respondents: ACF-funded non-discretionary grant programs.

Annual Burden Estimates

Find currently approved information collections here: *https://www.reginfo.gov/public/do/PRAICList?ref_nbr=202308-0970-008.* The request to OMB will include an extension request for the following approved collections.

Burden Estimates—Ongoing Requests

Study	Number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Child Care and Development Fund (CCDF) ACF–696 Financial Report for States and Territories	56	4	5	1,344
Child Care and Development Fund (CCDF) ACF–696T Financial Report for Tribal Grantees	221	1	7	1,547
Child Support Services Program Financial Reporting Forms (OCSS–34 and OCSS–396)	168	4	14	9,408
Form CB–496: Title IV–E Programs Quarterly Financial Report	67	4	25	6,700
Refugee Cash and Medical Assistance Federal Financial Report (ORR–2) Supplemental Data Collection	66	1	1.67	110
Refugee Support Services Federal Financial Report (SF–425) Supplemental Data Collection	53	4	4	848
Totals:	768	Avg: 2.7	Avg: 8.9	19,957

Burden Estimates—New Requests

Based on use of this generic, we have revised burden estimates for the next 3 years.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Burden hours
Non-discretionary Grant Financial Reports	700	4	12	33,600

Mary C. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2024–09879 Filed 5–6–24; 8:45 am]

BILLING CODE 4184–88–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Statement of Organization, Functions, and Delegations of Authority

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA), Center for Devices and Radiological Health's (CDRH), Office of Communication and Education (OCE) has modified their organizational structure. The new organizational structure was approved by the Secretary of Health and Human Services on December 21, 2023, and it became effective on January 22, 2024.

FOR FURTHER INFORMATION CONTACT: Yashika Rahaman, Director, Office of Planning, Evaluation and Risk Management, Office of Finance, Budget, Acquisitions and Planning, Food and Drug Administration, 4041 Powder Mill Rd., Beltsville, MD 20705–4304, 301–796–3843.

I. Introduction

Part D, Chapter D–B, (Food and Drug Administration), the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (35 FR 3685, February 25, 1970, 60 FR 56606, November 9, 1995, 64 FR 36361, July 6, 1999, 72 FR 50112, August 30, 2007, 74 FR 41713, August 18, 2009, 76 FR 45270, July 28, 2011, and 84 FR 22854, May 20, 2019) is amended to reflect the reorganization of the CDRH OCE.

The reorganization retitled OCE as the Office of Communication, Information Disclosure, Training, and Education (OCITE); abolished the Digital Communication Media Staff; established the Office of Communication and Content Development (OCCD) and the Office of Training and Education (OTE) within OCITE, established the Division of Digital Communication and Marketing (DDCM) within OCCD, and realigned the existing divisions to the new offices.

DCCE. ORGANIZATION. CDRH's OCITE is headed by the Director, and includes the following:

Office of Communication, Information Disclosure, Training, and Education (DCCE)

Program Management Operations Staff (DCCE1)

Office of Communication and Content Development (DCCEE)

Division of Communication (DCCEEA)

Division of Information Disclosure (DCCEEB)

Division of Digital Communication and Marketing (DCCEEC)

Office of Training and Education (DCCEF)

Division of Employee Training and Development (DCCEFA)

Division of Industry and Consumer Education (DCCEFB)

II. Delegations of Authority

Pending further delegation, directives, or orders by the Commissioner of Food and Drugs, all delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegations, provided they are consistent with this reorganization.

III. Electronic Access

This reorganization is reflected in FDA's Staff Manual Guide (SMG). Persons interested in seeing the complete SMG can find it on FDA's website at: *https://www.fda.gov/AboutFDA/ReportsManualsForms/StaffManualGuides/default.htm.*

(Authority: 44 U.S.C. 3101).

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2024–09381 Filed 5–6–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Statement of Organization, Functions, and Delegations of Authority

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA), Center for Devices and Radiological Health's (CDRH), Office of Product Evaluation and Quality (OPEQ) has modified their organizational structure. The new organizational structure was approved by the Secretary of Health and Human Services on December 21, 2023, and it became effective on January 22, 2024.

FOR FURTHER INFORMATION CONTACT: Yashika Rahaman, Director, Office of Planning, Evaluation and Risk Management, Office of Finance, Budget, Acquisitions and Planning, Food and Drug Administration, 4041 Powder Mill Rd., Beltsville, MD 20705–4304, 301–796–3843.

I. Introduction

Part D, Chapter D–B, (Food and Drug Administration), the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (35 FR 3685, February 25, 1970, 60 FR 56606, November 9, 1995, 64 FR 36361, July 6, 1999, 72 FR 50112, August 30, 2007, 74 FR 41713, August 18, 2009, 76 FR 45270, July 28, 2011, and 84 FR 22854, May 20, 2019) is amended to reflect the reorganization of the CDRH OCE.

The reorganization of OPEQ impacted the OPEQ's Office of Clinical Evidence and Analysis (OCEA) and the OPEQ's Office of Health Technology IV (OHT IV). OCEA established the Division of Clinical Evidence and Analysis IV and the Division of Clinical Evidence and Analysis V. OHT IV established the Division of Health Technology IV C.

DCCFB. ORGANIZATION. CDRH's OPEQ OCEA is headed by the Director, and includes the following:

Office of Clinical Evidence and Analysis (DCCFB)

Division of Clinical Evidence and Analysis I (DCCFBA)

Division of Clinical Evidence and Analysis II (DCCFBB)

Division of Clinical Evidence and Analysis III (DCCFBC)

Division of Clinical Evidence and Analysis IV (DCCFBD)

Division of Clinical Evidence and Analysis V (DCCFBE)

DCCFF. ORGANIZATION. CDRH's OPEQ OHT IV is headed by the Director, and includes the following:

Office of Health Technology IV (DCCFF)

Division of Health Technology IV A (DCCFFA)

Division of Health Technology IV B (DCCFFB)

Division of Health Technology IV C (DCCFFC)

II. Delegations of Authority

Pending further delegation, directives, or orders by the Commissioner of Food and Drugs, all delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegations, provided they are consistent with this reorganization.

III. Electronic Access

This reorganization is reflected in FDA's Staff Manual Guide (SMG). Persons interested in seeing the complete SMG can find it on FDA's website at: *https://www.fda.gov/AboutFDA/ReportsManualsForms/StaffManualGuides/default.htm.*

(Authority: 44 U.S.C. 3101).

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2024–09382 Filed 5–6–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–1917]

Fresenius Kabi USA, LLC, et. al.; Withdrawal of Approval of 12 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 12 abbreviated new drug applications (ANDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of June 6, 2024.

FOR FURTHER INFORMATION CONTACT: Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New

Hampshire Ave., Bldg. 75, Rm. 1676, Silver Spring, MD 20993–0002, 240–402–6980, *Martha.Nguyen@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process described in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
ANDA 040379	Fluorouracil Injectable, 50 milligrams (mg)/milliliter (mL)	Fresenius Kabi USA, LLC, Three Corporate Dr., Lake Zurich, IL 60047.
ANDA 062901	Ampicillin Sodium; Sulbactam Sodium Injectable, Equivalent to (EQ) 2 grams (gm) base/vial; EQ 1 gm base/vial, and EQ 1 gm base/vial; EQ 500 mg base/vial.	Pfizer Inc., 66 Hudson Blvd East, New York, NY 10001.
ANDA 071981	Droperidol Injectable, 2.5 mg/mL	Hospira Inc., 275 North Field Dr., Bldg. H1–3S, Lake Forest, IL 60045.
ANDA 202546	Ribavirin Tablets, 200 mg, 400 mg, 500 mg, and 600 mg	RegCon Solutions, LLC, U.S. Agent for Beximco Pharmaceuticals USA Inc., 10525 Vista Sorrento Parkway, Suite 100, San Diego, CA 92121.
ANDA 203544	Sodium Fluoride F–18 Injectable, 10–200 millicurie (mCi)/mL	SOFIE Co. dba SOFIE, 21000 Atlantic Blvd., Suite 730, Dulles, VA 20166.
ANDA 203773	Dexmedetomidine Hydrochloride (HCl) Injectable, EQ 200 microgram (mcg) base/2 mL (EQ 100 mcg base/mL).	American Regent, Inc., 5 Ramsey Rd., Shirley, NY 11967.
ANDA 203884	Amiodarone HCl Injectable, 50 mg/mL	Hospira Inc.
ANDA 204315	Sodium Fluoride F–18 Injectable, 10–200 mCi/mL	B&H Consulting Services, Inc., U.S. Agent for Shertech Laboratories, LLC, 50 Division St., Suite 206, Somerville, NJ 08876.
ANDA 204366	Ammonia N 13 Injectable, 3.75–260 mCi/mL	Do.
ANDA 204854	Meropenem for Injection, 500 mg/vial and 1 gm/vial	Freyr Inc., U.S. Agent for Daewoong Pharmaceutical Co., Ltd., 150 College Rd. West, Suite 102, Princeton, NJ 08540.
ANDA 206710	Paricalcitol Capsules, 1 mcg, 2 mcg, and 4 mcg	Alvogen PB Research and Development LLC, U.S. Agent for Lotus Pharmaceutical Co., Ltd. Nantou Plant, 44 Whippany Rd., Suite 300, Morristown, NJ 07960.
ANDA 208695	Bosentan Tablets, 62.5 mg, and 125 mg	Hikma Pharmaceuticals USA Inc., 1809 Wilson Rd., Columbus, OH 43228.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of June 6, 2024. Approval of each entire application is withdrawn, including any strengths and dosage forms inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products listed in the table without an approved new drug application or ANDA violates sections 505(a) and 301(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(a) and 331(d)). Drug products that are listed in the table that are in inventory on June 6, 2024 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: May 2, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09914 Filed 5–6–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–3827]

Adam Paul Runsdorf: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Adam Paul Runsdorf from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Runsdorf was convicted of a felony under Federal law for conduct that relates to the regulation of a drug product under the FD&C Act. Mr. Runsdorf was given notice of the proposed debarment and an opportunity to request a hearing within the timeframe prescribed by regulation. As of February 25, 2024 (30 days after receipt of the notice), Mr. Runsdorf has not responded. Mr. Runsdorf's failure to respond and request a hearing constitutes a waiver of Mr. Runsdorf's right to a hearing concerning this matter.

DATES: This order is applicable May 7, 2024.

ADDRESSES: Any application by Mr. Runsdorf for special termination of debarment under section 306(d)(4) of the FD&C Act (21 U.S.C. 335a(d)(4)) may be submitted at any time as follows:

Electronic Submissions

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. An application submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your application will be made public, you are solely responsible for ensuring that your application 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 application, that information will be posted on *https://www.regulations.gov.*

- If you want to submit an application with confidential information that you do not wish to be made available to the public, submit the application as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

- *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 a written/paper application submitted to the Dockets Management Staff, FDA will post your application, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All applications must include the Docket No. FDA–2023–N–3827. Received applications 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 an application with confidential information that you do not wish to be made publicly available, submit your application 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 your application. 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. 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, 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 between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 240–402–8743, *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On July 27, 2023, Adam Paul Runsdorf was convicted as defined in section 306(l)(1) of the FD&C Act, in the U.S. District Court for the Eastern District of Texas-Beaumont Division, when the court entered judgment against him, after his plea of guilty, to Conspiracy to Traffick in Drugs with Counterfeit Mark in violation of 18 U.S.C. 371, 18 U.S.C. 2320(a)(4) and Trafficking in Drugs with Counterfeit Mark in violation of 18 U.S.C. 2320(a)(4), 18 U.S.C. 2320(b)(3)(A). The underlying facts supporting the conviction are as follows:

As contained in the Third Superseding Indictment, and as contained in Factual Basis and Stipulation memorandum, between approximately April 2014 and February 2021, Mr. Runsdorf conspired to distribute counterfeit cough syrup. Specifically, Mr. Runsdorf owned a group of pharmaceutical companies including Woodfield Pharmaceutical LLC, a contract manufacturing company, and Woodfield Distribution LLC, a third-party logistics company (collectively, ''Woodfield''). On April 25, 2014, Mr. Runsdorf acquired Pernix Manufacturing LLC (Pernix). Pernix had, in January 2014, entered into an agreement with Byron A. Marshall and his Drug Trafficking Organization (DTO) to copy and manufacture cough syrup according to the directions of Marshall and his associates.

Marshall was not licensed or authorized to distribute cough syrup and any background check of the personal information provided by Marshall to Pernix or later Woodfield would have revealed that he was not a licensed physician. Initially, Marshall sought to copy Actavis Prometh VC with Codeine (Actavis). Actavis is a purple, peach-mint flavor prescription cough syrup that was in demand as a street drug. Marshall and his associates wanted to mass produce and traffic a counterfeit version of Actavis that contained Promethazine, but not Codeine. On April 24, 2014, Actavis Holdco US discontinued production of the Actavis product due to its widespread abuse by recreational drug users. A Pernix product-development scientist worked with Marshall and his associates to re-create the Actavis product without Codeine and Promethazine in order to re-create the syrup base, which is a necessary component of cough syrup. Marshall and his associates would add Promethazine to the counterfeit substance prior to bottling and distribution in order to create the drug. Marshall and his DTO also obtained counterfeited commercial-grade pharmaceutical labels designed to look exactly like the genuine labels for the prescription cough syrup from another supplier. Later in the conspiracy, Marshall and his DTO asked Woodfield employees to reformulate other cough syrup to use in their drug trafficking scheme to include Hi-Tech Promethazine Hydrocholoride and Codeine Phosphate Oral Solution and Wockhardt Promethazine Syrup Plain.

As Pernix was scaling-up production of the syrup base for Marshall and his DTO in April 2014, Mr. Runsdorf acquired Pernix. Mr. Runsdorf retained Pernix employees but made changes to management staff who oversaw and were responsible for producing the syrup base for the Marshall DTO, to which they knew the Marshall DTO was adding active ingredients. During the conspiracy, Marshall communicated directly with Mr. Runsdorf regarding production of the counterfeit cough syrup. At Mr. Runsdorf's request, Marshall paid Woodfield in cash only, and Woodfield employees mailed the cash directly to him.

Mr. Runsdorf knew his company was producing thousands of gallons of the counterfeit cough syrup to be distributed to drug traffickers in Texas and other States. Woodfield's production of syrup base for Marshall and his DTO bypassed the protocols for safety and quality testing. Initially, there were no batch records to document the

production of the syrup as required. Woodfield provided the syrup to Marshall and his DTO without any corresponding documentation that identified the ingredients of the syrup; practices that continued until February 2019 when Woodfield started creating paper records for some of the cough syrup batches Woodfield made for the DTO. From 2014 through February 2021, the conspiracy between the Marshall DTO produced and distributed, or attempted to produce and distribute, approximately 65,920 gallons of counterfeit cough syrup. The total amount of cash paid by Marshall and his DTO to Mr. Runsdorf was approximately at least $3 million.

As a result of this conviction, FDA sent Mr. Runsdorf, by certified mail, on January 23, 2024, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B), that Mr. Runsdorf was convicted of two felonies under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal informed Mr. Runsdorf of the proposed debarment and offered him an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Mr. Runsdorf received the proposal and notice of opportunity for a hearing on January 26, 2024. Mr. Runsdorf failed to request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and waived any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Runsdorf has been convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Mr. Runsdorf is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(B) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses in any capacity the services of Mr. Runsdorf during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Runsdorf provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Mr. Runsdorf during his period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act). Note that, for purposes of sections 306 and 307 of the FD&C Act, a ''drug product'' is defined as a ''drug subject to regulation under section 505, 512, or 802 of this FD&C Act [(21 U.S.C. 355, 360b, or 382)] or under section 351 of the Public Health Service Act [(42 U.S.C. 262)]'' (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Dated: May 2, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09917 Filed 5–6–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–D–1032]

Risk Evaluation and Mitigation Strategy Logic Model: A Framework to Link Program Design With Assessment; 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 ''REMS Logic Model: A Framework to Link Program Design With Assessment.'' The guidance describes FDA's risk evaluation and mitigation strategy (REMS) logic model. The REMS logic model is a framework that FDA recommends, which provides applicants with a systematic, structured approach to the design, implementation, and evaluation of a REMS. The aim of applying the REMS logic model is to develop clear goals, objectives, and strategies that align with the intended outcomes and to help applicants of new drug applications (NDAs), biologics license applications (BLAs), and abbreviated new drug applications (ANDAs) incorporate REMS assessment planning into the design of a REMS. The principles in this guidance apply to designing a REMS, developing a REMS assessment, and modifying a REMS.

DATES: Submit either electronic or written comments on the draft guidance by August 5, 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–1032 for ''REMS Logic Model:

A Framework to Link Program Design With Assessment.'' 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; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Gita Toyserkani, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 1106, Silver Spring, MD, 20993–0002, 301–796–1783, or James Myers, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''REMS Logic Model: A Framework to Link Program Design With Assessment.'' Section 505–1 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355–1) establishes FDA's REMS authority. A REMS is a required risk management strategy that can include one or more elements to ensure that the benefits of a drug outweigh its risks (see section 505–1(a) of the FD&C Act). A REMS can include a Medication Guide, a patient package insert, a communication plan, and certain packaging and safe disposal technologies for a drug that poses a serious risk of abuse or overdose. FDA also may require certain elements to assure safe use as part of the REMS for drugs or biological products (see section 505–1(f) of the FD&C Act).

A REMS, like other public health programs, involves a set of activities or interventions to achieve an intended outcome. Program evaluation is a systematic method of collecting, analyzing, and using data to examine the effectiveness and efficiency of those programs and to inform continuous program improvement. Several theories, frameworks, and logic models have been used to guide both program design and evaluation. In particular, logic models describe in detail how a program or intervention operationally works to achieve benefits and captures the logical flow and linkages that exist within the program or intervention and its proximal and distal outcomes. Leveraging this type of systematic approach is a critical aspect to the success and effectiveness of programs.

In 2013, FDA received feedback from the Office of the Inspector General (available at *https://oig.hhs.gov/oei/reports/OEI-04-11-00510.asp*) on the overall effectiveness of REMS. To address the feedback, FDA convened a public meeting on REMS standardization (78 FR 30313, May 22, 2013) (meeting materials available at *https://www.fda.gov/industry/prescription-drug-user-fee-amendments/background-materials-rems-standardization-and-evalution-public-meeting).* FDA sought stakeholder input on using a commonly cited framework for program planning and evaluation. FDA also encouraged applicants to consider using healthcare program assessment frameworks to assess REMS (see the draft guidance for industry entitled ''REMS Assessment: Planning and Reporting'' (available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/rems-assessment-planning-and-reporting*). FDA continued to explore and research the application of theories, frameworks, and models to develop a systematic approach to REMS design, implementation, and evaluation. Existing healthcare program evaluation frameworks, together with stakeholder feedback and FDA's research, informed the development of FDA's REMS logic model.

This draft guidance describes FDA's REMS logic model, which uses common logic model principles adapted for use in a REMS and makes explicit the scientific evidence, assumptions, and underlying logic that support the program and the various processes behind it. The REMS logic model provides applicants [1] with a recommended systematic, structured approach to design, implement, and evaluate a REMS. The REMS logic model delineates the relationship between the goal, objectives, strategies, and intended outcomes. The logic model includes the three phases of a REMS life cycle: design, implement, and evaluate. Each phase is further separated into two or more steps. Application of the REMS logic model begins with the design phase (situation context, program goal). The next phase is the implement phase (inputs, activities, outputs). The last phase is the evaluate phase (outcome, impact). The REMS logic model, although described in sequential steps, is an iterative process that involves moving back and forth or toggling between steps and phases to address uncertainties,

[1] For the purposes of the ''REMS Logic Model: A Framework to Link Program Design With Assessment'' guidance, the term *applicant* refers to sponsors of investigational new drug applications and applicants of NDAs, BLAs, and ANDAs.

validating assumptions, incorporating new information, and refining the program.

This draft guidance is being issued to fulfill the performance goals (available at *https://www.fda.gov/industry/prescription-drug-user-fee-amendments/pdufa-vii-fiscal-years-2023-2027*) under the sixth reauthorization of the Prescription Drug User Fee Act (PDUFA VII). This REMS logic model guidance is the first in a series of planned guidances for industry and FDA staff to optimize REMS design and improve the way a REMS is assessed.

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 ''REMS Logic Model: A Framework to Link Program Design With Assessment.'' 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 312 for the submission of investigational new drug applications have been approved under OMB control number 0910–0014. The collections of information in 21 CFR part 314 for the submission of new drug applications and abbreviated new drug applications have been approved under OMB control number 0910–0001. The collections of information in 21 CFR part 601 for the submission of biologics license applications have been approved under OMB control number 0910–0338. The collections of information in 21 CFR part 208 pertaining to Medication Guides for prescription drug and biological products have been approved under OMB control number 0910–0393. The collections of information in 21 CFR 201.56 and 201.57 for the content and format requirements for labeling of drugs and biologics have been approved under OMB control number 0910–0572. The collections of information in 21 CFR part 316 regarding orphan drug product development are approved under OMB control number 0910–0167. The collections of information pertaining to Prescription Drug User Fee Program have been approved under OMB control number 0910–0297.

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/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: May 2, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09928 Filed 5–6–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Rural Communities Opioid Response Program Performance Measures

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than July 8, 2024.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Joella Roland, the HRSA Information Collection Clearance Officer, at (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Rural Communities Opioid Response Program (RCORP) Performance Measures, OMB No. 0906–0044—Revision

Abstract: HRSA administers RCORP, which is authorized by section 711(b)(5) of the Social Security Act (42 U.S.C. 912(b)(5)) and is a multi-initiative program that aims to: (1) support treatment for and prevention of substance use disorder (SUD), including opioid use disorder (OUD); and (2) reduce morbidity and mortality associated with SUD, including OUD, by improving access to and delivering prevention, treatment, and recovery support services to high-risk rural communities. To support this purpose, RCORP grant initiatives include:

- RCORP—Implementation grants fund established networks and consortia to deliver SUD/OUD prevention, treatment, and recovery activities in high-risk rural communities.
- RCORP—Psychostimulant Support grants aim to strengthen and expand access to prevention, treatment, and recovery services for individuals in rural areas who misuse psychostimulants, to enhance their ability to access treatment and move toward recovery.
- RCORP—Medication Assisted Treatment Access grants aim to establish new access points in rural facilities where none currently exist.
- RCORP—Behavioral Health Care support grants aim to expand access to and quality of behavioral health care services at the individual-, provider-, and community-levels.
- RCORP Overdose Response recipients address immediate needs in rural areas through improving access to, capacity for, and sustainability of prevention, treatment, and recovery services for SUD.
- RCORP Child and Adolescent Behavioral Health grants aim to establish and expand sustainable behavioral health care services for children and adolescents aged 5–17 years who live in rural communities.
- RCORP-Neonatal Abstinence Syndrome grants aim to reduce the incidence and impact of Neonatal Abstinence Syndrome in rural communities by improving systems of care, family supports, and social determinants of health.
- Note that additional grant initiatives may be added pending fiscal year 2025 and future fiscal year appropriations.

HRSA currently collects information about RCORP grants using approved

performance measures. HRSA developed separate performance measures for RCORP's new Overdose Response, Behavioral Health, and Neonatal Abstinence Syndrome grants and seeks OMB approval for the new performance measures.

Need and Proposed Use of the Information: Due to the growth in the number of grant initiatives included within RCORP, as well as emerging SUD and other behavioral health trends in rural communities, HRSA is submitting a revised ICR that includes measures for RCORP's new Overdose Response, Child and Adolescent Behavioral Health, and Neonatal Abstinence Syndrome grants.

For this program, performance measures were developed to provide data on each RCORP initiative and to enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act of 1993. These measures cover the principal topic areas of interest to HRSA's Federal Office of Rural Health Policy, including: (a) provision of, and referral to, rural behavioral health care services, including SUD prevention, treatment and recovery support services; (b) behavioral health care, including SUD prevention, treatment, and recovery, process and outcomes; (c) education of health care providers and community members; (d) emerging trends in rural behavioral health care needs and areas of concern; and (e) consortium strength and sustainability. All measures will speak to the progress on meeting the set goals of the Federal Office of Rural Health Policy.

Likely Respondents: The respondents will be the recipients of the RCORP grants.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
RCORP—Implementation	290	2	580	1.24	719.20
RCORP—Psychostimulant Support	15	1	15	1.30	19.50
RCORP—Medication Assisted Treatment Access	11	1	11	1.95	21.45
RCORP—Behavioral Health Care Support	58	1	58	2.02	117.16
Rural Communities Opioid Response—Overdose Response (NEW)	47	3	141	0.56	78.96
RCORP—Child and Adolescent Behavioral Health (NEW)	9	2	18	0.48	8.64
RCORP—Neonatal Abstinence Syndrome (NEW)	41	4	164	2.31	378.84
Total	471		987		1,343.75

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024–09888 Filed 5–6–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Clinical and Basic Science Study Section.

Date: June 27–28, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Bethesdan Hotel, Tapestry Collection by Hilton, 8120 Wisconsin Ave, Bethesda, MD 20814 (Hybrid Meeting).

Contact Person: Manoj Kumar Valiyaveettil, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–R, Bethesda, MD 20817, (301) 402–1616, *manoj.valiyaveettil@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 1, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09896 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; 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 Board of Scientific Counselors, National Institute of Dental and Craniofacial Research.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Dental and Craniofacial Research, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Dental and Craniofacial Research.

Date: June 4, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institute of Dental and Craniofacial Research, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lynn M. King, Ph.D., Director, Division of Extramural Activities, National Institute of Dental & Craniofacial Research, 6701 Democracy Blvd., Bethesda, MD 20892, (301) 594–5006, *lynn.king@nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: May 1, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09899 Filed 5–6–24; 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 & 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 Initial Review Group; Population Sciences Study Section.

Date: June 6, 2024.

Time: 10:00 a.m. to 5:00 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, 6710 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Christiane M. Robbins, Scientific Review Officer, Scientific Review Branch (SRB), DER, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Bethesda, MD 20817, 301–451–4989, *christiane.robbins@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: May 2, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09947 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: Heart, Lung, and Blood Initial Review Group, NHLBI Single-Site and Pilot Clinical Trials Study Section.

Date: June 26–27, 2024.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Canopy, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: YingYing Li-Smerin, MD, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 207–P, Bethesda, MD 20892, 301–827–7942, *lismerin@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 1, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09898 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiology of Eye Disease—2 Study Section.

Date: June 4–5, 2024.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Cibu Paul Thomas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011–H, Bethesda, MD 20894, (301) 402–4341, *thomascp@mail.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Prokaryotic Cell and Molecular Biology Study Section.

Date: June 4–5, 2024.

Time: 10:00 a.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

Contact Person: Rebecca Catherine Burgess, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–8034, *rebecca.burgess@nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Surgery, Anesthesiology and Trauma Study Section.

Date: June 5–6, 2024.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Weihua Luo, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, (301) 435–1170, *luow@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Addiction Risks and Mechanisms Study Section.

Date: June 5–6, 2024.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, (301) 496–0726, *prenticekj@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biomedical Data Repositories and Knowledgebases.

Date: June 5, 2024.

Time: 10:00 a.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Joseph Thomas Peterson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9694, *petersonjt@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–20–131: Mammalian Models for Translational Research.

Date: June 5, 2024.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maria Dolores Arjona Mayor, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 806D, Bethesda, MD 20892, (301) 827–8578, *dolores.arjonamayor@nih.gov.*

Name of Committee: Applied Immunology and Disease Control Integrated Review Group; Interspecies Microbial Interactions and Infectious Study Section.

Date: June 5, 2024.

Time: 10:00 a.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

Contact Person: Subhamoy Pal, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–0926, *subhamoy.pal@nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group, Innovations in Nanosystems and Nanotechnology Study Section.

Date: June 6–7, 2024.

Time: 8:00 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Yingli Fu, Scientific Review Officer, The Center for Scientific Review, The National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–0840, *yingli.fu@nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Maximizing Investigators' Research Award B Study Section.

Date: June 6–7, 2024.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Place Georgetown, 2121 M Street NW, Washington, DC 20037.

Contact Person: Sudha Veeraraghavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7846, Bethesda, MD 20892, (301) 827–5263, *sudha.veeraraghavan@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 1, 2024.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09864 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: Heart, Lung, and Blood Initial Review Group; Heart, Lung, and Blood Program Project Study Section.

Date: June 14, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Melissa H. Nagelin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute National Institutes of Health, 6705 Rockledge Drive, Room 208–R, Bethesda, MD 20892, (301) 827–7951, *nagelinmh2@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 1, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09892 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Patient-Oriented Research Study Section.

Date: June 13–14, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Fungai Chanetsa, MPH, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–B, Bethesda, MD 20817, (301) 402–9394, *fungai.chanetsa@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 1, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09897 Filed 5–6–24; 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 & 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; NICHD Bio-Specimen Repository.

Date: June 18, 2024.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Magnus A. Azuine, Ph.D., Scientific Review Branch (SRB), Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Room 2125C, Bethesda, MD 20817, 301–480–4645, *magnus.azuine@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: May 2, 2024.

Lauren Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09946 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: Heart, Lung, and Blood Initial Review Group; Clinical Trials Review Study Section.

Date: June 20, 2024.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Keary A. Cope, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 209–A, Bethesda, MD 20892–7924, (301) 827–7912, *copeka@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 1, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09891 Filed 5–6–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R7–ES–2024–0016; FXES111607MRG01–245–FF07CAMM00]

Marine Mammals; Incidental Take During Specified Activities; Proposed Incidental Harassment Authorization for the Southeast Alaska Stock of Northern Sea Otters in Sitka, Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application; proposed incidental harassment authorization; draft environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, in response to a request under the Marine Mammal Protection Act of 1972, as amended, from the City and Borough of Sitka, Alaska, propose to authorize nonlethal, incidental take by harassment of small numbers of Southeast Alaska stock of northern sea otters (*Enhydra lutris kenyoni*) between July 1, 2024, and July 1, 2025. The applicant requested this authorization for take by harassment that may result from activities associated with construction of a seaplane base in Sitka Channel, Sitka, Alaska. We estimate that this project may result in the nonlethal, incidental take by harassment of up to 36 sea otters from the Southeast Alaska stock. This proposed authorization, if finalized, will be for up to 36 takes of sea otters by Level B harassment only. No take by injury or mortality is requested, expected, or proposed to be authorized.

DATES: Comments on this proposed incidental harassment authorization and the accompanying draft environmental assessment must be received by June 6, 2024.

ADDRESSES: *Document availability:* You may view this proposed incidental harassment authorization, the application package, supporting information, draft environmental assessment, and the list of references cited herein at *https://www.regulations.gov* under Docket No. FWS–R7–ES–2024–0016, or you may request these documents from the person listed under **FOR FURTHER INFORMATION CONTACT.**

Comment submission: You may submit comments on the proposed authorization by one of the following methods:

• *Electronic submission:* Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R7–ES–2024–0016.

• *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R7–ES–2024–0016, Policy and Regulations Branch, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will post all comments at *https://www.regulations.gov.* You may request that we withhold personal identifying information from public review; however, we cannot guarantee that we will be able to do so. See **REQUEST FOR PUBLIC COMMENTS** for more information.

FOR FURTHER INFORMATION CONTACT: Charles Hamilton, U.S. Fish and Wildlife Service, 1011 East Tudor Road, MS–341, Anchorage, AK 99503; by email at *r7mmmregulatory@fws.gov,* or by telephone at (907) 786–3800. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972 (MMPA; 16 U.S.C. 1361 *et seq.*) authorizes the Secretary of the Interior (Secretary) to allow, upon request, the incidental, but not intentional, taking by harassment of small numbers of marine mammals in response to requests by U.S. citizens (as defined in title 50 of the Code of Federal Regulations (CFR) in part 18, at 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region during a period of not more than 1 year. The Secretary has delegated authority for implementation of the MMPA to the U.S. Fish and Wildlife Service (FWS, or we). The FWS shall allow this incidental taking for a period of up to 1 year if we find that such taking:

(1) will affect only small numbers of individuals of the species or stock;

(2) will have no more than a negligible impact on the species or stock; and

(3) will not have an unmitigable adverse impact on the availability of the species or stock for taking for subsistence use by Alaska Natives.

If the requisite findings are made, we issue an authorization that sets forth the following, where applicable:

(1) permissible methods of taking;

(2) means of effecting the least practicable adverse impact on the species or stock and its habitat and the availability of the species or stock for subsistence uses; and

(3) requirements for monitoring and reporting of such taking by harassment, including, in certain circumstances, requirements for the independent peer review of proposed monitoring plans or other research proposals.

The term ''take'' means to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal. ''Harassment'' for activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government means any act of pursuit, torment, or annoyance which (a) has the potential to injure a marine mammal or marine mammal stock in the wild (the MMPA defines this as ''Level A harassment''), or (b) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (the MMPA defines this as ''Level B harassment'').

The terms ''negligible impact'' and ''unmitigable adverse impact'' are defined in 50 CFR 18.27 (*i.e.,* regulations governing small takes of marine mammals incidental to specified activities) as follows: ''Negligible impact'' is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. ''Unmitigable adverse impact'' means an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

The term ''small numbers'' is also defined in 50 CFR 18.27. However, we do not rely on that definition here as it conflates ''small numbers'' with ''negligible impacts.'' We recognize ''small numbers'' and ''negligible impacts'' as two separate and distinct considerations when reviewing requests for incidental harassment authorizations (IHA) under the MMPA (see *Natural Res. Def. Council, Inc.* v. *Evans,* 232 F. Supp. 2d 1003, 1025 (N.D. Cal. 2003)). Instead, for our small numbers determination, we estimate the likely number of takes of marine mammals and evaluate if that take is small relative to the size of the species or stock.

The term ''least practicable adverse impact'' is not defined in the MMPA or its enacting regulations. For this IHA, we ensure the least practicable adverse impact by requiring mitigation measures that are effective in reducing the impact of project activities, but they are not so restrictive as to make project activities unduly burdensome or impossible to undertake and complete.

If the requisite findings are made, we shall issue an IHA, which may set forth the following, where applicable: (i) permissible methods of taking; (ii) other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for subsistence uses by coastal-dwelling Alaska Natives (if applicable); and (iii) requirements for monitoring and reporting take by harassment.

Summary of Request

On August 18, 2023, the City and Borough of Sitka (hereafter ''CBS'' or ''the applicant'') submitted a request to the FWS for the nonlethal, incidental harassment of a small number of northern sea otters (*Enhydra lutris kenyoni*) (hereafter, ''sea otters'' or ''otters'' unless another species is specified) from the Southeast Alaska stock. The CBS expects that incidental take of sea otters by harassment may occur during the construction of a new seaplane base in Sitka Channel, Sitka, Alaska for the period July 2024 through July 2025. The FWS requested additional information on September 10, 2023, and October 27, 2023. We received revised requests on October 13, 2023, and November 16, 2023. The FWS deemed the November 16, 2023, request adequate and complete (hereafter referred to as the ''Request'').

Description of Specified Activities and Specified Geographic Region

The specified activity (''the project'') involves the construction of a new seaplane base by the CBS on the shore of Japonski Island in Sitka, Alaska. Construction will include creation of an upland approach, storage area and

parking, a seaplane ramp float, a drive-down float, a pedestrian and vehicle transfer bridge, and an approach dock. Building these components of the new seaplane base will require pile driving, blasting, excavation, and deposition of fill material.

Twelve 16-inch galvanized steel piles will be temporarily installed as templates to guide permanent piles using a vibratory hammer for both installation and removal, and an impact hammer for installation only. Ten permanent 16-inch-diameter galvanized steel piles and 16 permanent 24-inch galvanized steel piles will be driven using a vibratory hammer, socketed using down-the-hole drilling equipment, and driven with an impact hammer. These piles will support the approach dock, pedestrian and vehicle transfer bridge, drive-down float, and seaplane ramp float.

The upland project area will be developed through blasting and excavation. Over a period of 62 days, approximately 7,263 cubic meters (m^3) (9,500 cubic yards (yd^3)) above the high tide line will be blasted, and an additional 4,530 cm (5,925 yd^3) of rock, gravel, and sediment will be excavated. Materials will be stored in an upland location to dry, then used to fill both above and below the high tide line to develop the areas needed for a bridge abutment, approach, vehicle turnaround, parking, basic amenities, curb, and vehicle driveway. Up to 26,492 m^3 (34,650 yd^3) of fill will be placed over a period of 87 days using an excavator and dozer, and then compacted using a vibratory soil compactor. Only 275 m^3 (360 yd^3) of fill material will be placed in marine waters.

A material barge, construction barge, and skiff will be used to transport materials, equipment, and personnel to the project location. The materials barge will originate in Seattle, Washington, travelling at an average of 6 knots, and be used on location as a staging area during construction, tied to existing harbor structures. The construction barge will originate in coastal Alaska, travelling at an average of 6 knots, and will be used on location to support construction, and will be secured in place by four mooring anchors. The skiff will be used to transport personnel less than 91 meters (m) (300 feet (ft)) to the barge work platform multiple times a day at a speed no higher than 5 knots. Additionally, standard barges, tugboats, and other equipment may be used to place and position piles on the substrate.

Project activities would begin as early as July 2024 and be completed by July 2025. During this time, piling driving activities are expected to occur for 46 hours over a period of 31 days with 18 days of activity. Vibratory pile driving would occur for approximately 8.4 hours, impact pile driving would occur for approximately 3.1 hours, and down-the-hole drilling would occur for approximately 34 hours. Fill in marine waters would occur over a period of 11 hours and fill in intertidal waters would occur over a period of 641 hours.

Additional project details may be reviewed in the application materials available as described under **ADDRESSES** or may also be requested as described under **FOR FURTHER INFORMATION CONTACT**.

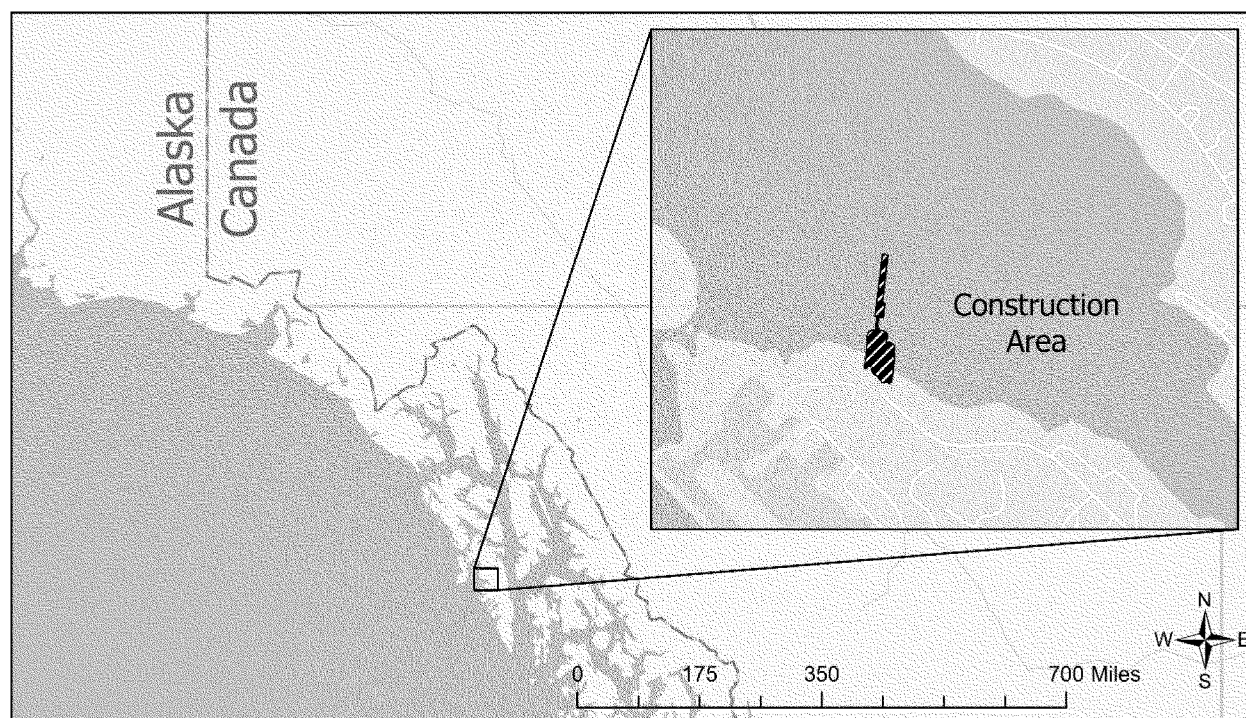

Figure 1—Specified geographic region of City and Borough of Sitka request for incidental harassment authorization for sea otters in 2024-2025 under the Marine Mammal Protection Act.

Description of Marine Mammals in the Specified Geographic Region

The northern sea otter is the only marine mammal under the FWS's jurisdiction that normally occupies the Northeast Pacific Ocean. Sea otters in Alaska are represented by three stocks: the Southwest Alaska stock, the Southcentral Alaska stock, and the Southeast Alaska stock. Those in the Northeast Pacific Ocean belong to the Southeast Alaska stock. Detailed information about the biology of the Southeast Alaska stock can be found in the most recent stock assessment report (88 FR 53510, August 8, 2023), available at: *https://www.fws.gov/project/marine-mammal-stock-assessment-reports.*

Sea otters may be distributed anywhere within the specific geographic region other than upland areas; however, they generally occur in shallow water near the shoreline. They are most commonly observed within the 40-meter (m) (131-foot (ft)) depth contour (88 FR 53510, August 8, 2023), although they can be found in areas with deeper water. Ocean depth is generally correlated with distance to shore, and sea otters typically remain within 1 to 2 kilometers (km) (0.62 to 1.24 miles (mi)) of shore (Riedman and Estes 1990). They tend to be found closer to shore during storms, but they venture farther out during good weather and calm seas (Lensink 1962; Kenyon 1969). In the 14 aerial surveys conducted from 1995 to 2012 in Southeast Alaska, 95 percent of otters were found in areas shallower than 40 m (131 ft) (Tinker et al. 2019). Areas important to mating for the Southeast Alaska stock include marine coastal regions containing adequate food resources within the 40-m (131-ft) depth contour.

The 1995–2012 survey data were combined with results from recent aerial surveys conducted in Glacier Bay National Park and incorporated into a spatiotemporal model of ecological diffusion using a Bayesian hierarchical framework as described in Eisaguirre et al. (2021) (88 FR 53510, August 8, 2023). This model was used to develop the most recent estimate of 27,285 otters in the Southeast Alaska stock and generated otter abundance estimates at a resolution of 1000 m by 1000 m. Abundance values within the project area ranged from 0.065 to 0.65 otters per square kilometer (km^2) (0.39 square miles (mi^2)).

The documented home range sizes and movement patterns of sea otters illustrate the types of movements that could be seen among otters responding to the proposed activities. Sea otters are nonmigratory and generally do not disperse over long distances (Garshelis and Garshelis 1984). They usually remain within a few kilometers of their established feeding grounds (Kenyon 1981). Breeding males stay for all or part of the year in a breeding territory covering up to 1 km (0.62 mi) of coastline while adult females have home ranges of approximately 8 to 16 km (5 to 10 mi), which may include one or more male territories. Juveniles move greater distances between resting and foraging areas (Lensink 1962; Kenyon 1969; Riedman and Estes 1990; Estes and Tinker 1996). Although sea otters generally remain local to an area, they are capable of long-distance travel. Otters in Alaska have shown daily movement distances greater than 3 km (1.9 mi) at speeds up to 5.5 km per hour (km/hr) (3.4 mi per hour (mi/h)) (Garshelis and Garshelis 1984).

Potential Impacts of the Specified Activities on Marine Mammals

Effects of Noise on Sea Otters

The project has the potential to result in take of sea otters by Level B harassment from noise. Here, we characterize ''noise'' as sound released into the environment from human activities that exceeds ambient levels or interferes with normal sound production or reception by sea otters. The terms ''acoustic disturbance'' or ''acoustic harassment'' are disturbances or harassment events resulting from noise exposure. Potential effects of noise exposure are likely to depend on the distance of the sea otter from the sound source, the level and intensity of sound the sea otter receives, background noise levels, noise frequency, noise duration, and whether the noise is pulsed or continuous. The actual noise level perceived by individual sea otters will also depend on whether the sea otter is above or below water and atmospheric and environmental conditions. Temporary disturbance of sea otters or localized displacement reactions are the most likely effects to occur from noise exposure. No lethal take is anticipated, nor was it requested by the applicant. Therefore, none will be authorized.

Sea Otter Hearing

Seaplane base construction activities will fall within the hearing range of sea otters. Controlled sound exposure trials on southern sea otters (*Enhydra lutris nereis*) indicate that sea otters can hear frequencies between 125 hertz (Hz) and 38 kilohertz (kHz), with best sensitivity between 1.2 and 27 kHz (Ghoul and Reichmuth 2014). Aerial and underwater audiograms for a captive adult male southern sea otter in the presence of ambient noise suggest the sea otter's hearing was less sensitive to high-frequency (greater than 22 kHz) and low-frequency (less than 2 kHz) sound than terrestrial mustelids, but was similar to that of a California sea lion (*Zalophus californianus*). However, the sea otter was still able to hear low-frequency sounds, and the detection thresholds for sounds between 0.125 and 1 kHz were between 116 and 101 decibels (dB), respectively. Dominant frequencies of southern sea otter vocalizations are between 3 and 8 kHz, with some energy extending above 60 kHz (McShane et al. 1995; Ghoul and Reichmuth 2012).

Exposure to high levels of sound may cause changes in behavior, masking of communications, temporary or permanent changes in hearing sensitivity, discomfort, and injury to marine mammals. Unlike other marine mammals, sea otters do not rely on sound to orient themselves, locate prey, or communicate under water; therefore, masking of communications by anthropogenic sound is less of a concern than for other marine mammals. However, sea otters, especially mothers and pups, do use sound for communication in air (McShane et al. 1995), and sea otters may monitor underwater sound to avoid predators (Davis et al. 1987).

Exposure Thresholds

Noise exposure criteria for identifying underwater noise levels capable of causing Level A harassment (injury) to marine mammal species, including sea otters, have been established using the same methods as those used by National Marine Fisheries Service (NMFS) (Southall et al. 2019). These criteria are based on estimated levels of sound exposure capable of causing a permanent shift in hearing sensitivity (*i.e.,* a permanent threshold shift [PTS]) (NMFS 2018). PTS occurs when noise exposure causes permanent damage to hair cells within the inner ear system (Ketten 2012).

Sound exposure thresholds incorporate two metrics of exposure: the peak level of instantaneous exposure likely to cause PTS and the cumulative sound exposure level during a 24-hour period (SEL_{CUM}). They also include weighting adjustments for the sensitivity of different species to varying frequencies. PTS-based injury criteria were developed from theoretical extrapolation of observations of temporary threshold shifts (TTS) detected in lab settings during sound exposure trials. The TTS is a noise-induced threshold shift in hearing sensitivity that fully recovers over time (Finneran 2015). Southall and colleagues (2019) predict that PTS for sea otters, which are included in the ''other marine carnivores'' category, will occur at 232 dB peak or 203 dB cumulative sound exposure (SEL_{CUM}) for impulsive underwater sound, and at 219 dB SEL_{CUM} for nonimpulsive (continuous) underwater sound.

Thresholds based on TTS have been used as a proxy for Level B harassment (70 FR 1871, January 11, 2005; 71 FR 3260, January 20, 2006; 73 FR 41318, July 18, 2008). Southall et al. (2007) derived TTS thresholds for pinnipeds based on 212 dB peak and 171 dB SEL_{CUM}. Exposures resulting in TTS in

pinnipeds were found to range from 152 to 174 dB (183 to 206 dB SEL) (Kastak et al. 2005), with a persistent TTS, if not a PTS, after 60 seconds of 184 dB SEL (Kastak et al. 2008). Kastelein et al. (2012) found small but statistically significant TTSs at approximately 170 dB SEL (136 dB, 60 minutes [min]) and 178 dB SEL (148 dB, 15 min). Based on these findings, Southall et al. (2019) developed TTS thresholds for sea otters, which are included in the ''other marine carnivores'' category, of 188 dB SEL_{CUM} for impulsive sounds and 199 dB SEL_{CUM} for nonimpulsive sounds.

The NMFS (2018) criteria do not identify sound level thresholds for avoidance of Level B harassment. For pinnipeds under their jurisdiction (seals and sea lions), the NMFS has adopted a 160-dB threshold for Level B harassment from exposure to impulsive noise and a 120-dB threshold for continuous noise (81 FR 51693, August 4, 2016; NMFS 2022). These thresholds were developed from observations of mysticete (baleen) whales responding to airgun operations (Malme et al. 1983a, b; Richardson et al. 1986, 1995) and from equating Level B harassment with noise levels capable of causing TTS in lab settings. Southall et al. (2007, 2019) assessed behavioral response studies and found considerable variability among pinnipeds. The authors determined that exposures between approximately 90 to 140 dB generally do not appear to induce strong behavioral responses from pinnipeds in water. However, they found behavioral effects, including avoidance, become more likely in the range between 120 to 160 dB, and most marine mammals showed some, albeit variable, responses to sound between 140 to 180 dB. Wood et al. (2012) adapted the approach identified in Southall et al. (2007) to develop a probabilistic scale for marine mammal taxa at which 10 percent, 50 percent, and 90 percent of individuals exposed are assumed to produce a behavioral response. For many marine mammals, including pinnipeds, these response rates were set at sound pressure levels of 140, 160, and 180 dB, respectively.

We have evaluated these thresholds and determined that a Level B harassment threshold of 120 dB for nonimpulsive noise is not applicable to sea otters. The 120-dB threshold is based on studies in which gray whales (*Eschrichtius robustus*) were exposed to experimental playbacks of industrial noise (Malme et al. 1983a, b). During these playback studies, southern sea otter responses to industrial noise were also monitored (Riedman 1983, 1984). Gray whales exhibited avoidance to industrial noise at the 120-dB threshold; however, there was no evidence of disturbance reactions or avoidance in southern sea otters. Thus, given the different range of frequencies to which sea otters and gray whales are sensitive, the NMFS 120-dB threshold based on gray whale behavior is not appropriate for predicting sea otter behavioral responses, particularly for low-frequency sound.

Based on the best available scientific information about sea otters, and closely related marine mammals when sea otter data are limited, the FWS has set 160 dB of received underwater sound as a threshold for Level B take by disturbance for sea otters for this IHA. Exposure to unmitigated in-water noise levels between 125 Hz and 38 kHz that are greater than 160 dB—for both impulsive and nonimpulsive sound sources—will be considered by the FWS as Level B harassment. Thresholds for potentially injurious Level A take will be 232-dB peak or 203-dB SEL for impulsive sounds and 219-dB SEL for continuous sounds (table 1).

TABLE 1—TEMPORARY THRESHOLD SHIFT (TTS) AND PERMANENT THRESHOLD SHIFT (PTS) THRESHOLDS ESTABLISHED BY SOUTHALL ET AL. (2019) THROUGH MODELING AND EXTRAPOLATION FOR ''OTHER MARINE CARNIVORES,'' WHICH INCLUDES SEA OTTERS

	TTS			PTS		
	Nonimpulsive	Impulsive		Nonimpulsive	Impulsive	
	SEL_{CUM}	SEL_{CUM}	Peak SPL	SEL_{CUM}	SEL_{CUM}	Peak SPL
Air	157	146	170	177	161	176
Water	199	188	226	219	203	232

Note: Values are weighted for other marine carnivores' hearing thresholds and given in cumulative sound exposure level (SEL_{CUM} dB re 20 micropascal (µPa) in air and SELCUM dB re 1 µPa in water) for impulsive and nonimpulsive sounds, and unweighted peak sound pressure level in air (dB re 20µPa) and water (dB 1µPa) (impulsive sounds only).

Airborne Sounds

The NMFS (2018) guidance neither addresses thresholds for preventing injury or disturbance from airborne noise, nor provides thresholds for avoidance of Level B harassment. Southall et al. (2007) suggested thresholds for PTS and TTS for sea lions exposed to non-pulsed airborne noise of 172.5 and 159 dB re (20 µPa)2-s SEL. Conveyance of underwater noise into the air is of little concern since the effects of pressure release and interference at the water's surface reduce underwater noise transmission into the air. For activities that create both in-air and underwater sounds, we will estimate take based on parameters for underwater noise transmission. This estimation will also account for exposures to sea otters at the surface, as sound energy travels more efficiently through water than through air.

Evidence From Sea Otter Studies

Sea otters may be more resistant to the effects of sound disturbance and human activities than other marine mammals. For example, southern sea otters were observed to not change their presence, density, or behavior in response to underwater sounds from industrial noise recordings at 110 dB and a frequency range of 50 Hz to 20 kHz, even at the closest distance of 0.5 nautical miles (<1 km or 0.6 mi) (Riedman 1983). Southern sea otters did not respond noticeably to noise from a single 1,638 cubic centimeter (cm^3) (100 cubic inch (in^3)) airgun, and no sea otter disturbance reactions were evident when a 67,006 cm^3 (4,089 in^3) airgun array was as close as 0.9 km (0.6 mi) to sea otters (Riedman 1983, 1984). However, southern sea otters displayed slight reactions to airborne engine noise (Riedman 1983). Northern sea otters were observed to exhibit a limited response to a variety of airborne and underwater sounds, including a warble tone, sea otter pup calls, killer whale (*Orcinus orca*) calls (which are predators to sea otters), air horns, and an underwater noise harassment system designed to drive marine mammals away from crude oil spills (Davis et al.

1988). These sounds elicited reactions from northern sea otters, including startle responses and movement away from noise sources. However, these reactions were only observed when northern sea otters were within 100–200 m (328–656 ft) of noise sources. Further, northern sea otters appeared to become habituated to the noises within 2 hours or, at most, 3–4 days (Davis et al. 1988).

Noise exposure may be influenced by the amount of time sea otters spend at the water's surface. Noise at the water's surface can be attenuated by turbulence from wind and waves more quickly compared to within deeper water, reducing potential noise exposure (Greene and Richardson 1988, Richardson et al. 1995). Additionally, turbulence at the water's surface limits the transference of sound from water to air. A sea otter with its head above water will be exposed to only a small fraction of the sound energy traveling through the water beneath it. The average amount of time that sea otters spend above the water each day while resting and grooming varies between males and females and across seasons (Esslinger et al. 2014, Zellmer et al. 2021). For example, female sea otters foraged for an average of 8.78 hours per day compared to male sea otters, which foraged for an average of 7.85 hours per day during the summer months (Esslinger et al. 2014). Male and female sea otters spend an average of 63 to 67 percent of their day at the surface resting and grooming during the summer months (Esslinger et al. 2014). Few studies have evaluated foraging times during the winter months. Garshelis et al. (1986) found that foraging times increased from 5.1 hours per day to 16.6 hours per day in the winter; however, Gelatt et al. (2002) did not find a significant difference in seasonal foraging times. It is likely that seasonal variation is determined by seasonal differences in energetic demand and the quality and availability of prey sources (Esslinger et al. 2014). These findings suggest that the large portion of the day sea otters spend at the surface may help limit sea otters' exposure during noise-generating operations.

Sea otter sensitivity to industrial activities may be influenced by the overall level of human activity within the sea otter population's range. In locations that lack frequent human activity, sea otters appear to have a lower threshold for disturbance. Sea otters in Alaska exhibited escape behaviors in response to the presence and approach of vessels (Udevitz et al. 1995). Behaviors included diving or actively swimming away from a vessel, sea otters on haulouts entering the water, and groups of sea otters disbanding and swimming in multiple directions (Udevitz et al. 1995). Alaskan sea otters were observed to avoid areas with heavy boat traffic and return to these areas during seasons with less vessel traffic (Garshelis and Garshelis 1984). In Cook Inlet, sea otters drifting on a tide trajectory that would have taken them within 500 m (0.3 mi) of an active offshore drilling rig were observed to swim in order to avoid a close approach of the drilling rig despite near-ambient noise levels (BlueCrest 2013). Sea otter responses to disturbance can result in energetic costs, which increases the amount of prey required by sea otters (Barrett 2019). This increased prey consumption may impact sea otter prey availability and cause sea otters to spend more time foraging and less time resting (Barrett 2019).

Individual sea otters in Sitka will likely show a range of responses to noise from pile driving activities. Some sea otters will likely show startle responses, change direction of travel, dive, or prematurely surface. Sea otters reacting to survey activities may divert time and attention from biologically important behaviors, such as feeding and nursing pups. Some sea otters may abandon the project area and return when the disturbance has ceased. Based on the observed movement patterns of sea otters (Lensink 1962; Kenyon 1969, 1981; Garshelis and Garshelis 1984; Riedman and Estes 1990; Tinker and Estes 1996), we expect some individuals will respond to pile driving activities by dispersing to nearby areas of suitable habitat; however, other sea otters, especially territorial adult males, will not be displaced.

Vessel Activities

Vessel collisions with marine mammals can result in death or serious injury. Wounds resulting from vessel strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus 2001). An individual may be harmed by a vessel if the vessel runs over the animal at the surface, the animal hits the bottom of a vessel while the animal is surfacing, or the animal is cut by a vessel's propeller. Mortality associated with vessel strike has been determined based on recovery of carcasses with lacerations indicative of propeller injuries (Wild and Ames 1974; Morejohn et al. 1975). Vessel strike has been documented as a cause of death across all three stocks of northern sea otters in Alaska. In a review of sea otter mortality that occurred during a 10-year period (2002–12), 10 individuals out of 483 with an identifiable cause of death were determined to die due to trauma from a boat strike (Burek-Huntington et al. 2021). These events occurred in across central and southeast Alaska, with fatalities occurring in the specified geographic region of Sitka. In many boat strike cases, trauma was determined to be the ultimate cause of death; however, there was a contributing factor, such as disease or biotoxin exposure, which incapacitated the sea otter and made it more vulnerable to vessel strike (88 FR 53510, August 8, 2023).

Vessel speed influences the likelihood of vessel strikes involving sea otters. The probability of death or serious injury to a marine mammal increases as vessel speed increases (Laist et al. 2001; Vanderlaan and Taggart 2007). Sea otters spend a considerable portion of their time at the water's surface (Esslinger et al. 2014), and are typically visually aware of approaching vessels and can move away if a vessel is not traveling too quickly. The CBS has committed to speeds of 6 knots for their materials and construction barges and 5 knots for their personnel skiffs. These speeds are slow enough to allow nearby sea otters to move away from vessels if needed, and significantly reduce the risk of potential boat strike.

Sea otters exhibit behavioral flexibility in response to vessels, and their responses may be influenced by the intensity and duration of the vessel's activity. For example, sea otter populations in Alaska were observed to avoid areas with heavy vessel traffic but return to those same areas during seasons with less vessel traffic (Garshelis and Garshelis 1984). Sea otters have also shown signs of disturbance or escape behaviors in response to the presence and approach of survey vessels, including: sea otters diving and/or actively swimming away from a vessel; sea otters on haulouts entering the water; and groups of sea otters disbanding and swimming in multiple different directions (Udevitz et al. 1995).

Additionally, sea otter responses to vessels may be influenced by the sea otter's previous experience with vessels. Sea otters in different study locations in California were found to exhibit markedly different responses to kayakers, suggesting a different level of tolerance between the groups (Gunvalson 2011). Benham (2006) found evidence that the sea otters exposed to high levels of recreational activity may have become more tolerant than individuals in less-disturbed areas. Sea otters off the California coast showed only mild interest in vessels passing

within hundreds of meters and appeared to have habituated to vessel traffic (Riedman 1983, Curland 1997). The project area is within an active harbor used year-round by commercial and recreational vessels and is immediately adjacent to the flight path of aircraft landing at Sitka Rocky Gutierrez Airport. As such, it is probable that sea otters in the area have been frequently exposed to boating and aircraft activity and would not regard the project's vessel activities as novel stimuli.

Consequences of Disturbance

The reactions of wildlife to disturbance can range from short-term behavioral changes to long-term impacts that affect survival and reproduction. When disturbed by noise, animals may respond behaviorally (*e.g.,* escape response) or physiologically (*e.g.,* increased heart rate, hormonal response) (Harms et al. 1997, Tempel and Gutierrez 2003). The energy expense and associated physiological effects could ultimately lead to reduced survival and reproduction (Gill and Sutherland 2000, Frid and Dill 2002). For example, South American sea lions (*Otaria byronia*) visited by tourists exhibited an increase in the state of alertness and a decrease in maternal attendance and resting time on land, thereby potentially reducing population size (Pavez et al. 2015). In another example, killer whales that lost feeding opportunities due to vessel traffic faced a substantial (18 percent) estimated decrease in energy intake (Williams et al. 2002). Such disturbance effects can have population-level consequences. Increased disturbance rates have been associated with a decline in bottlenose dolphin (*Tursiops* spp.) abundance (Bejder et al. 2006, Lusseau et al. 2006).

These examples illustrate direct effects on survival and reproductive success, but disturbances can also have indirect effects. Response to noise disturbance is considered a nonlethal stimulus that is similar to an antipredator response (Frid and Dill 2002). Sea otters are susceptible to predation, particularly from killer whales and eagles, and have a well-developed antipredator response to perceived threats. For example, the presence of a harbor seal (*Phoca vitulina*) did not appear to disturb sea otters, but they demonstrated a fear response in the presence of a California sea lion by actively looking above and beneath the water (Limbaugh 1961).

Although an increase in vigilance or a flight response is nonlethal, a tradeoff occurs between risk avoidance and energy conservation. An animal's reactions to noise disturbance may cause stress and direct an animal's energy away from fitness-enhancing activities such as feeding and mating (Frid and Dill 2002, Goudie and Jones 2004). For example, southern sea otters in areas with heavy recreational boat traffic demonstrated changes in behavioral time budgeting, showing decreased time resting and changes in haulout patterns and distribution (Benham et al. 2006, Maldini et al. 2012). Chronic stress can also lead to weakened reflexes, lowered learning responses (Welch and Welch 1970, van Polanen Petel et al. 2006), compromised immune function, decreased body weight, and abnormal thyroid function (Seyle 1979).

Changes in behavior resulting from anthropogenic disturbance can include increased agonistic interactions between individuals or temporary or permanent abandonment of an area (Barton et al. 1998). The extent of previous exposure to humans (Holcomb et al. 2009), the type of disturbance (Andersen et al. 2012), and the age or sex of the individuals (Shaughnessy et al. 2008, Holcomb et al. 2009) may influence the type and extent of response.

Effects on Sea Otter Habitat and Prey

Physical and biological features of habitat essential to the conservation of sea otters include the benthic invertebrates (*e.g.,* red sea urchins (*Mesocentrotus franciscanus*), blue mussels (*Mytilus* spp.), butter clams (*Saxidomus giganteus*), etc.) eaten by sea otters, shallow rocky areas, and kelp (*e.g.,* bull kelp (*Nereocystis luetkeana*) and dragon kelp (*Eualaria fistulosa*)) beds that provide cover from predators. Important sea otter habitat in the project area includes coastal areas within the 40-m (131-ft) depth contour where high densities of sea otters have been detected.

Construction activities, such as pile driving and fill placement, may generate in-water noise at levels which can temporarily displace sea otters from important habitat and impact sea otter prey species. The primary prey species for sea otters are sea urchins, abalone, clams, mussels, crabs, and squid (Tinker and Estes 1996). When preferential prey are scarce, sea otters will also eat kelp, slow-moving benthic fishes, sea cucumbers, egg cases of rays, turban snails (*Tegula* spp.), octopuses (*e.g., Octopus* spp.), barnacles (*Balanus* spp.), sea stars (*e.g., Pycnopodia helianthoides*), scallops (*e.g., Patinopecten caurinus*), rock oysters (*Saccostrea* spp.), worms (*e.g., Eudistylia* spp.), and chitons (*e.g., Mopalia* spp.) (Riedman and Estes 1990; Davis and Bodkin 2021). Several studies have addressed the effects of noise on invertebrates (Tidau and Briffa 2016; Carroll et al. 2017). Behavioral changes, such as an increase in lobster (*Homanus americanus*) feeding levels (Payne et al. 2007), an increase in avoidance behavior by wild-caught captive reef squid (*Sepioteuthis australis*) (Fewtrell and McCauley 2012), and deeper digging by razor clams (*Sinonovacula constricta*) (Peng et al. 2016) have been observed following experimental exposures to sound. Physical changes have also been observed in response to increased sound levels, including changes in serum biochemistry and hepatopancreatic cells in lobsters (Payne et al. 2007) and long-term damage to the statocysts required for hearing in several cephalopod species (André et al. 2011; Solé et al. 2013, 2019). De Soto et al. (2013) found impaired embryonic development in scallop (*Pecten novaezelandiae*) larvae when exposed to 160 dB. Christian et al. (2004) noted a reduction in the speed of egg development of bottom-dwelling crabs following exposure to noise; however, the sound level (221 dB at 2 m (6.6 ft)) was far higher than the proposed project activities will produce. Industrial noise can also impact larval settlement by masking the natural acoustic settlement cues for crustaceans and fish (Pine et al. 2012, Simpson et al. 2016, Tidau and Briffa 2016).

While these studies provide evidence of deleterious effects to invertebrates as a result of increased sound levels, Carroll et al. (2017) caution that there is a wide disparity between results obtained in field and laboratory settings. In experimental settings, changes were observed only when animals were housed in enclosed tanks and many were exposed to prolonged bouts of continuous, pure tones. We would not expect similar results in open marine conditions. It is unlikely that noises generated by project activities will have any lasting effect on sea otter prey given the short-term duration of sounds produced by each component of the proposed work.

Noise-generating activities that interact with the seabed can produce vibrations, resulting in the disturbance of sediment and increased turbidity in the water. Although turbidity is likely to have little impact on sea otters and prey species (Todd et al. 2015), there may be some impacts from vibrations and increased sedimentation. For example, mussels (*Mytilus edulis*) exhibited changes in valve gape and oxygen demand, and hermit crabs (*Pagurus bernhardus*) exhibited limited behavioral changes in response to

vibrations caused by pile driving (Roberts et al. 2016). Increased sedimentation is likely to reduce sea otter visibility, which may result in reduced foraging efficiency and a potential shift to less-preferred prey species. These outcomes may cause sea otters to spend more energy on foraging or processing the prey items; however, the impacts of a change in energy expenditure are not likely to be seen at the population level (Newsome et al. 2015). Additionally, the benthic invertebrates may be impacted by increased sedimentation, resulting in higher abundances of opportunistic species that recover quickly from industrial activities that increase sedimentation (Kotta et al. 2009). The impacts of increased turbidity at the project site will be temporary. Conversely, placement of fill below the high tide line and construction of a new upland peninsula will result in the permanent removal of 1.3 acres of sea otter habitat. However, sea otter habitat is abundant throughout the Sitka area, and loss of a small amount of habitat is unlikely to apply density-dependent pressure on the population, as it is estimated to be well below carrying capacity (estimated K=47 percent (Tinker et al. 2019).

Potential Impacts on Subsistence Uses

The proposed specified activities will occur near marine subsistence harvest areas used by Alaska Native Peoples from Sitka and the surrounding areas. Subsistence harvest of sea otters in the Sitka subregion has been consistent over time. Between 1988 and 2015, it is estimated that 12,546 sea otters were harvested in southeast Alaska. Of these harvests, 2,744, or roughly 22 percent, occurred in the Sitka subregion.

The proposed project is immediately adjacent to Sitka Airport and the Sitka harbor. Active subsistence harvest does not typically occur in these heavily used areas. Construction activities will not preclude access to hunting areas or interfere in any way with individuals wishing to hunt. In September 2018, the Alaska Harbor Seal Commission, the Alaska Sea Otter and Steller Sea Lion Commission, and the Sitka Tribe of Alaska were contacted by CBS to discuss a project in Sitka Channel and request comments. The Commissions and Sitka Tribe of Alaska did not express concerns with the project impacting the harvest of marine mammals. However, the Sitka Tribe of Alaska did request that no pile driving be conducted from March 15 to May 31 to protect herring, and the CBS will honor the request. If any conflicts are identified in the future, the CBS will develop a plan of cooperation (POC) specifying the particular steps necessary to minimize any effects the project may have on subsistence harvest.

Mitigation Measures

If an IHA for the project is issued, it must specify means for effecting the least practicable adverse impact on sea otters and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance and the availability of sea otters for subsistence uses by coastal-dwelling Alaska Natives.

In evaluating what mitigation measures are appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses, we considered the manner and degree to which the successful implementation of the measures are expected to achieve this goal. We considered the nature of the potential adverse impact being mitigated (likelihood, scope, range), the likelihood that the measures will be effective if implemented, and the likelihood of effective implementation. We also considered the practicability of the measures for applicant implementation (*e.g.,* cost, impact on operations).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, the applicants have proposed mitigation measures including the following:

- Development of a marine mammal monitoring and mitigation plan;
- Establishment of shutdown and monitoring zones;
- Monitoring by designated protected species observers (PSOs);
- Clearance of the site before startup;
- Limiting in-water activity to daylight hours;
- Use of silt curtains to prevent sedimentation and turbidity during down-the-hold drilling;
- Adherence to soft-start procedures; and
- Shutdown procedures.

These measures are further specified under Proposed Authorization, part *B. Avoidance and Minimization.* The FWS has not identified any additional (*i.e.,* not already incorporated into the CBS's request) mitigation or monitoring measures that are practicable and would further reduce potential impacts to sea otters and their habitat.

Estimated Take

Definitions of Incidental Take Under the Marine Mammal Protection Act

Below we provide definitions of three potential types of take of sea otters. The FWS does not anticipate and is not authorizing lethal take or Level A harassment as a part of this proposed IHA; however, the definitions of these take types are provided for context and background.

Lethal Take—Human activity may result in biologically significant impacts to sea otters. In the most serious interactions human actions can result in the mortality of sea otters.

Level A Harassment—Human activity may result in the injury of sea otters. Level A harassment for nonmilitary readiness activities is defined as any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild. The specified action is not anticipated to result in Level A harassment due to exposure of sea otters to noise capable of causing PTS.

Level B Harassment—The applicant requested authorization for only take by Level B harassment, and the FWS is proposing to authorize only take by Level B harassment for this IHA. Level B harassment for nonmilitary readiness activities means any act of pursuit, torment, or annoyance that has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behaviors or activities, including, but not limited to, migration, breathing, nursing, feeding, or sheltering. Human-caused changes in behavior that disrupt biologically significant behaviors or activities for the affected animal indicate take by Level B harassment under the MMPA.

The FWS has identified the following sea otter behaviors as indicating possible Level B harassment:

- Swimming away at a fast pace on belly (*i.e.,* porpoising);
- Repeatedly raising the head vertically above the water to get a better view (spyhopping) while apparently agitated or while swimming away;
- In the case of a pup, repeatedly spyhopping while hiding behind and holding onto its mother's head;
- Abandoning prey or feeding area;
- Ceasing to nurse and/or rest (applies to dependent pups);
- Ceasing to rest (applies to independent animals);
- Ceasing to use movement corridors;
- Ceasing mating behaviors;
- Shifting/jostling/agitation in a raft so that the raft disperses;
- Sudden diving of an entire raft; or
- Flushing animals off a haulout.

This list is not meant to encompass all possible behaviors; other behavioral responses may also be indicative of Level B harassment. Relatively minor changes in behavior such as the animal raising its head or temporarily changing

its direction of travel are not likely to disrupt biologically important behavioral patterns, and the FWS does not view such minor changes in behavior as indicative of a take by Level B harassment. It is also important to note that eliciting behavioral responses that equate to take by Level B harassment repeatedly may result in Level A harassment. For example, while a single flushing event would likely indicate Level B harassment, repeatedly flushing sea otters from a haulout may constitute Level A harassment.

Calculating Take

The FWS does not anticipate, nor do we propose to authorize, the Level A or Level B harassment of sea otters as a result of vessel operations or placement of fill in the waterway. Vessels will be operated in areas with year-round boat traffic at conservatively slow speeds, significantly reducing the probability of sea otter harassment. Deposition of fill material is not anticipated to generate appreciable underwater noise (Dickerson et al. 2001, Nedwell and Howell 2004). Finally, otters are not anticipated to be physically injured due to fill deposition due to the use of protected species observers and shutdown zones.

We assumed all animals exposed to underwater sound levels from pile driving operations that meet the acoustic exposure criteria shown in table 1 will experience, at a minimum, take by Level B harassment due to exposure to underwater noise. Spatially explicit zones of ensonification were established around the proposed construction location to estimate the number of otters that may be exposed to these sound levels.

The project can be divided into three major components: down-the-hole drilling, vibratory hammering, and pile-driving using an impact hammer. Each of these components will generate a different type of in-water noise. Vibratory hammering will produce nonimpulsive or continuous noise, impact driving will produce impulsive noise, and down-the-hole drilling is considered to produce both impulsive and continuous noise (NMFS 2020).

The level of sound anticipated from each project component was established using recorded data from pile-driving in Friday Harbor, Washington, Bangor Naval Base, Washington, and Trinidad Bay, California (a proxy for vibratory hammering; NAVFAC 2015); Rodeo, California (a proxy for impact hammering of 24-inch piles; Caltrans 2020); Anderson, California (a proxy for impact hammering of 16-inch piles; Caltrans 2020); Tenakee Springs, Alaska (a proxy for down-the-hole drilling of 16-inch and 24-inch piles; Heyvaert and Reyff 2021); and Biorka Island, Alaska (a proxy for down-the-hole drilling of 24-inch piles; Guan and Miner 2020). The NMFS Technical Guidance and User Spreadsheet (NMFS 2018, 2020) was used to determine the distance at which sound levels would attenuate to Level A harassment thresholds, and we used the NMFS Multi-species pile driving calculator to determine the distance at which sound levels would attenuate to Level B harassment thresholds (table 2). The weighting factor adjustment included in the NMFS User Spreadsheet accounts for sound created in portions of an organism's hearing range where they have less sensitivity. We used the weighting factor adjustment for otariid pinnipeds (2), as they are the closest available physiological and anatomical proxy for sea otters. Both tools incorporate a transmission loss coefficient, which accounts for the reduction in sound level outward from a sound source. We used the NMFS-recommended transmission loss coefficient of 15 for coastal pile-driving activities to indicate simple spread (NMFS 2020).

TABLE 2—SUMMARY BY PROJECT COMPONENT OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, OTTERS IN LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE

Sound source	Down-the-hole drilling (16-inch steel piles)	Down-the-hole drilling (24-inch steel piles)	Vibratory hammering (16 and 24-inch steel piles)	Impact hammer (16-inch steel piles)	Impact hammer (24-inch steel piles)
Sound level at 10 meters:					
dB RMS	167	173	161	185	190
dB SEL	146	159		175	177
dB peak	172	184		200	203
Literature reference	Heyvaert and Reyff 2021 (dB RMS); Guan and Miner 2020 (dB SEL and dB peak).	Heyvaert and Reyff 2021.	NAVFAC 2015	Caltrans 2020	Caltrans 2020
Timing per pile	60 minutes/pile	90 minutes/pile	10 minutes/pile	5 minutes/pile	5 minutes/pile
Strikes per pile	36,000 strikes/pile	54,000 strikes/pile.		175 strikes/pile	175 strikes/pile
Maximum piles per day	2	2	6	4	4
Maximum number of days	5	8	9	6	4
Distance to below Level A harassment threshold in meters.	2.3	22.2	0.3	9	12.2
Distance to below Level B harassment threshold in meters.	30	75	20	465	1,000
Estimated sea otter density in affected area	0.85	0.85	0.85	0.85	0.85
Potential sea otters affected by sound	0*	2	0*	2	2
Days of activity	5	8	9	6	4
Potential harassment events	0	16	0	12	8

* The project shutdown zone extends 30 meters from the sound source. Therefore, we do not anticipate sea otters to experience Level B harassment as a result of down-the-hole drilling of 16-inch steel piles or vibratory hammering of 16-inch or 24-inch steel piles.

Note: Sound levels for all sources are unweighted and given in dB re 1 μPa. Nonimpulsive sounds are in the form of mean maximum root mean square (RMS) sound pressure level (SPL) as it is more conservative than cumulative sound exposure level (SEL) or peak SPL for these activities. Impulsive sound sources are in the form of SEL for a single strike (s-s).

Recent estimates of the number of sea otters in the project area are less than one otter per square kilometer. Tinker et al. (2019) estimated an average of 0.85 otters/km² in the sub-region that includes the project area (N05). Similarly, fine-scale ecological diffusion models have estimated 0.062 otters/km² inside the harbor breakwater and 0.65 otters/km² outside the harbor breakwater Eisaguirre et al. (2023). Given these values, we assume up to

one otter per square kilometer may be in the area during construction activities. However, the project is within an area that may provide refuge for mom-pup pairs. Northern sea otters enter estrus immediately following pup loss or weaning (Monson et al. 2000) and may have pups year-round. Thus, when estimating the number of potential Level B harassment events, we account for the possibility of the otter having a dependent pup by assuming two otters per square kilometer during project activities.

To determine the number of sea otters that may experience in-water sound greater than 160 dB, we calculated the area of potential impact for each project activity (*i.e.,* down-the-hole drilling and impact hammering) that would generate noise >160 dB beyond the project's 30-meter shutdown zone. Impact areas were drawn and their area calculated in ArcPro 3.1.4 using geospatial files of the project location, adjacent coastline, and the harbor breakwater to account for sound attenuation by land shadows (figure 2). These impact areas were multiplied by the number of otters/km^2 and rounded to account for the possibility of a mom-pup pair (table 1).

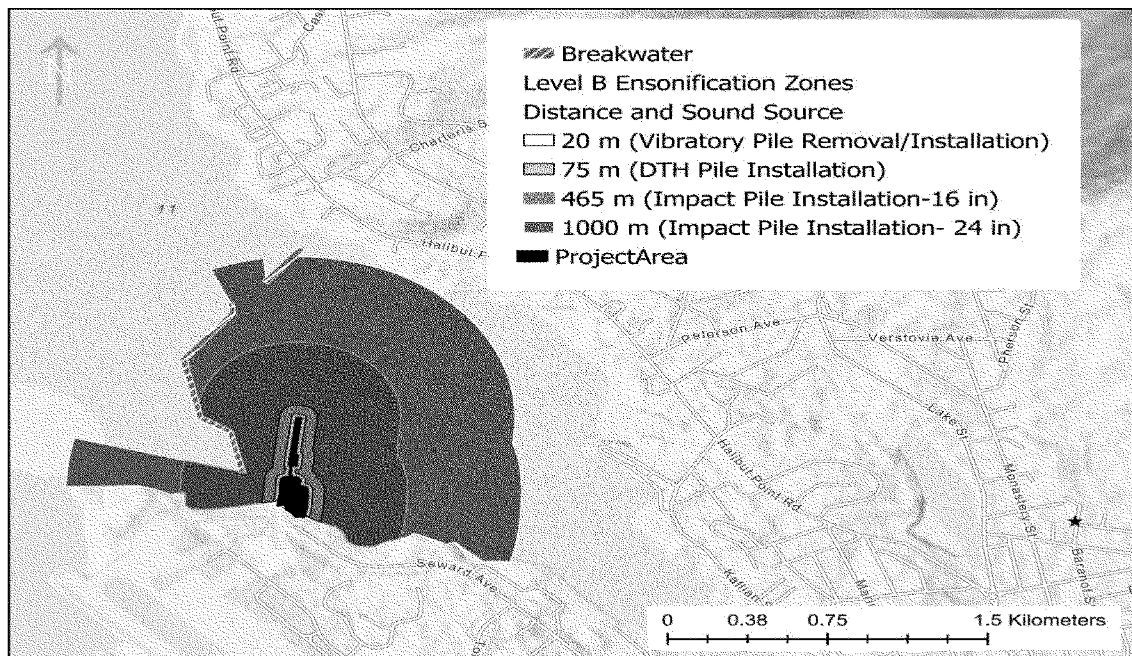

Figure 2 – Project area, source locations, and Level B harassment ensonification zones for each project component.

Although sea otters are non-migratory, they typically move amongst focal areas within their home ranges to rest and forage (Garshelis and Garshelis 1984, Laidre et al. 2009). It is possible that given the density of sea otters in the region, the large variability in individual home range sizes, and the potential for up to daily movement in and out of foraging or resting areas, that a different mom-pup pair could be found within the ensonification zone each day of the project. Thus, the FWS conservatively assumes that the 36 estimated harassment events may impact up to 36 different sea otters. However, should an individual or mom-pup pair remain in the impact area more than one day, and therefore experience Level B harassment more than once, we do not anticipate repeated exposure events to lead to harassment greater than Level B. No Level A harassment (*i.e.,* injury) is anticipated or proposed to be authorized. While in-water noise will be at a level capable of causing PTS from up to 22.2 m from the source location (during down-the-hole drilling of 24-inch piles), operations will be shut down should any marine mammal come within 30 m of project activities.

Critical Assumptions

We estimate 36 takes of 36 sea otters by Level B harassment will occur due to the proposed specified activities. To conduct this analysis and estimate the potential amount of Level B harassment, several critical assumptions were made.

Otter density was calculated using a state-space model created by Tinker et al. (2019) and a Bayesian hierarchical model created by Eisaguirre et al. (2021), which includes assumptions that can be found in the original publications. The northern sea otter southeast stock Stock Assessment Report (88 FR 53510, August 8, 2023) also elaborates on the inclusion of Glacier Bay National Park aerial surveys into the most recent iteration of the Eisaguirre et al. (2021) Bayesian hierarchical model.

Sound level estimates for construction activities were generated using sound source verification from recent pile-driving activities in several locations in California, Washington, and Alaska. Environmental conditions in these locations, including water depth, substrate, and ambient sound levels are similar to those in the project location but not identical. Further, estimation of ensonification zones were based on sound attenuation models using a simple spreading loss model. These factors may lead to actual sound values differing slightly from those estimated here.

Finally, the pile-driving activities described here will also create in-air noise. Because sea otters spend over half of their day with their heads above water (Esslinger et al. 2014), they will be exposed to increases in in-air noise from

construction equipment. However, we have calculated Level B harassment with the assumption that an individual may be harassed only one time per 24-hour period, and underwater sound levels will be more disturbing and extend farther than in-air noise. Thus, while sea otters may be disturbed by noise both in air and underwater, we have relied on the more conservative underwater estimates.

Determinations and Findings

Sea otters exposed to project-produced sounds are likely to respond with temporary behavioral modification or displacement. Project activities could temporarily interrupt the feeding, resting, and movement of sea otters. Because activities will occur during a limited amount of time and in a localized region, the impacts associated with the project are likewise temporary and localized. The anticipated effects are primarily short-term behavioral reactions and displacement of sea otters near active operations.

Sea otters that encounter the specified activity may exert more energy than they would otherwise due to temporary cessation of feeding, increased vigilance, and retreat from the project area. We expect that affected sea otters will tolerate this exertion without measurable effects on health or reproduction. Most of the anticipated takes will be due to short-term Level B harassment in the form of TTS, startling reactions, or temporary displacement. Chronic exposure to sound levels that cause TTS may lead to PTS (which would constitute Level A harassment). While more research into the relationship between chronic noise exposure and PTS is needed (Finneran 2015), it is likely that the transition from temporary effects to permanent cellular damage occurs over a longer time period than the proposed project activities (Southall et al. 2019). With the adoption of the mitigation measures proposed in the request and required by this proposed IHA, estimated take was reduced.

Small Numbers

For our small numbers determination, we consider whether the estimated number of sea otters to be subjected to incidental take is small relative to the population size of the species or stock. We estimate the CBS's specified activities in the specified geographic region will take no more than 36 takes of sea otters by Level B harassment during the 1-year period of this proposed IHA (see *Calculating Take*). Take of 36 animals is 0.13 percent of the best available estimate of the current Southeast Alaska stock size of 27,285 animals ($(36 \div 27{,}285) \times 100 \approx 0.13$), and represents a ''small number'' of sea otters of that stock.

Negligible Impact

We propose a finding that any incidental take by Level B harassment resulting from the specified activities cannot be reasonably expected to, and is not reasonably likely to, adversely affect the Southeast Alaska stock of northern sea otters through effects on annual rates of recruitment or survival and will, therefore, have no more than a negligible impact on the stock. In making this finding, we considered the best available scientific information, including the biological and behavioral characteristics of the species, the most recent information on species distribution and abundance within the area of the specified activities, the current and expected future status of the stock (including existing and foreseeable human and natural stressors), the potential sources of disturbance caused by the project, and the potential responses of marine mammals to this disturbance. In addition, we reviewed applicant-provided materials, information in our files and datasets, published reference materials, and species experts.

Sea otters are likely to respond to planned activities with temporary behavioral modification or temporary displacement. These reactions are not anticipated to have consequences for the long-term health, reproduction, or survival of affected animals. Most animals will respond to disturbance by moving away from the source, which may cause temporary interruption of foraging, resting, or other natural behaviors. Affected animals are expected to resume normal behaviors soon after exposure, with no lasting consequences. Sea otters may move in and out of the project area during pile driving activities, leading to as many as 36 individuals experiencing one day of exposure. However, it is possible that an individual or a mom-pup pair may enter the ensonification area more than once during the project. At most, if the same mom-pup pair enters the ensonification area every day pile driving occurs, the mom-pup pair would experience Level B harassment for 18 days. However, injuries (*i.e.,* Level A harassment or PTS) due to chronic sound exposure are estimated to occur over a longer time scale (Southall et al. 2019). The greatest area that will experience noise greater than Level B thresholds due to pile driving is small (less than 0.7 km^2), and an animal that may be disturbed could escape the noise by moving to nearby quiet areas. Further, sea otters spend over half of their time above the surface during the summer months (Esslinger et al. 2014), and likely no more than 70 percent of their time foraging during winter months (Gelatt et al. 2002); thus, their ears will not be exposed to continuous noise, and the amount of time it may take for permanent injury is considerably longer than that of mammals primarily under water. Some animals may exhibit some of the stronger responses typical of Level B harassment, such as fleeing, interruption of feeding, or flushing from a haulout. These responses could have temporary biological impacts for affected individuals, but are not anticipated to result in measurable changes in survival or reproduction.

The total number of animals affected and severity of impact are not sufficient to change the current population dynamics at the stock scale. Although the specified activities may result in approximately 36 incidental takes of up to 36 sea otters from the Southeast Alaska stock, we do not expect this level of harassment to affect annual rates of recruitment or survival or result in adverse effects on the stock.

Our proposed finding of negligible impact applies to incidental take associated with the specified activities as mitigated by the avoidance and minimization measures identified in the City and Borough of Sitka's mitigation and monitoring plan. These mitigation measures are designed to minimize interactions with and impacts to sea otters. These measures and the monitoring and reporting procedures are required for the validity of our finding and are a necessary component of the proposed IHA. For these reasons, we propose a finding that the specified project will have a negligible impact on the Southeast Alaska stock of northern sea otters.

Least Practicable Adverse Impacts

To reduce the potential for disturbance from their specified activities, the CBS will implement mitigation measures as described in Mitigation Measures and further specified under Proposed Authorization, part *B. Avoidance and Minimization.* We find that the mitigation measures required by this proposed IHA will affect the least practicable adverse impacts on the stock from any incidental take likely to occur in association with the specified activities. In making this finding, we considered the biological characteristics of sea otters, the nature of the specified activities, the potential effects of the activities on sea otters, the documented

impacts of similar activities on sea otters, and alternative mitigation measures.

We evaluated the manner and degree to which the successful implementation of the measures are expected to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses. We considered the nature of the potential adverse impact being mitigated (likelihood, scope, range), the likelihood that the measures will be effective if implemented, and the likelihood of effective implementation. We also considered the practicability of the measures for applicant implementation (*e.g.,* cost, impact on operations). We assessed whether any additional practicable requirements could be implemented to further reduce effects and did not identify any.

During the IHA application process, the FWS coordinated closely with the applicant to discuss potential mitigation measures and their practicability. A comprehensive list of these measures can be found in the supplemental information for this proposed IHA. One notable measure considered by both the FWS and CBS but deemed to be impracticable was the use of bubble curtains during pile driving. The CBS has stated the small-diameter piles used in this project will be placed closely together, and this close placement will not allow enough space to deploy bubble curtains, sound mitigation screens, or nets to dampen sound.

Following the discussion of potential mitigation measures with the applicant, the FWS has not identified any additional (*i.e.,* not already incorporated into the applicant's request) mitigation or monitoring measures that are practicable and would further reduce potential impacts to sea otters and their habitat.

Impact on Subsistence Use

We propose a finding that the CBS's anticipated harassment will not have an unmitigable adverse impact on the availability of the Southeast Alaska stock of northern sea otters for taking for subsistence uses. In making this finding, we considered the timing and location of the proposed activities and the timing and location of subsistence harvest activities in the area of the proposed project. We also considered the applicant's consultation with subsistence communities, proposed measures for avoiding impacts to subsistence harvest, and commitment to development of a POC, should any concerns be identified.

Required Determinations

National Environmental Policy Act (NEPA)

We have prepared a draft environmental assessment in accordance with the NEPA (42 U.S.C. 4321 *et seq.).* We have preliminarily concluded that authorizing the nonlethal, incidental, unintentional take by Level B harassment of up to 36 northern sea otters from the Southeast Alaska stock during the specified activities would not significantly affect the quality of the human environment and, thus, preparation of an environmental impact statement for this incidental harassment authorization is not required by section 102(2) of NEPA or its implementing regulations. We are accepting comments on the draft environmental assessment as specified above in **DATES** and **ADDRESSES**.

Endangered Species Act

Under the Endangered Species Act (ESA) (16 U.S.C. 1536(a)(2)), all Federal agencies are required to ensure the actions they authorize are not likely to jeopardize the continued existence of any threatened or endangered species or result in destruction or adverse modification of critical habitat. The specified activities would occur entirely within the range of the Southeast Alaska stock of northern sea otters, which is not listed as threatened or endangered under the ESA.

The authorization of incidental take of sea otters and the measures included in the proposed IHA would not affect other listed species or designated critical habitat.

Government-to-Government Consultation

It is our responsibility to communicate and work directly on a Government-to-Government basis with federally recognized Alaska Native Tribes and organizations in developing programs for healthy ecosystems. We seek their full and meaningful participation in evaluating and addressing conservation concerns for protected species. It is our goal to remain sensitive to Alaska Native culture, and to make information available to Alaska Natives. Our efforts are guided by the following policies and directives:

(1) *The Native American Policy of the Service* (January 20, 2016);

(2) *The Alaska Native Relations Policy* (currently in draft form);

(3) *Executive Order 13175* (January 9, 2000);

(4) *Department of the Interior Secretarial Orders 3206* (June 5, 1997), *3225* (January 19, 2001), *3317* (December 1, 2011), and *3342* (October 21, 2016);

(5) *The Alaska Government-to-Government Policy* (a departmental memorandum issued January 18, 2001); and

(6) the Department of the Interior's policies on consultation with Alaska Native Tribes and organizations.

We have evaluated possible effects of the specified activities on federally recognized Alaska Native Tribes and organizations. Through the IHA process identified in the MMPA, the applicant has presented a communication process, culminating in a POC if needed, with the Native organizations and communities most likely to be affected by their work. The FWS does not anticipate impacts to Alaska Native Tribes or Alaska Native Claims Settlement Act corporations and does not anticipate requesting consultation; however, we invite continued discussion, either about the project and its impacts or about our coordination and information exchange throughout the IHA/POC process.

Paperwork Reduction Act

This rule does not contain any new collection of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with IHAs and assigned OMB Control Number 1018–0194 (expires 08/31/2026). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Proposed Authorization

We propose to authorize the nonlethal, incidental take by Level B harassment of 36 Southeast Alaska stock northern sea otters. Authorized take will be limited to disruption of behavioral patterns that may be caused by construction of a seaplane base, and support activities conducted by the City and Borough of Sitka in the Sitka Channel, Sitka, Alaska, between July 1, 2024 and July 1, 2025. We do not anticipate or propose to authorize any lethal take or Level A harassment.

A. General Conditions for This IHA

(1) Activities must be conducted in the manner described in the revised Request dated November 16, 2023, for an IHA and in accordance with all applicable conditions and mitigations measures. The taking of sea otters whenever the required conditions,

mitigation, monitoring, and reporting measures are not fully implemented as required by the IHA is prohibited. Failure to follow the measures specified both in the Request and within this proposed authorization may result in the modification, suspension, or revocation of the IHA.

(2) If project activities cause unauthorized take (*i.e.,* take of more than 36 Southeast Alaska stock northern sea otters, a form of take other than Level B harassment, or take of one or more sea otters through methods not described in the IHA), the City and Borough of Sitka must take the following actions:

(i) cease its activities immediately (or reduce activities to the minimum level necessary to maintain safety);

(ii) report the details of the incident to the FWS within 48 hours; and

(iii) suspend further activities until the FWS has reviewed the circumstances and determined whether additional mitigation measures are necessary to avoid further unauthorized taking.

(3) All operations managers, vehicle operators, and vessel operators must receive a copy of this IHA and maintain access to it for reference at all times during project work. These personnel must understand, be fully aware of, and be capable of implementing the conditions of the IHA at all times during project work.

(4) This IHA will apply to activities associated with the specified project as described in this document and in the City and Borough of Sitka's Request. Changes to the specified project without prior authorization may invalidate the IHA.

(5) The City and Borough of Sitka's Request is approved and fully incorporated into this IHA unless exceptions are specifically noted herein. The Request includes:

(i) The City and Borough of Sitka's original request for an IHA, dated August 18, 2023;

(ii) Revised requests, dated October 13, 2023, and November 16, 2023; and

(iii) Geospatial files of the project location and ensonification areas.

(6) Operators will allow FWS personnel or the FWS's designated representative to visit project work sites to monitor for impacts to sea otters and subsistence uses of sea otters at any time throughout project activities so long as it is safe to do so. ''Operators'' are all personnel operating under the City and Borough of Sitka's authority, including all contractors and subcontractors.

B. Avoidance and Minimization

(7) Construction activities must be conducted using equipment that generates the lowest practicable levels of underwater sound within the range of frequencies audible to sea otters.

(8) During all pile-installation activities, regardless of predicted sound levels, a physical interaction shutdown zone of 30 m (98 ft) must be enforced. If a sea otter enters the shutdown zone, in-water activities must be delayed until either the animal has been visually observed outside the shutdown zone, or 30 minutes have elapsed since the last observation time without redetection of the animal.

(9) If the impact driver has been idled for more than 30 minutes, an initial set of 3 strikes from the impact driver must be delivered at reduced energy, followed by a 1-minute waiting period, and then two subsequent 3-strike sets before full-powered proofing strikes.

(10) In-water activity must be conducted in daylight. If environmental conditions prevent visual detection of sea otters within the shutdown zone, in-water activities must be stopped until visibility is regained.

C. Mitigation Measures for Vessel Operators

Vessel operators must take every precaution to avoid harassment of sea otters when a vessel is operating near these animals. The applicant must carry out the following measures:

(11) Vessels must remain at least 500 m (0.3 mi) from rafts of 10 or more sea otters, unless safety is a factor. Vessels must reduce speed and maintain a distance of 100 m (328 ft) from all sea otters, unless safety is a factor.

(12) Vessels must not be operated in such a way as to separate members of a group of sea otters from other members of the group, and must avoid alongshore travel in shallow water (<20 m (66 ft)) whenever practicable.

(13) When weather conditions require, such as when visibility drops, vessels must adjust speed accordingly to avoid the likelihood of injury to sea otters.

(14) Vessel operators must be provided written guidance for avoiding collisions and minimizing disturbances to sea otters. Guidance will include measures identified in paragraphs (C)(11) through (13) of this section.

D. Monitoring

(15) Operators shall work with protected species observers (PSO) to apply mitigation measures and shall recognize the authority of PSOs up to and including stopping work, except where doing so poses a significant safety risk to personnel.

(16) Duties of the PSOs include watching for and identifying sea otters, recording observation details, documenting presence in any applicable monitoring zone, identifying and documenting potential harassment, and working with operators to implement all appropriate mitigation measures.

(17) A sufficient number of PSOs will be available to meet the following criteria: 100 percent monitoring of exclusion zones during all daytime periods of underwater noise-generating work; a maximum of 4 consecutive hours on watch per PSO; a maximum of approximately 12 hours on watch per day per PSO.

(18) All PSOs will complete a training course designed to familiarize individuals with monitoring and data collection procedures. A field crew leader with prior experience as a sea otter observer will supervise the PSO team. Initially, new or inexperienced PSOs will be paired with experienced PSOs so that the quality of marine mammal observations and data recording is kept consistent. Resumes for candidate PSOs will be made available for the FWS to review.

(19) Observers will be provided with reticule binoculars (7×50 or better), big-eye binoculars or spotting scopes (30×), inclinometers, and range finders. Field guides, instructional handbooks, maps, and a contact list will also be made available.

(20) Observers will collect data using the following procedures:

(i) All data will be recorded onto a field form or database.

(ii) Global positioning system data, sea state, wind force, and weather will be collected at the beginning and end of a monitoring period, every hour in between, at the change of an observer, and upon sightings of sea otters.

(iii) Observation records of sea otters will include date; time; the observer's locations, heading, and speed (if moving); weather; visibility; number of animals; group size and composition (adults/juveniles); and the location of the animals (or distance and direction from the observer).

(iv) Observation records will also include initial behaviors of the sea otters, descriptions of project activities and underwater sound levels being generated, the position of sea otters relative to applicable monitoring and mitigation zones, any mitigation measures applied, and any apparent reactions to the project activities before and after mitigation.

(v) For all sea otters in or near a mitigation zone, observers will record

the distance from the sound source to the sea otter upon initial observation, the duration of the encounter, and the distance at last observation in order to monitor cumulative sound exposures.

(vi) Observers will note any instances of animals lingering close to or traveling with vessels for prolonged periods of time.

(21) Monitoring of the shutdown zone must continue for 30 minutes following completion of pile installation.

E. Measures To Reduce Impacts to Subsistence Users

(22) Prior to conducting the work, the City and Borough of Sitka will take the following steps to reduce potential effects on subsistence harvest of sea otters:

(i) Avoid work in areas of known sea otter subsistence harvest;

(ii) Discuss the planned activities with subsistence stakeholders including Southeast Alaska villages and traditional councils;

(iii) Identify and work to resolve concerns of stakeholders regarding the project's effects on subsistence hunting of sea otters; and

(iv) If any concerns remain, develop a POC in consultation with the FWS and subsistence stakeholders to address these concerns.

F. Reporting Requirements

(23) The City and Borough of Sitka must notify the FWS at least 48 hours prior to commencement of activities.

(24) Reports will be submitted to the FWS's MMM weekly during project activities. The reports will summarize project work and monitoring efforts.

(25) A final report will be submitted to the FWS's MMM within 90 days after completion of work or expiration of the IHA. It will summarize all monitoring efforts and observations, describe all project activities, and discuss any additional work yet to be done. Factors influencing visibility and detectability of marine mammals (*e.g.,* sea state, number of observers, fog, and glare) will be discussed. The report will describe changes in sea otter behavior resulting from project activities and any specific behaviors of interest. Sea otter observation records will be provided in the form of electronic database or spreadsheet files. The report will assess any effects the City and Borough of Sitka's operations may have had on the availability of sea otters for subsistence harvest and if applicable, evaluate the effectiveness of the POC for preventing impacts to subsistence users of sea otters.

(26) Injured, dead, or distressed sea otters that are not associated with project activities (*e.g.,* animals found outside the project area, previously wounded animals, or carcasses with moderate to advanced decomposition or scavenger damage) must be reported to the FWS within 24 hours of discovery. Photographs, video, location information, or any other available documentation shall be provided to the FWS.

(27) All reports shall be submitted by email to *fw7_mmm_reports@fws.gov.*

(28) The City and Borough of Sitka must notify the FWS upon project completion or end of the work season.

Request for Public Comments

If you wish to comment on this proposed authorization, the associated draft environmental assessment, or both documents, you may submit your comments by either of the methods described in **ADDRESSES**. Please identify if you are commenting on the proposed authorization, draft environmental assessment, or both, make your comments as specific as possible, confine them to issues pertinent to the proposed authorization, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph that you are addressing. The FWS will consider all comments that are received before the close of the comment period (see **DATES**). The FWS does not anticipate extending the public comment period beyond the 30 days required under section 101(a)(5)(D)(iii) of the MMPA.

Comments, including names and street addresses of respondents, will become part of the administrative record for this proposal. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comments to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Peter Fasbender,

Assistant Regional Director for Fisheries and Ecological Services, Alaska Region.

[FR Doc. 2024–09895 Filed 5–6–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R7–ES–2024–0003; FXES111607MRG01–245–FF07CAMM00]

Marine Mammals; Letters of Authorization To Take Pacific Walruses, Polar Bears, and Northern Sea Otters in Alaska, in 2023

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended, the U.S. Fish and Wildlife Service (Service) issues letters of authorization (LOA) for the nonlethal take of polar bears and Pacific walruses incidental to oil and gas industry exploration, development, and production activities in the Beaufort Sea and the adjacent northern coast of Alaska. The Service also issues LOAs for the nonlethal take of northern sea otters incidental to pile driving and marine construction activities in the Gulf of Alaska. This notice announces the LOAs issued in calendar year 2023. The LOAs stipulate conditions and methods that minimize impacts to polar bears, Pacific walruses, and northern sea otters from these activities.

ADDRESSES:

Accessing documents: You may view the letters of authorization at *https://www.regulations.gov* under Docket No. FWS–R7–ES–2024–0003. Alternatively, you may request these documents from the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Charles Hamilton, U.S. Fish and Wildlife Service, 1011 East Tudor Road MS–341, Anchorage, AK 99503, by email at *R7mmmregulatory@fws.gov* or by telephone at (907) 786–3800. 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: On August 5, 2021, the U.S. Fish and Wildlife Service (Service) published in the **Federal Register** a final rule (86 FR 42982) establishing regulations that allow us to authorize the nonlethal, incidental, unintentional take of small numbers of polar bears (*Ursus maritimus*) and Pacific walruses

(*Odobenus rosmarus divergens*) during year-round oil and gas industry exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska. These incidental take regulations are located in subpart J in part 18 of title 50 of the Code of Federal Regulations (CFR) and are effective through August 5, 2026. The rule prescribed a process under which we issue letters of authorization (LOA) to applicants conducting activities as described under the provisions of the regulations.

Each LOA stipulates conditions or methods that are specific to the activity and location. Holders of the LOAs must use methods and conduct activities in a manner that minimizes to the greatest extent practicable adverse impacts on Pacific walruses and polar bears and their habitat, and on the availability of these marine mammals for subsistence purposes. No intentional take or lethal incidental take is authorized under these regulations.

In accordance with section 101(a)(5)(A) of the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) and our regulations at 50 CFR part 18, subpart J, in 2023, we issued LOAs to the companies in the Beaufort Sea and adjacent northern coast of Alaska shown in table 1.

TABLE 1—LETTERS OF AUTHORIZATION ISSUED FOR OIL AND GAS DEVELOPMENT ACTIVITIES IN THE BEAUFORT SEA, ALASKA, IN 2023

Company	Project	LOA #
Eni U.S. Operating Company Inc	Oil and gas drilling and production within the Nikaitchuq and Oooguruk Units on Alaska's North Slope.	23–01.
ASRC Consulting and Environmental Services.	Well drilling and production test facility construction and operation for a methane hydrate project on the Kuparuk State 7–11–12 gravel pad within the Prudhoe Bay Unit on the North Slope of Alaska.	23–02.
Alyeska Pipeline Service Company	Operation and maintenance of the Trans Alaska Pipeline System, which extends from Pump Station 1 in the Prudhoe Bay Oilfield to the Valdez Marine Terminal.	23–03.
Oil Search Alaska, LLC	Oil and gas exploration and development within and adjacent to the Pikka Unit area and oil and gas exploration on Oil Search Alaska operated leaseholds on Alaska's North Slope.	23–04.
Hilcorp Alaska, LLC	Year-round oil and gas exploration, production, development, and support activities in the Milne Point, Duck Island (Endicott), Northstar Island, Prudhoe Bay, and Point Thomson operation areas located in the Beaufort Sea incidental take regulations area of the North Slope of Alaska.	23–05.
Hilcorp Alaska, LLC	An amendment request dated November 2, 2023, for 23–INC–05 to include three additional pad expansions, two additional road expansions, repair of the Northstar bench, and construction and use of an ice road from Niakuk to Endicott's main drilling island in the Mine Point, Duck Island (Endicott), and Northstar Island operational areas. Original LOA (23–INC–05) for year-round oil and gas exploration, production, development, and support activities in the Milne Point, Duck Island (Endicott), Northstar Island, Prudhoe Bay, and Point Thomson operation areas located in the Beaufort Sea incidental take regulations area of the North Slope of Alaska.	23–05 [Amended in Dec. 2023 from July 2023].
Hilcorp Alaska, LLC	A letter from the Service dated December 19, 2023, outlining additional monitoring and mitigation measures to reduce disturbance of a putative den identified through aerial infrared surveys and located within the 1-mile buffer zone of operations and infrastructure.	23–05 [Amended in Dec. 2023 from July 2023].
Conoco Philips Alaska Inc	Incidental take of polar bears during oil and gas activities associated with the Willow Development (Project) work in 2023–2024. Represents an extension of Willow LOA 22–INC–10, which expires August 6, 2023.	23–06.
Conoco Philips Alaska Inc	Renewal request of 22–INC–09: Incidental take of polar bears and Pacific walrus that may occur during ConocoPhillips Alaska Inc.'s field-wide operations in the Kuparuk River, Western North Slope, Colville River, Greater Moose's Tooth, and Bear Tooth Units on the North Slope of Alaska.	23–07.
Glacier Oil and Gas	Incidental harassment of polar bears and Pacific walrus that may occur during Glacier Oil and Gas Corporation's oil production, facilities and pipeline maintenance, workovers of existing wells, and construction and maintenance of ice roads associated with the Badami oilfield near Mikkelsen Bay in the North Slope.	23–08.
Conoco Philips Alaska Inc	Incidental take of polar bears that may occur during CPAI's Ptarmigan Seismic Survey in the Greater Mooses Tooth, Bear Tooth, and non-unitized land on the North Slope of Alaska.	23–09.
ASRC Consulting and Environmental Services.	Incidental take of polar bears associated with Lagniappe drilling program activities, including ice road and ice pad construction, ice road transportation, well drilling, and aircraft-supported cleanup for an oil and gas exploration well drilling project. Drilling located south of the Badami Unit.	23–10.
Oil Search Alaska, LLC	Amendment submitted on Jan. 18, 2023, to LOA 22–INC–04. Amendment pertains to the incidental take of polar bears that may occur during activities associated with oil and gas exploration and development within and adjacent to the Pikka Unit area and oil and gas exploration on OSA-operated leaseholds on Alaska's North Slope. Amendment allows for additional tundra travel to survey a pipeline route between Oliktok Point and the Kuparuk area and the construction of a 10-acre gravel pad alongside the NDA gravel road.	22–04 [Amended in 2023 from 2022].

On April 19, 2023, the Service published in the **Federal Register** a final rule (88 FR 24115) establishing regulations that allow us to authorize the nonlethal, incidental, unintentional take of small numbers of northern sea otters (*Enhydra lutris kenyoni*) during marine construction and pile-driving activities in coastal waters surrounding eight United States Coast Guard (USCG) facilities in the Gulf of Alaska. These incidental take regulations are located in subpart L in part 18 of title 50 of the Code of Federal Regulations (CFR) and are effective through May 19, 2028. The rule prescribed a process under which we issue LOAs to the USCG Guard conducting activities as described under the provisions of the regulations.

Each LOA stipulates conditions or methods that are specific to the activity and location. Holders of the LOAs must use methods and conduct activities in a manner that minimizes to the greatest extent practicable adverse impacts on northern sea otters and their habitat, and on the availability of northern sea otters for subsistence purposes. No intentional take or lethal incidental take is authorized under these regulations.

In accordance with section 101(a)(5)(A) of the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) and our regulations at 50 CFR part 18, subpart L, in 2023, we issued two LOAs to the USCG for their activities in the Gulf of Alaska shown in table 2.

TABLE 2—LETTERS OF AUTHORIZATION ISSUED TO THE U.S. COAST GUARD (USCG) FOR MARINE CONSTRUCTION AND PILE-DRIVING ACTIVITIES IN THE GULF OF ALASKA

Company	Project	LOA #
USCG	Incidental take of small numbers of northern sea otters that may occur during activities associated with pile driving and marine construction activities in Cordova, Alaska.	23–CG–01
USCG	Incidental take of small numbers of northern sea otters that may occur during activities associated with improvements to the small boat fueling tank facility at USCG Station Valdez, Alaska.	23–CG–02

Authority: We issue this notice under the authority of the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*).

Peter Fasbender,

Assistant Regional Director, Fisheries and Ecological Services, Alaska Region.

[FR Doc. 2024–09900 Filed 5–6–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_OR_FRN_MO4500178813]

Second Call for Nominations for the San Juan Islands National Monument Advisory Committee

AGENCY: Bureau of Land Management, Interior.

ACTION: Second call for nominations to San Juan Islands National Monument Advisory Committee.

SUMMARY: The purpose of this notice is to request public nominations for the Bureau of Land Management's (BLM) San Juan Islands National Monument Advisory Committee (MAC). The Council provides advice and recommendations to the BLM on land use planning and management of the public land resources located within the BLM's San Juan Islands National Monument, located in the Spokane District.

DATES: All nominations must be received no later than June 21, 2024.

ADDRESSES: Nominations and completed applications should be sent to the BLM office listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

FOR FURTHER INFORMATION CONTACT: Travis Edwards BLM Spokane District Office, 1103 N Fancher, Spokane Valley, WA 99212; telephone: (509) 536–1297; or email: *tedwards@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: The Federal Land Policy and Management Act (FLPMA) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by the BLM. Section 309 of FLPMA, as amended (43 U.S.C. 1739), directs the Secretary to establish 10- to 15-member citizen-based advisory committees that are consistent with the Federal Advisory Committee Act (FACA). As required by FACA, MAC membership must be balanced and representative of the various interests concerned with the management of the public lands. The BLM's regulations governing resource advisory councils are found at 43 CFR 1784.

The MAC includes thirteen representative members to be appointed by the Secretary of the Interior as follows:

(a) One member representing archeological, cultural, and heritage interests;

(b) One member representing wildlife and ecological interests;

(c) One member representing the interests of a nonprofit organization whose mission is conservation and/or management of natural resources, land, or water;

(d) One member representing natural resource management or natural sciences interests;

(e) One member representing recreation and tourism interests;

(f) One member representing local youth, education, and interpretation interests;

(g) Two members that have significant cultural or historic connections to, and knowledge about, the landscape, archeological sites, or cultural sites connected to the Monument;

(h) One member who holds State, county, or local elected office;

(i) One member representing conservation and/or management of natural resources, land, or water interests;

(j) One member representing local interests that is a resident of Lopez Island; and

(k) One member of the public-at-large.

Members will be appointed to the MAC to serve three-year staggered terms.

Nominating Potential Members: Nominations should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an

informed decision regarding the membership requirements of the MAC and permit the Department to contact a potential member. Nominees are strongly encouraged to include supporting letters from employers, associations, professional organizations, and/or other organizations that indicate support by a meaningful constituency for the nominee. Please indicate any BLM permits, leases, or licenses that you hold personally or are held by your employer.

Members of the MAC serve without compensation. However, while away from their homes or regular places of business, members engaged in MAC business may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by 5 U.S.C. 5703, in the same manner as persons employed intermittently in Federal Government service.

Simultaneous with this notice, the BLM will issue a press releases providing additional information for submitting nominations.

Before including any address, phone number, email address, or other personal identifying information in the application, nominees should be aware this information may be made publicly available at any time. While the nominee may ask to withhold the personal identifying information from public review, the BLM cannot guarantee that it will be able to do so.

Authority: 43 CFR 1784.4–1.

Stephen Small,

District Manager, Spokane District.

[FR Doc. 2024–09950 Filed 5–6–24; 8:45 am]

BILLING CODE 4331–24–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2024–0027]

Notice of Availability of a Final Environmental Assessment for Additional Site Assessment Activities on Beacon Wind, LLC's Renewable Energy Lease OCS–A 0520

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of a final environmental assessment (EA) and its finding that additional site assessment activities in Lease Area OCS–A 0520 offshore Massachusetts will not significantly impact the environment. Beacon Wind, LLC (Beacon Wind), the leaseholder, requested to conduct the additional activities in the lease area, which were not analyzed in the initial EA titled "Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore Massachusetts" (2014 EA). This final EA analyzed the potential environmental impacts of the proposed additional site assessment activities. Those activities comprise 35 deployments and removals of a single suction bucket foundation at 26 locations within the lease area to gather engineering information to inform Beacon Wind's foundation design for wind turbines and offshore substations. This EA will inform BOEM's decision whether to approve Beacon Wind's site assessment plan (SAP) amendment for suction bucket foundation testing.

FOR FURTHER INFORMATION CONTACT: Laura Lee Wolfson, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787–1433 or *lauralee.wolfson@boem.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Action: The final EA analyzes the proposed action alternative, which is approving the additional site assessment activities proposed in the Beacon Wind SAP amendment to the lease area. The EA considers the reasonably foreseeable environmental consequences associated with the deployment and recovery of suction bucket foundations to further assess the site conditions and gather information to support the engineering design of wind turbine and offshore substation foundations that would potentially be installed within the lease area for the proposed Beacon Wind project. BOEM prepared an EA for this proposed action in order to assist the agency's planning and decision-making (40 CFR 1501.5(b)).

Alternatives: In addition to the proposed action, BOEM considered the no action alternative. Under the no action alternative, BOEM would not approve the SAP amendment, and the additional site assessment activities for foundation testing would not occur within the Beacon Wind lease area OCS–A 0520. BOEM's preferred alternative is the proposed action.

Finding of no significant Impact: After carefully considering alternatives described and analyzed in the final EA and comments from the public and cooperating and consulting agencies on the draft EA, BOEM finds that approval of the SAP amendment for suction bucket foundation testing within the Beacon Wind lease area would have no significant impact on the environment.

Availability of the final EA and finding: This EA, its finding, and associated information are available on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/beacon-wind.*

Authority: 42 U.S.C. 4231 *et seq.* (NEPA, as amended) and 40 CFR 1506.6.

Walter Cruickshank,

Deputy Director, Bureau of Ocean Energy Management.

[FR Doc. 2024–09844 Filed 5–6–24; 8:45 am]

BILLING CODE 4340–98–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0013]

Agency Information Collection Activities; Extension of Previously Approved eCollection eComments Requested; Semi-Annual Progress Report for Grantees From the Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance Program

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office on Violence Against Women, 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 30 days until June 6, 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: Catherine Poston, Office on Violence Against Women, at 202–514–5430 or *Catherine.poston@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register** on March 26, 2024 allowing a 60-day comment period.

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 1122–0013. 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:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance Program.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: 1122–0013. U.S. Department of Justice, Office on Violence Against Women.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: The affected public includes the approximately 165 grantees of the Rural Domestic Violence, Dating Violence, Sexual Assault, and Stalking and Child Abuse Enforcement Assistance Program (Rural Program). Grantees include States, Indian tribes, local governments, and nonprofit, public or private entities, including tribal nonprofit organizations.

Abstract; Authorized by 34 U.S.C. 12341, the Rural Program supports efforts to enhance the safety of rural victims of domestic violence, dating violence, sexual assault, and stalking and supports projects uniquely designed to address and prevent these crimes in rural areas.

5. *Obligation to Respond:* The obligation to respond is required to obtain/retain a benefit.

6. *Total Estimated Number of Respondents:* Approximately 165 grantees of the Rural Program.

Estimated Time per Respondent: 1 hour. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Rural Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

7. *Frequency:* Semi-annually.

8. *Total Estimated Annual Time Burden:* 330 hours.

9. *Total Estimated Annual Other Costs Burden:* The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be $18,480.

Activity	Number of respondents	Frequency	Total annual responses	Time per response	Total annual burden (hours)
Survey	165	Semi-annually	2	1 hour	330
Unduplicated Totals	165	Semi-annually			330

If additional information is required, contact: John R. Carlson, 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: May 2, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09908 Filed 5–6–24; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0039]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Currently Approved Collection; FBI Bioterrorism Preparedness Act Entity/ Individual Information

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division, 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 July 8, 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: Timothy R. Wiles, National Instant Criminal Background Check System Section (NICS), NICS External Service Unit, Federal Bureau of Investigation, CJIS Division, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; *nicsliaison@fbi.gov,* (304) 625–2000.

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: On June 13, 2002, the President of the United States signed the Public Health and Bioterrorism Preparedness and Response Act of 2002, (Bioterrorism Act), Public Law 107–188 into effect. Under this Act, the Secretaries of the United States Department of Agriculture (USDA) and Health and Human Services (HHS), in consultation with the Attorney General, are responsible for establishing appropriate safeguards and security requirements to prevent access to select agents and toxins for use in domestic or international terrorism or for any other criminal purpose.

On January 30, 2003, the U.S. Attorney General directed the FBI to conduct the Bioterrorism Security Risk Assessments (SRAs) under sections 201, 212 and 221 of the Public Health Security and Bioterrorism Act, Public Law 107–188, 166 Stat. 594 (2002). On March 25, 2003, FBI Director Mueller directed the Criminal Justice Information Services (CJIS) Division to promptly conduct the Bioterrorism SRAs. Under this delegation, the FBI receives biometric and biographic information submitted by individuals requesting access to select agents and toxins; utilizes criminal, immigration, national security and other electronic databases that are available to the Federal Government to conduct SRAs of such individuals; and consult with appropriate officials of the HHS and the USDA to determine whether certain individuals should be disqualified from possessing, using or transferring select agents and toxins.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.
2. *The Title of the Form/Collection:* Federal Bureau of Investigation Bioterrorism Preparedness Act: Entity/ Individual Information.
3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form is FD–961. The applicable component within the Criminal Justice Information Services Division, Department of Justice (DOJ), Federal Bureau of Investigation (FBI).
4. *Affected public who will be asked or required to respond, as well as the obligation to respond:*

Primary: Those individuals applying for access to biological select agents and toxins. This collection is needed for the FBI to conduct security risk assessments (SRAs)required by the Bioterrorism Act and to determine whether applicants should be denied access to or granted limited access to specific agents and toxins. That information is then used by the FBI in consultations with appropriate officials of the Department of Health and Human Services (HHS) and the Department of Agriculture (USDA) as to whether certain individuals specified in the provisions should be denied access to or granted limited access to specific agents.

Obligation to respond: Individuals voluntarily provide the requested/ collected information; however, providing such information is required in order to obtain approval for access to select agents and toxins. (Sections 201, 212 and 221 of the Public Health Security and Bioterrorism Act, Public Law 107–188, 166 Statute 594 (2002).

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 3,007 (FY 2023) respondents at 1 hour 30 minutes for the FD–961 form.
6. *An estimate of the total annual burden (in hours) associated with the collection:* The total annual burden hours for this collection is estimated to be 4,510.5 burden hours (3,007 × 90min/ 60 = 4,510.5)
7. *An estimate of the total annual cost burden associated with the collection, if applicable:* Respondents will incur the estimated cost of $3.07 for postage fees to submit the FD–961 form and two completed fingerprint cards. It is estimated that the cost to the applicant to submit a photograph that meets criteria specified in the instruction pages based on national averages would be $15 at the post office. It is estimated that each applicant would travel approximately 3 miles one way and 6 miles round trip to a business to obtain their photo. This distance is estimated to take an amount of five minutes each way for a total of 10 minutes round trip. Also, to determine the travel cost to the respondent, the Department of Justice (DOJ) is factoring in the General Services Administration (GSA) reimbursement rate of $0.67 mile for privately owned automobiles (POA) use as of January 1, 2024. Therefore, the cost to the respondent to travel this distance is estimated to be $4.02.

3,007 (number of respondents) × (6 (miles) × $0.67 (amount per mile)) = $12,088.14
3,007 (number of respondents × $3.07 (postage) = $9,231.49
3,007 (number of respondents × $15.00 (picture at USPS) = $45,105

The total annual cost incurred by the FY2023 respondents is ($12,088.14 + $9,231.49 + $45,105) = $66,424.63 or $66,424.63/3,007 ($22.09 per person.)

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (min)	Total annual burden (hours)
Complete form and travel time for photo for respondent	3,007	1/annually	3,007	90	4,510.5
Unduplicated Totals	3,007	1/annually	3,007	90	4,510.5

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: May 1, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09859 Filed 5–6–24; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0018]

Agency Information Collection Activities; Extension of Previously Approved eCollection eComments Requested; Semi-Annual Progress Report for the Grantees From the Grants to Indian Tribal Governments Program

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office on Violence Against Women, 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 30 days until June 6, 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: Catherine Poston, Office on Violence Against Women, at 202–514–5430 or *Catherine.poston@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register** on March 26, 2024 allowing a 60-day comment period.

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 1122–0018. 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:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Semi-Annual Progress Report for the Grantees from the Grants to Indian Tribal Governments Program.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0018. U.S. Department of Justice, Office on Violence Against Women.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public—The affected public includes the approximately 85 grantees of the Grants to Indian Tribal Governments Program (Tribal Governments Program), a grant program authorized by the Violence Against Women Act, as amended. This discretionary grant program is designed to enhance the ability of tribes to respond to violent crimes against Indian women, enhance victim safety, and develop education and prevention strategies.

Abstract: Authorized by 34 U.S.C. 10452, the Tribal Governments Program is designed to enhance the ability of tribal governments and authorized designees of tribal governments to respond to domestic violence, dating violence, sexual assault, sex trafficking, and stalking in their communities, enhance victim safety and hold offenders accountable, and develop education and prevention strategies.

5. *Obligation to Respond:* The obligation to respond is required to obtain/retain a benefit.

6. *Total Estimated Number of Respondents:* Approximately 85 grantees of the Tribal Governments Program.

Estimated Time per Respondent: 1 hour. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Tribal Governments Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

7. *Frequency:* Semi-annually.

8. *Total Estimated Annual Time Burden:* 170 hours.

9. *Total Estimated Annual Other Costs Burden:* The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be $9520.

Activity	Number of respondents	Frequency	Total annual responses	Time per response (hour)	Total annual burden (hours)
Survey	85	Semi-annually	2	1	170
Unduplicated Totals	85	Semi-annually			170

If additional information is required, contact: John R. Carlson, 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: May 2, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09906 Filed 5–6–24; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0011]

Agency Information Collection Activities; Extension of Previously Approved eCollection eComments Requested; Semi-Annual Progress Report for Grantees From the Grants to Tribal Sexual Assault and Domestic Violence Coalitions Program

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office on Violence Against Women, 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 30 days until June 6, 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: Catherine Poston, Office on Violence Against Women, at 202–514–5430 or *Catherine.poston@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register** on March 4, 2024 allowing a 60-day comment period. 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 1122–0011. 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:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Grants to Tribal Sexual Assault and Domestic Violence Coalitions Program.

3. Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: *Form Number:* 1122–0011. U.S. Department of Justice, Office on Violence Against Women.

4. Affected public who will be asked or required to respond, as well as a brief abstract:

Affected Public: The affected public includes 14 grantees from the Grants to Tribal Domestic Violence and Sexual Assault Coalitions (Tribal Coalitions) Program which include nonprofit, nongovernmental tribal domestic violence and sexual assault coalitions.

Abstract: The Tribal Coalitions Program supports the development and operation of nonprofit, nongovernmental tribal domestic violence and sexual assault coalitions. Tribal coalitions provide education, support, and technical assistance to member Indian service providers and tribes to enhance their response to victims of domestic violence, dating violence, sexual assault, and stalking. 34 U.S.C. 10441(d) and 12511(d).

5. *Obligation to Respond:* The obligation to respond is required to obtain/retain a benefit.

6. *Total Estimated Number of Respondents:* Approximately 14 grantees of the Tribal Coalitions Program.

Estimated Time per Respondent: 1 hour. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Tribal Coalition grantee will only be required to complete the sections of the form that pertain to its own specific activities.

7. *Frequency:* Semi-annually.

8. *Total Estimated Annual Time Burden:* 28 hours.

9. *Total Estimated Annual Other Costs Burden:* The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be $1568.

Activity	Number of respondents	Frequency	Total annual responses	Time per response	Total annual burden (hours)
Survey	14	Semi-annually	2	1 hour	32 hrs.
Unduplicated Totals	*14*	*Semi-annually*			*32 hours.*

If additional information is required, contact: John R. Carlson, 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: May 2, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09905 Filed 5–6–24; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0010]

Agency Information Collection Activities; Extension of Previously Approved eCollection eComments Requested; Semi-Annual Progress Report for Grantees From the Grants to State Sexual Assault and Domestic Violence Coalitions Program

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office on Violence Against Women, 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 30 days until June 6, 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: Catherine Poston, Office on Violence Against Women, at 202–514–5430 or *Catherine.poston@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register** on March 4, 2024 allowing a 60-day comment period.

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 1122–0010. 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:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Grants to State Sexual Assault and Domestic Violence Coalitions Program.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: 1122–0010. U.S. Department of Justice, Office on Violence Against Women.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: The affected public includes the 88 grantees from the Grants to State Sexual Assault and Domestic Violence Coalitions (State Coalitions) Program. The State Coalitions Program provides federal financial assistance to state coalitions to support the coordination of state victim services activities, and collaboration and coordination with Federal, State, and local entities engaged in violence against women activities.

Abstract: The State Coalitions Program provides federal financial assistance to state coalitions to support the coordination of state victim services activities, and collaboration and coordination with federal, state, and local entities engaged in violence against women activities. (34 U.S.C. 10446.)

5. *Obligation to Respond:* The obligation to respond is required to obtain/retain a benefit.

6. *Total Estimated Number of Respondents:* Approximately 88 grantees of the State Coalitions Program.

Estimated Time per Respondent: 1 hour. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A State Coalition grantee will only be required to complete the sections of the form that pertain to its own specific activities.

7. *Frequency:* Semi-annually.

8. *Total Estimated Annual Time Burden:* 176 hours.

9. *Total Estimated Annual Other Costs Burden:*

(1) The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be $9,856.

Activity	Number of respondents	Frequency	Total annual responses	Time per response (hours)	Total annual burden (hours)
Survey	88	Semi-annually	2	1	176
Unduplicated Totals	88	Semi-annually	....	....	176

If additional information is required, contact: John R. Carlson, 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: May 2, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09949 Filed 5–6–24; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0005]

Agency Information Collection Activities; Extension of Previously Approved eCollection eComments Requested; Semi-Annual Progress Report for Grantees From the Grants To Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office on Violence Against Women, 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 30 days until June 6, 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: Catherine Poston, Office on Violence Against Women, at 202–514–5430 or *Catherine.poston@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register** on March 4, 2024 allowing a 60-day comment period.

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 1122–0005. 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:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: 1122–0005. U.S. Department of Justice, Office on Violence Against Women.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Affected Public: The affected public includes the approximately 100 grantees (institutions of higher education) of the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program (Campus Program) whose eligibility is determined by statute.

Abstract: The Higher Education Amendments of 1998 originally created the Grants to Combat Violent Crimes Against Women on Campuses Program (renamed the Grants to Reduce Violent Crimes Against Women on Campus Program in the Violence Against Women Act (VAWA) of 2000. (34 U.S.C. 20125) Campus Program grant funds may be used to enhance victim services and develop programs to prevent violent crimes against women on campuses. The Campus Program also enables institutions of higher education to develop and strengthen effective security and investigation strategies to combat violent crimes against women on campuses, including domestic violence, dating violence, sexual assault, and stalking.

5. *Obligation to Respond:* The obligation to respond is required to obtain/retain a benefit.

6. *Total Estimated Number of Respondents:* Approximately 100 grantees of the Campus Program.

Estimated Time per Respondent: 1 hour. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Campus Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

7. *Frequency:* Semi-annually.

8. *Total Estimated Annual Time Burden:* 200 hours.

9. *Total Estimated Annual Other Costs Burden:*

The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be $11,200.

Activity	Number of respondents	Frequency	Total annual responses	Time per response (hour)	Total annual burden (hours)
Survey	100	Semi-annually	2	1	200

Activity	Number of respondents	Frequency	Total annual responses	Time per response (hour)	Total annual burden (hours)
Unduplicated Totals	100	Semi-annually			200

If additional information is required, contact: John R. Carlson, 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: May 2, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09909 Filed 5–6–24; 8:45 am]

BILLING CODE 4410–FX–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 2415 Eisenhower Avenue, Alexandria, VA 22314.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF website: *https://new.nsf.gov/events/proposal-review-panels.* This information may also be requested by telephoning, 703/292–8687.

Dated: May 1, 2024.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2024–09826 Filed 5–6–24; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2024–0070]

Application for Amendments to Facility Operating Licenses and Involving Proposed No Significant Hazards Consideration Determination and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; notice of opportunity to comment, request a hearing, and petition for leave to intervene; order imposing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) received and is considering approval of one amendment request. The amendment request is for Limerick Generating Station, Units 1 and 2. For the amendment request, the NRC proposes to determine that it involves no significant hazards consideration (NSHC). Because the amendment request contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation by persons who file a hearing request or petition for leave to intervene.

DATES: Comments must be filed by June 6, 2024. A request for a hearing or petitions for leave to intervene must be filed by July 8, 2024. Any potential party as defined in section 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR) who believes access to SUNSI is necessary to respond to this notice must request document access by May 17, 2024.

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–2024–0070. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Shirley Rohrer, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–5411; email: *Shirley.Rohrer@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2024–0070, facility name, unit number(s), docket number(s), application date, and subject when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0070.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS)

is provided the first time that it is mentioned in this document.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2024–0070, facility name, unit number(s), docket number(s), application date, and subject, in your comment submission.

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

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

II. Background

Pursuant to Section 189a.(1)–(2) of the Atomic Energy Act of 1954, as amended (the Act), the NRC is publishing this notice. The Act requires the Commission to publish notice of any amendments issued or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves NSHC, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes a notice of an amendment containing SUNSI.

III. Notice of Consideration of Issuance of an Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment request involves NSHC. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for the amendment request is shown as follows.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action on the amendment prior to the expiration of either the comment period or the notice period, it will publish a notice of issuance in the **Federal Register**. If the Commission makes a final no significant hazards consideration determination for the amendment, any hearing on the amendment will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and on the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

The following table provides the plant name, docket numbers, date of application, ADAMS accession number, and location in the application of the licensee's proposed NSHC determination. For further details with respect to this license amendment application, see the application for amendment, publicly available portions of which are available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

Constellation Energy Generation, LLC; Limerick Generating Station, Units 1 and 2; Montgomery County, PA

Docket No(s)	50–352, 50–353.
Application Date	September 26, 2022.
ADAMS Accession No	September 26, 2022 (non-public, withheld under 10 CFR 2.390); as supplemented by letters dated June 26, 2023, (ML23177A224); September 12, 2023, (ML23255A095); November 21, 2023, (ML23325A206); January 26, 2024, (ML24026A296).
Location in Application of NSHC	Pages 24–28 of Attachment 1 of the supplement dated September 12, 2023.

Brief Description of Amendment(s)	The proposed amendments would change both the design and technical specifications to permit the use of a new single digital instrumentation and controls system to replace analog instrumentation of reactor protection system, analog nuclear steam supply shutoff system, emergency core cooling system, reactor core isolation cooling system, and end-of-cycle recirculation pump trip at Limerick. In addition, the proposed amendments would change the classification of the redundant reactivity control system from safety-related to nonsafety-related, eliminate the automatic redundant reactivity control system feedwater runback function, eliminate the automatic isolation function for the turbine enclosure main steam line tunnel, eliminate several surveillance requirements, and allow the use of automated operator aids (or automated controls) from main control room.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Michael L. Marshall, Jr., 301–415–2871.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

Constellation Energy Generating, LLC

Limerick Generating Station, Units 1 and 2, Montgomery County, PA

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing or opportunity for hearing, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Licensing, Hearings, and Enforcement, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email addresses for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgcMailCenter.Resource@nrc.gov*, respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C, the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2), the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if this individual is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if this individual is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated: April 15, 2024.

For the Nuclear Regulatory Commission.

Carrie Safford,

Secretary of the Commission.

ATTACHMENT 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding

Day	Event/activity
0	Publication of **Federal Register** notice of hearing or opportunity for hearing, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: (i) supporting the standing of a potential party identified by name and address; and (ii) describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	U.S. Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Agreement or Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement or Affidavit for SUNSI.
A	If access granted: issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Agreements or Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or notice of opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.

[FR Doc. 2024–08312 Filed 5–6–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–29 and 72–31; NRC–2024–0067]

Yankee Atomic Electric Company; Yankee Atomic Power Station; Exemption

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued an exemption in response to the May 4, 2023, request from Yankee Atomic Electric Company (YAEC), for the Yankee Nuclear Power Station (YNPS or Yankee Rowe) located in Rowe, Massachusetts. The exemption permits YAEC to make withdrawals from a separate account within YAEC's overall nuclear decommissioning trust (NDT), on an annual basis, for spent nuclear fuel (SNF) and Greater than Class C

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012, 78 FR 34247, June 7, 2013) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

(GTCC) waste management and non-radiological site restoration without prior notification to the NRC.

DATE: The exemption was issued on April 11, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0067 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–2024–0067. 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.* 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.

FOR FURTHER INFORMATION CONTACT: Tilda Liu, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 404–997–4730, email: *Tilda.Liu@nrc.gov.*

SUPPLEMENTARY INFORMATION: By letter dated May 4, 2023 (ADAMS Accession No. ML23157A101), YAEC submitted a request to the NRC for an exemption from paragraphs 50.82(a)(8)(i)(A) and 50.75(h)(2) of title 10 of the *Code of Federal Regulations* (10 CFR) for the YNPS Independent Spent Fuel Storage Installation [1] (ISFSI).

YAEC has established a separate (segregated) account within its over-arching NDT, entitled ''ISFSI Radiological Decom,'' that identifies the funds for radiological decommissioning of the ISFSI apart from the larger balance of funds in the NDT allocated for ongoing management of SNF and GTCC waste and for non-radiological site restoration activities. Although 10 CFR 50.82 applies to the segregated account, it does not apply to the overall NDT.

The exemption from 10 CFR 50.82(a)(8)(i)(A) and 50.75(h)(2) allows YAEC to make withdrawals from the segregated account, on an annual basis, for SNF and GTCC waste management and non-radiological site restoration without prior notification to the NRC. More specifically, with this exemption, YAEC can annually transfer funds exceeding 110 percent of the inflation-adjusted Decommissioning Cost Estimate, described in 10 CFR 50.75, from the segregated account to its overarching NDT and use those funds for SNF and GTCC waste management and non-radiological site restoration.

Based on the review, the NRC determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, the NRC determined that special circumstances are present. Therefore, the NRC granted YAEC an exemption from the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(2) to permit YAEC to make withdrawals from the segregated account, on an annual basis, for SNF and GTCC waste management and non-radiological site restoration without prior notification to the NRC. All other relevant requirements shall be met. On April 11, 2024, the NRC issued an exemption for YAEC (ADAMS Package Accession No. ML23298A052). The NRC staff also prepared an environmental assessment and finding of no significant impact regarding the proposed exemption request, published in the **Federal Register** on April 9, 2024 (89 FR 24877), and concluded that the proposed exemption would not have a significant impact on the quality of the human environment.

Dated: May 2, 2024.

For the Nuclear Regulatory Commission.

Yoira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2024–09910 Filed 5–6–24; 8:45 am]

BILLING CODE 7590–01–P

[1] As discussed in this document, the Yankee Rowe ISFSI sits on the former site of Yankee Rowe, which YAEC finished decommissioning in 2007. Although only the Yankee Rowe ISFSI remains on the site, YAEC's 10 CFR part 50 license, Facility Operating License No. DPR–3, remains in effect. Because YAEC requested an exemption from the requirements of 10 CFR part 50, this would be an exemption for YAEC's 10 CFR part 50 license rather than for YAEC's 10 CFR part 72 general license. Therefore, although YAEC's submission requested an exemption for the Yankee Rowe ISFSI, the NRC staff will consider it a request for an exemption for YNPS.

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0169]

Information Collection: Fitness for Duty Programs

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Fitness for Duty Programs.''

DATES: Submit comments by July 8, 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–2023–0169. 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–2023–0169 when contacting the NRC about the availability of information for this action. Y ou may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0169. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0169 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.* 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 (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–2023–0169, 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 as follows.

1. *The title of the information collection:* 10 CFR part 26, ''Fitness for Duty Programs.''

2. *OMB approval number:* 3150–0146.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* NRC Form 890, ''Single Positive Test Form''; NRC Form 891, ''Annual Reporting Form for Drug and Alcohol Tests''; and NRC Form 892, ''Annual Fatigue Reporting Form.''

5. *How often the collection is required or requested:* Annually and on occasion. The NRC receives reports on an annual basis that detail the Fitness for Duty (FFD) Program performance. The NRC also receives, on occasion, reports associated with FFD policy violations or programmatic failures. Depending on the type of violation or programmatic failure, the report would be made within 24 hours of the event occurrence, or within 30 days of completing an investigation into a programmatic failure.

6. *Who will be required or asked to respond:* Nuclear power reactor licensees licensed under 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities'' and 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants'' (except those who have permanently ceased operations and have verified that fuel has been permanently removed from the reactor); all holders of nuclear power plant construction permits and early site permits with a limited work authorization and applicants for nuclear power plant construction permits that have a limited work authorization under the provisions of 10 CFR part 50; all holders of a combined license for a nuclear power plant issued under 10 CFR part 52 and applicants for a combined license that have a limited work authorization; all licensees who are authorized to possess, use, or transport formula quantities of strategic special nuclear material (SSNM) under the provisions of 10 CFR part 70, ''Domestic Licensing of Special Nuclear Material''; all holders of a certificate of compliance of an approved compliance plan issued under 10 CFR part 76 ''Certification of Gaseous Diffusion Plants,'' if the holder engages in activities involving formula quantities of SSNM; and all contractor/vendors (C/Vs) who implement FFD programs or program elements to the extent that the licensees and other entities listed in this paragraph rely on those C/V FFD programs or program elements to comply with 10 CFR part 26.

7. *The estimated number of annual responses:* 324,646 responses (254 reporting responses + 49 recordkeepers + 324,343 third-party disclosure responses).

8. *The estimated number of annual respondents:* 64,392 respondents (28 drug and alcohol testing programs + 21 fatigue management programs + 64,343 third party respondents).

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 540,050 (5,301 hours reporting + 169,746 hours recordkeeping + 365,003 hours third-party disclosure)

10. *Abstract:* The NRC regulations in 10 CFR part 26 prescribe requirements to establish, implement, and maintain FFD programs at affected licensees and other entities. The objectives of these requirements are to provide reasonable assurance that persons subject to the rule are trustworthy, reliable, and not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way could adversely affect their ability to safely and competently perform their duties. These requirements also provide reasonable assurance that the effects of fatigue and degraded alertness on individual's abilities to safely and competently perform their duties are managed commensurate with maintaining public health and safety. The information collections required by 10 CFR part 26 are necessary to properly manage FFD programs and to enable effective and efficient regulatory oversight of affected licensees and other entities. These licensees and other entities must perform certain tasks, maintain records, and submit reports to comply with 10 CFR part 26 drug and alcohol and fatigue management

requirements. These records and reports are necessary to enable regulatory inspection and evaluation of a licensee's or other entity's compliance with NRC regulations, FFD performance, and significant FFD-related events to help maintain public health and safety, promote the common defense and security, and protect the environment.

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?

IV. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS.

Document description	ADAMS accession No.
Draft Supporting Statement ..	ML24012A205
Burden Spreadsheet	ML24012A206
NRC Form 890, "Single Positive Test Form"	ML22321A221
NRC Form 891, "Annual Reporting Form for Drug and Alcohol Tests"	ML22321A193
NRC Form 892, "Annual Fatigue Reporting Form"	ML22013B250

Dated: May 2, 2024.

For the Nuclear Regulatory Commission.

David Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2024–09915 Filed 5–6–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–237 and 50–249; NRC–2024–0080]

Constellation Energy Generation, LLC.; Dresden Nuclear Power Station, Units 2 and 3; Subsequent License Renewal Application

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; receipt.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has received an application for the renewal of Facility Operating License Nos. DPR–19 and DPR–25, which authorizes Constellation Energy Generation, LLC (CEG, the applicant) to operate Dresden Nuclear Power Station (Dresden), Units 2 and 3. The renewed licenses would authorize the applicant to operate Dresden, Units 2 and 3, for an additional 20 years beyond the period specified in the current licenses. The current operating license for Dresden, Unit 2, expires December 22, 2029. The current operating license for Dresden, Unit 3, expires January 12, 2031.

DATES: The subsequent license renewal application referenced in this document is available on May 7, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0080 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–2024–0080. 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.* 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.

• *Public Library:* A copy of the subsequent license renewal application for Dresden, Units 2 and 3, can be accessed at the following public libraries: Morris Area Public Library, 604 Liberty St., Morris, IL 60450, and Coal City Public Library District, 85 N Garfield St., Coal City, IL 60416.

• *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: Mark Yoo, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–8583; email: *Mark.Yoo@nrc.gov*.

SUPPLEMENTARY INFORMATION: The NRC has received an application from CEG, dated April 17, 2024 (ADAMS Package Accession No. ML24108A007) filed pursuant to section 103 of the Atomic Energy Act of 1954, as amended, and part 54 of title 10 of the *Code of Federal Regulations,* ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' to renew the operating licenses for Dresden, Units 2 and 3. Renewal of the licenses would authorize the applicant to operate the facility for an additional 20-year period beyond the period specified in the current operating licenses. The current operating license for Dresden, Unit 2, expires December 22, 2029. The current operating license for Dresden, Unit 3, expires January 12, 2031. Dresden, Units 2 and 3, are boiling water reactors located near Morris, Illinois. The acceptability of the tendered application for docketing, and other matters, including an opportunity to request a hearing, will be the subject of subsequent **Federal Register** notices.

A copy of the subsequent license renewal application for Dresden, Units 2 and 3, is also available to local residents near the site at the following public libraries: Morris Area Public Library, 604 Liberty St., Morris, IL 60450, and Coal City Public Library District, 85 N Garfield St., Coal City, IL 60416.

Dated: May 2, 2024.

For the Nuclear Regulatory Commission.

Lauren Gibson,

Chief, License Renewal Project Branch, Division of New and Renewed Licenses, Office of Nuclear Reactor Regulation.

[FR Doc. 2024–09951 Filed 5–6–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Notice of meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will convene a meeting of the Advisory Committee on

the Medical Uses of Isotopes (ACMUI) on June 5, 2024 to discuss the ACMUI's draft subcommittee report on the NRC's draft interim staff guidance for the implementation of training and experience requirements in the NRC's regulations, ''Medical Use of Byproduct Material.'' Meeting information, including a copy of the agenda and handouts, will be available on the ACMUI's Meetings and Related Documents web page at *https://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2024.html* or by emailing Ms. L. Armstead at the contact information below.

DATES: June 5, 2024, from 1:00 p.m. to 3:00 p.m. Eastern Time.

ADDRESSES: This is a virtual meeting.

Date	Webinar information (Microsoft teams)
June 5, 2024 ...	Link: *https://teams.microsoft.com/l/meetup-join/19%3ameeting_NjllNmZkODktZTg3My00MDU0LTk4NzMtNjRhNmJlYmRmNGY1%40thread.v2/0?context=%7b%22Tid%22%3a%22e8d01475-c3b5-436a-a065-5def4c64f52e%22%2c%22Oid%22%3a%22304f46bf-32c2-4e0f-912c-878db895e74a%22%7d*. *Meeting ID:* 242 726 987 987. Passcode: pWAXN2. *Call in number (audio only):* +301–576–2978, United States, Silver Spring. Phone Conference ID: 652 827 577#.

Public Participation: The meeting will be held using Microsoft Teams. Any member of the public who wishes to participate in the meeting via Microsoft Teams or via phone can use the information provided above or should contact Ms. L. Armstead. Members of the public should also monitor the NRC's Public Meeting Schedule at *https://www.nrc.gov/pmns/mtg* for any meeting updates.

FOR FURTHER INFORMATION CONTACT: Ms. L. Armstead, email: *lxa5@nrc.gov,* telephone: 301–415–1650.

Conduct of the Meeting

The ACMUI Vice Chair, Mr. Richard Green will preside over the meeting. Mr. Green will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Ms. L. Armstead using the contact information listed above. All submittals must be received by the close of business on May 30, 2024, and must only pertain to the topics on the agenda.

2. Questions and comments from members of the public will be permitted during the meeting, at the discretion of the ACMUI Vice Chair.

3. The draft transcript and meeting summary will be available on ACMUI's website *https://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2024.html* on or about July 19, 2024.

4. Persons who require special services, such as those for the hearing impaired, should notify Ms. L. Armstead of their planned participation.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10 of the *Code of Federal Regulations,* part 7.

Dated at Rockville, Maryland this 2nd day of May, 2024.

For the U.S. Nuclear Regulatory Commission.

Russell E. Chazell,

Federal Advisory Committee Management Officer.

[FR Doc. 2024–09901 Filed 5–6–24; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Privacy Act; System of Records

AGENCY: Postal Service™

ACTION: Notice of a modified system of records.

SUMMARY: The United States Postal Service® (USPS®) is proposing to revise one General Privacy Act Systems of Records (SOR). These updates are being made to support an effort to improve postal tool management and equipment support.

DATES: These revisions will become effective without further notice on June 6, 2024, unless comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*uspsprivacyfedregnotice@usps.gov*). Arrangements to view copies of any written comments received, to facilitate public inspection, will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and Records Management Officer, Privacy and Records Management Office, *uspsprivacyfedregnotice@usps.gov* and by phone at 202–268–2000.

SUPPLEMENTARY INFORMATION:

I. Background

USPS seeks to implement a series of products to improve postal operations related to tool management and equipment support using Radio Frequency Identification (RFID) technology. USPS will utilize a suite of products, including an automated tool control application, industrial vending machines, RFID scanner tunnels, and electronically controlled lockers. These products will use RFID badge scans to track usage and provide access to tools. The system generates reports for restocking and analysis, and live dashboards are available to managers for customization. The aim of these systems is to enhance accountability and tool management, ensuring control of existing tools and adding cost-savings through enhanced tracking of equipment. This system will further promote efficiency, as not only with USPS be able to track its workroom and tool assets but anticipate when perishable resources are running low and take appropriate action.

II. Rationale for Changes to USPS Privacy Act Systems of Records

To further its efforts, this SOR will be revised as follows:

New purposes added: 17–20.

Modified Categories of Records: 1 and 2.

New category of records: 15. Tool Management Analytics and Transactional Records.

New Policy for Retrieval of Records: 8.

New Policy for Retention of Records: 9.

III. Description of the Modified System of Records

Pursuant to 5 U.S.C. 552a (e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed

revisions has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect these amended systems of records to have any adverse effect on individual privacy rights.

The notice for modifications to USPS SOR 500.000, Property Management Records is provided below in its entirety:

SYSTEM NAME AND NUMBER:

USPS 500.000, Property Management Records

SECURITY CLASSIFICATION:

None

SYSTEM LOCATION:

All USPS facilities and contractor sites.

SYSTEM MANAGER(S):

For records of accountable property, carpool membership, and use of USPS parking facilities:

Vice President, Facilities, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

For records of building access and Postal Inspector computer access authorizations: Chief Postal Inspector, Inspection Service, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

For other records of computer access authorizations: Chief Information Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401.

PURPOSE(S) OF THE SYSTEM:

1. To ensure personal and building safety and security by controlling access to USPS facilities.
2. To ensure accountability for property issued to persons.
3. To assign computer logon IDs; to identify USPS computer users to resolve their computer access problems by telephone; and to monitor and audit the use of USPS information resources as necessary to ensure compliance with USPS regulations.
4. To enable access to the USPS meeting and video web conferencing applications.
5. To enhance your online meeting experience by utilizing enhanced features and functionality, including voluntary polling to gather responses from attendees to generate reports or the interactive chat feature.
6. To facilitate team collaboration and communication through information sharing and cross-functional participation.
7. To allow users to communicate through web-based applications.
8. To facilitate and support cybersecurity investigations of detected or reported information security incidents.
9. To share your personal image via your device camera during meetings and web conferences, if you voluntarily choose to turn the camera on, enabling virtual face-to-face conversations.
10. To authenticate user identity for the purpose of accessing USPS information systems.
11. To provide parking and carpooling services to individuals who use USPS parking facilities.
12. To provide pre-registration for guest access to online meetings and web conferences.
13. To provide visibility on unmeasured workroom floor activities.
14. To enhance visibility into work hours used by product type, standard work management, and overtime status.
15. To improve scheduling efficiency through visibility into the use of workroom floor assets and activities.
16. To generate clock ring data based on employee workroom floor activities, assignments and/or duties.
17. To enhance tool management, security, and efficiency for Mail Processing Equipment mechanics and technicians.
18. To provide analytic, surveillance, and reporting support for tool management services.
19. To enhance tool management accountability through reports and alerts.
20. To provide managers with visibility into employee tool management and use and provide remediation capabilities and enable personnel recourse related to improper tool management.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Individuals who are granted regular access to USPS facilities through the issuance of a building access badge, or who are assigned accountable property.
2. Individuals with authorized access to USPS computers and information resources, including USPS employees, contractors, and other individuals; Individuals participating in web-based meetings, video conferences, collaboration, and communication applications.
3. Individuals who are members of carpools with USPS employees or otherwise regularly use USPS parking facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Building and property access information:* Records related to issuance of building and property access authorization and badges, including name, Social Security Number, Employee Identification Number, date of birth, photograph, postal assignment information, work contact information, finance number(s), duty location, and pay location, Advanced Computing Environment (ACE) ID, email address.
2. *Property issuance information:* Records related to issuance of accountable USPS property, equipment, and controlled documents, including name, Social Security Number, equipment description, equipment serial numbers, and issuance date, Mail Processing Equipment (MPE) Machine Numbers, Mail Processing Equipment (MPE) Machine Work Order Numbers, and Locker User PIN.
3. *Computer access authorization information:* Records related to computer users, including logon ID, Social Security Number, Employee Identification Number, or other assigned identifier, employment status information or contractor status information, and extent of access granted.
4. *Participant session data from web-based meetings and web conferences:* Participant Name, Participant's Webcam-Generated Image (Including Presenters), Recorded Participant Audio, Video, And Shared Meeting Screen Content, Chat Interaction, Polling Questions And Associated Responses, Participant Join Time And Leave Time, Meeting Duration, Participant Location, Participant Media Hardware Information, Participant Job Information, Participant Stated Locale, Participant Connection Type, Participant Data Center, Participant Device Type, Participant Domain, Participant Full Data Center, Participant Hard Disk ID, Participant ID, Participant IP Address, Participant Join Time, Participant Camera Name, Participant MAC Address, Participant Microphone Name, Participant Network Type, Participant PC Name, Participant Role, Participant Share Settings, Participant Speaker Name, Participant Status, Participant User ID, Participant User Name, Participant Zoom, Participant SIP URL, Participant Leave Reason, Participant AS Input, Participant AS Output, Participant Audio Input, Participant Audio Output, Participant CPU Usage, Participant Video Input, Participant Video Output, Participant Quality, Participant Sharing Details, Participant Recording Details.
5. *Web-Based Meeting And Web Conference Application Data:* In-Meeting Messages, Meeting Transcriptions, Written Feedback Responses, Invitation Tails, Meeting

Name, Chat Name, Meeting Agenda, Meeting Host, Meeting Department, Meeting Duration, Meeting Email, Meeting End Time, Meeting Media Settings, Meeting ID, Meeting Participants, Meeting Participants In Room, Meeting Start Time, Meeting Topic, Meeting Tracking Fields, Meeting User Type, Meeting UU ID, Meeting Audio Quality, Meeting Video Quality, Meeting Screen Share Quality, Meeting Duration, Meeting Contacts, Meeting Contact Email, Meeting Settings, Web Conferences Custom Keys, Web Conferences Department, Web Conferences Duration, Web Conferences Email, Web Conferences End Time, Web Conferences Settings, Web Conferences ID, Web Conferences Participants, Web Conference Start Time, Web Conferences Topic, Web Conferences User Type, Web Conferences UU ID, Web Conferences Audio Quality, Web Conferences Video Quality, Web Conferences Screen Share Quality, Web Conferences Host Name, Web Conferences Participant Camera Name, Web Conferences Participant Connection Type, Web Conferences Participant Data Center, Web Conferences Participant Device Type, Web Conferences Participant Domain, Web Conferences Participant From SIP Uri, Web Conferences Participant Full Data Center, Web Conferences Participant Hard Disk ID, Web Conferences Participant ID, Web Conferences Participant IP Address, Web Conferences Participant Join Time, Web Conferences Participant Leave Reason, Web Conferences Participant Leave Time, Web Conferences Participant Location, Web Conferences Participant MAC Address, Web Conferences Participant Microphone Name, Web Conferences Participant Network Type, Web Conferences Participant PC Name, Web Conferences Participant Role, Web Conferences Participant Share Settings, Web Conferences Participant SIP URI, Web Conferences Participant Speaker Name, Web Conferences Participant Status, Web Conferences Participant User ID, Web Conferences Participant User Name, Web Conferences Participant Version, Web Conferences Participant AS Input, Web Conferences Participant AS Output, Web Conferences Participant Audio Input, Web Conferences Participant Audio Output, Web Conferences Participant CPU Usage, Web Conferences Participant Video Input, Web Conferences Participant Video Output, Web Conferences Participant Recording Details, Web Conferences Participant Sharing Details, Web Conferences Participant Customer Key, Web Conferences Poll Title, Web Conferences Poll Status, Web Conferences Poll Start Time, Web Conferences Q&A Question Email, Web Conferences Q&A Question Name, Web Conferences Q&A Question Details, Web Conferences Q&A Question Start Time, Web Conferences Registrant Address, Web Conferences Registrant City, Web Conferences Registrant Comments, Web Conferences Registrant Country, Web Conferences Registrant Create Time, Web Conferences Registrant Custom Questions, Web Conferences Registrant Email, Web Conferences Registrant Name, Web Conferences Registrant ID, Web Conferences Registrant Industry, Web Conferences Registrant Join URL, Web Conferences Registrant Job Title, Web Conferences Registrant Number Of Employees, Web Conferences Registrant Organization, Web Conferences Registrant Phone, Web Conferences Registrant Purchasing Time Frame, Web Conferences Registrant State, Web Conferences Registrant Status, Web Conferences Registrant ZIP Code, Web Conferences Poll Results, Web Conferences Panelist Email, Web Conferences Panelist Name, Meeting Registrant Name, Meeting Registrant Email, Meeting Invitation Text, Meeting Attendee Name, Meeting Attendee Join URL, Meeting Registrant Address, Meeting Registrant City, Meeting Registrant Comments, Meeting Registrant Country, Meeting Registrant Create Time, Meeting Registrant Custom Questions, Meeting Registrant Email, Meeting Registrant Name, Meeting Registrant ID, Meeting Registrant Industry, Meeting Registrant Job Title, Meeting Registrant Number Of Employees, Meeting Registrant Organization, Meeting Registrant Phone Number, Meeting Registrant Purchasing Time Frame, Meeting Registrant Role In Purchase Process, Meeting Registrant State, Meeting Registrant Status, Meeting Registrant ZIP Code, Meeting Registrant Language, Meeting Registrant Join URL, Meeting Attendee Poll Response, Meeting Attendee Department, Cloud Recording Registrant City, Cloud Recording Registrant Comments, Cloud Recording Registrant Country, Cloud Recording Registrant Create Time, Cloud Recording Registrant Custom Questions, Cloud Recording Registrant Email, Cloud Recording Registrant Name, Cloud Recording Registrant ID, Cloud Recording Registrant Industry, Cloud Recording Registrant Job Title, Cloud Recording Registrant Number of Employees, Cloud Recording Registrant Organization, Cloud Recording Registrant Phone, Cloud Recording Registrant Purchasing Time Frame, Cloud Recording Registrant Role in Purchase Process, Cloud Recording Registrant Share URL, Cloud Recording Registrant Status, Cloud Recording Registrant ZIP Code, Cloud Recording Registrant Address, Cloud Recording Registrant State, Cloud Recording Registrant Meeting ID, Cloud Recording Registrant Field Name, Cloud Recording Registrant List of Registrants.

6. *Device Data From Web-Based Meetings And Web Conferences:* Device type (such as mobile, desktop, or tablet), Device Operating System, Number of users of related Operating Systems, Operating System Version, Operating System Type, MAC address, IP address, hard disk ID, PC Name, Bluetooth Information, Packet Loss, Internet Connection Type, Bluetooth Device Name, Bluetooth Device Type, Device Architecture, Central Processing Unit (CPU) Core Type, CPU core frequency, CPU Brand, Available Memory, Total CPU Capacity, Total Capacity Utilized by Application, Memory Used by Application, API Permissions, API Authentication, Authentication Secret Key, Graphics Processing Unit (GPU) Brand, GPU Type, Custom Attributes Defined by Organization, Archived Meeting Files, Archive Meeting Account Name, Archived Meeting File Download User, Archived Meeting File Extension, Archived Meeting File Size, Archived Meeting File Type, Archived Meeting File ID, Archived Meeting File Participant Email, Archived Meeting Participant Join Time, Archived Meeting Participant Leave Time, Archived Meeting File Recording Type, Archived Meeting File Status, Archived Meeting Complete Time, Archived Meeting Complete Time Duration, Archived Meeting Duration, Archived Meeting Duration In Seconds, Archived Meeting Host ID, Archived Meeting ID, Archived Meeting Settings, Archived Meeting Type, Archived Meeting Recording Count, Archived Meeting Start Time, Archived Meeting Topic, Archived Meeting Total Size, Archived Meeting UU ID, Past Meeting Participant ID, Past Meeting Participant Name, Past Meeting Participant Email, SIP Phone Authorization Name, SIP Phone Domain, SIP Phone ID, SIP Phone Password, SIP Phone Proxy Servers, SIP Phone Register Servers, SIP Phone Registration Expire Time, SIP Phone Transport Protocols, SIP Phone User Email, SIP Phone User Name, SIP Phone Voice Voicemail.

7. *User Data From Web-Based Meetings And Web Conferences:* User Creation Date, User Department, User Email Address, User Employee ID, User

Name, User System ID, User Chat Group Ids, User System Client Version, User Last Login Time, User Picture URL, User PMI, User Status, User Timezone, User Type, User Verified Status, User Password, User JID, User Language, User Manager, User Personal Meeting URL, User Role ID, User Role Name, User Use PMI Status, User Phone Country, User Company, User Custom Attributes, User CMS User ID, User Pronouns, User Vanity Name, User Assistant Email, User Assistant ID, User Permissions, User Presence Status, User Scheduler Email, User Scheduler ID, User Settings, User Token, User Meeting Minutes, User Number Of Meetings, User Participant Number, User's Web Conferences Template, User Scheduled Web Conferences, User Web Conferences Settings, User Web Conferences Recurrence Settings, User Web Conferences Password, User Web Conferences Agenda, User Web Conferences Duration, User Web Conferences Start Time, User Web Conferences Template ID, User Web Conferences Topic. User Web Conferences Tracking Fields, User Web Conferences Time zone User Web Conferences Created Date, User Web Conferences Host ID, User Web Conferences Type, User Web Conferences UU ID, User Web Conferences Start URL, User TSP Account Conference Code, User TSP Account Dial-In Numbers, User TSP Account ID, User TSP Account Leader PIN, User TSP account TSP Bridge, User TSP Audio URL, Chat Messaging Content,

8. *Web-Based Meeting And Web Conference Administration Data:* Account Administrator Name, Account Contact Information Account ID, Account Billing Information, Account Plan Information, Conference Room Account type, Conference Room calendar name, conference room camera name, conference room device IP address, conference room email address, conference room health, conference room ID, conference room issues, conference room last start time, conference room microphone name, conference room name, conference room speaker name, conference room status, Conference Room live meeting, Conference Room past meetings, conference room activation code, conference room support email, conference room support phone, conference room passcode, conference room settings, conference room location description, conference room location name, User Sign In And Sign Out Times, Group admin name, Group admin email, group admin ID, group member email, group member first name, group member last name, group member ID, group member type, chat group ID, chat group name, chat croup total members, chat group, Files sent through chat, GIPHYs sent through chat, groups sent through chat, p2p sent through chat, text sent through chat, total sent through chat, audio sent through chat, code snippet sent through chat, Operation Log action, operation log category type, operation log operation detail, operation log user, operation log time, Role member department, role member email, role member first name, role member ID, role member type, client feedback detail email, client feedback detail meeting ID, client feedback detail participant name, client feedback detail time,

9. *Web-Based Meeting And Web Conference Telemetry Data:* Event Time, Client Type, Event Location, Event, Subevent, UUID, Client Version, UserID, Client OS, Meeting ID.

10. *Persistent Message Application Telemetry Data:* User Email, Group Chat, Message Type, In Meeting Message, Status, Do Not Disturb Time, Notification Setting, Show Group On Contact List, File Type, File Location, Link URL, Keywords, GIF Keywords, Emoji Code, Audio Setting, Video Setting, Is E2E Enabled, Message ID, IP Address.

11. *Communication Data:* Deleted Persistent Message Sender, Deleted Persistent Message Time, Deleted Persistent Message ID, Deleted Persistent Message Text, Deleted Persistent Message Main Message ID, Deleted Persistent Message Main Message Timestamp, Deleted Persistent Message File Name, Deleted Persistent Message File Size, Edited Persistent Message Sender, Edited Persistent Message Time, Edited Persistent Message ID, Edited Persistent Message Text, Edited Persistent Message Main Message ID, Edited Persistent Message Main Message Timestamp, Edited Persistent Message File Name, Edited Persistent Message File Size, Persistent Message Sender, Persistent Message Time, Persistent Message ID, Persistent Message Main Message ID, Persistent Message Main Message Timestamp, Persistent Message File, Persistent Message File Size, Persistent Message Images Exchanged, Persistent Message Files Exchanged, Persistent Message Videos Exchanged, Persistent Message Channel Title, Persistent Message Whiteboard Annotations, Persistent Message Text, Deleted Message Sender, Deleted Message Time, Deleted Message ID, Deleted Message Text, Deleted Message Main Message ID, Deleted Message Main Message Timestamp, Deleted Message File Name, Deleted Message File Size, Edited Message Sender, Edited Message Time, Edited Message ID, Edited Message Text, Edited Message Main Message ID, Edited Message Main Message Timestamp, Edited Message File Name, Edited Message File Size, Message Sender, Message Time, Message ID, Message Main Message ID, Message Main Message Timestamp, Message File, Message File Size, Message Text.

12. *Identity verification information:* Question, answer, and email address.

13. *Carpool and parking information:* Records related to membership in carpools with USPS employees or about individuals who otherwise regularly use USPS parking facilities, including name, space number, principal's and others' license numbers, home address, and contact information.

14. *Workroom Floor Access and Activity Information:* Records related to issuance of building access badges supporting time keeping functions, including name, Bluetooth Device ID, Employee Identification Number, postal assignment information, workroom floor activities, assignments and/or duties, work contact information, finance number(s), duty location, clock ring data, and pay location.

15. *Tool Management Analytics and Transactional Records:* Tools Checked Out/In With Time Stamps And Employee Info, Other Database Updates With Time Stamps And Employee Info, Parts Checked Out With Time Stamps, Work Order Info And Employee Info, Parts Restocked With Time Stamps And Employee Info, Locker Open Events With Time Stamps And Badge Info, Locker Open Events Marked As Open Via PIN With Supervisor Assistance (When End User Badge Is Not Available), Locker Assignments And Changes With Time Stamps And Employee Info PIN Reset Events With Time Stamps And Manager's USPS.Gov Email Address.

RECORD SOURCE CATEGORIES:

Employees; contractors; subject individuals; and other systems of records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Standard routine uses 1. through 9. apply.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

1. Records about building access and issuance of accountable property are retrieved by name, Social Security Number, or Employee Identification Number.

2. Records about authorized access to computer and information resources are retrieved by name, logon ID, Employee Identification Number, or other unique identifier of the individual.

3. Report and tracking data created during web-based meetings and video conferences that pertain to individual participants, content shared, conference codes and other relevant session data and historical device usage data are retrieved by meeting ID, host name or host email address.

4. Records pertaining to web-based collaboration and communication applications are retrieved by organizer name and other associated personal identifiers.

5. Media recordings created during web-based meetings and video conferences are retrieved by meeting ID, host name or host email address.

6. Records of carpools and parking facilities are retrieved by name, ZIP Code, space number, or parking license number.

7. Records pertaining to workhour data derived from RFID and Bluetooth technologies are retrieved by name, Employee Identification Number, and Bluetooth Device ID.

8. Records pertaining to transactional data are retrievable by name, EIN, and ACE ID.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. Building access and accountable property records are retained until termination of access or accountability.

2. Records of computer access privileges are retained 1 year after all authorizations are cancelled.

3. Report and tracking data created during web-based meeting and video conferences, such as other relevant session data and historical device usage data, are retained for twenty-four months.

4. Records pertaining to web-based collaboration and communication applications are retained for twenty-four months.

5. Web-based meeting or video session recordings are retained for twenty-four months.

6. Records of carpool membership and use of USPS parking facilities are retained 6 years.

7. Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

8. Records pertaining to workhour data derived from RFID and Bluetooth technologies may be retained up to 90 days.

9. Records pertaining to transactional data are retained for two years.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections. Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES

See Notification Procedure and Record Access Procedures above.

NOTIFICATION PROCEDURES:

Inquiries for records about building access, accountable property, carpool membership, and use of USPS parking facilities must be addressed to the facility head. Inquiries about computer access authorization records must be directed to the Manager, Corporate Information Security, 475 L'Enfant Plaza SW, Suite 2141, Washington, DC 20260. For Inspection Service computer access records, inquiries must be submitted to the Inspector in Charge, Information Technology Division, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201. Inquiries must include full name, Social Security Number or Employee Identification Number, and period of employment or residency at the location.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None

HISTORY:

June 21, 2023, 88 FR 40340; December 23, 2022, 87 FR 79006; August 4, 2020, 85 FR 47258; June 1, 2020, 85 FR 33210; April 11, 2014, 79 FR 20249; June 27, 2012, 77 FR 38342; June 17, 2011, 76 FR 35483; April 29, 2005, 70 FR 22516

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2024–09889 Filed 5–6–24; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–563, OMB Control No. 3235–0649]

Proposed Collection; Comment Request; Extension: Rule 17g–5

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17g–5 (17 CFR 240.17g–5) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17g–5(a)(3) and (e) contain collection of information requirements.[1] Specifically, Rule 17g–5(a)(3) prohibits a person within a nationally recognized statistical rating organization (''NRSRO'') from having a conflict of interest relating to the issuance or maintenance of a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument unless certain information and representations relating to the security are disclosed or furnished.

Currently, there are 6 credit rating agencies registered as NRSROs in the issuer of asset-backed securities category of credit ratings, and it is estimated based on recent issuance data that there are approximately 1,480 new asset-backed securities transactions per year that implicate Rule 17g–5(a)(3). Based on staff experience, the

[1] *See* 17 CFR 240.17g–5(a)(3) and (e).

Commission estimates that the total annual hour burden to comply with Rule 17g–5(a)(3) will be 61,899 hours. The Commission further estimates that this annual hour burden will result in a total annual cost of $14,126,168. This cost is attributable to costs that may be incurred by NRSROs and arrangers of asset-backed securities posting information on a password-protected website, as required by Rule 17g–5, and preparing and procuring representations to determine whether an exemption under the rule applies, as well as costs incurred by NRSROs preparing certifications required under the rule to gain access to websites maintained by other NRSROs or arrangers of asset-backed securities.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; 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. Consideration will be given to comments and suggestions submitted by July 8, 2024.

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.

Please direct your written comments to: Dave Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F St NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*.

Dated: May 1, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09850 Filed 5–6–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–563, OMB Control No. 3235–0693]

Proposed Collection; Comment Request; Extension: Rules 17g–8 and 17g–9

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rules 17g–8 and 17g–9 (17 CFR 240.17g–8 and 17 CFR 240.17g–9) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rules 17g–8 and 17g–9 set forth collection of information requirements. Specifically, Rule 17g–8 requires nationally recognized statistical rating organizations (''NRSROs'') to establish, maintain, enforce, and document policies and procedures that are reasonably designed to achieve the objectives articulated in the rule. Generally, these policies and procedures pertain to (i) the procedures and methodologies NRSROs use to determine credit ratings, and (ii) the symbols, numbers, or scores NRSROs use to denote credit ratings.[1] Rule 17g–8 also requires that the policies and procedures an NRSRO is required to establish, maintain, and enforce pursuant to Section 15E(h)(4)(A) of the Securities Exchange Act of 1934 must, at a minimum, include policies and procedures reasonably designed to achieve the objectives articulated in the rule.[2] Rule 17g–9 requires each NRSRO to establish, maintain, enforce, and document standards of training, experience, and competence for the individuals it employs to participate in the determination of credit ratings that are reasonably designed to achieve the objective that the NRSRO produces accurate credit ratings.[3]

Currently, there are 10 credit rating agencies registered as NRSROs with the Commission. The Commission estimates that the total annual hour burden for NRSROs to comply with Rule 17g–8 and Rule 17g–9 is 1,450 hours and 34,658 hours, respectively. The Commission further estimates that these annual hour burdens will result in a total annual cost with respect to Rule 17g–8 of $539,400 and with respect to Rule 17g–9 of $12,951,746. These costs are attributable to costs NRSROs may incur in completing updates and other activities relating to the policies and procedures adopted pursuant to Rule 17g–8 and the standards adopted pursuant to Rule 17g–9, and in conducting the periodic testing of credit analysts pursuant to standards adopted under Rule 17g–9.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; 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. Consideration will be given to comments and suggestions submitted by July 8, 2024.

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.

Please direct your written comments to: Dave Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F St NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*.

Dated: May 1, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09849 Filed 5–6–24; 8:45 am]

BILLING CODE 8011–01–P

[1] *See* 240.17g–8(a) and (b).

[2] *See* 240.17g–8(c).

[3] *See* 240.17g–9.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100046; File No. SR–FINRA–2024–007]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt the FINRA Rule 6500 Series (Securities Lending and Transparency Engine (SLATE™))

May 1, 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 May 1, 2024, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and III below, which Items have been prepared by FINRA. 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

FINRA is proposing, as required by Securities Exchange Act Rule 10c–1a, to adopt the new FINRA Rule 6500 Series (Securities Lending and Transparency Engine (SLATE™)) to (1) require reporting of securities loans; and (2) provide for the public dissemination of loan information.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA 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

(i) Background

On October 13, 2023, the Commission adopted new SEA Rule 10c–1a [3] to require any "covered person" [4] who agrees to a "covered securities loan" [5] to provide specified information to a Registered National Securities Association ("RNSA").[6] The RNSA is then required to make publicly available information regarding reported securities loans, as described in SEA Rule 10c–1a.[7] In its Adopting Release, the Commission stated that SEA Rule 10c–1a would increase transparency in the securities lending market, resulting in a reduction of the information disadvantage faced by end borrowers and beneficial owners, improved price discovery, increased competition among providers of securities lending analytics services, reduced costs associated with tracking market conditions for broker-dealers and lending programs, and improved decision-making by investors, beneficial owners and other market participants.[8] The Commission stated its belief that the rule would likely reduce the borrowing costs of some securities, improving price discovery, liquidity, and capital formation in the underlying security markets, and would benefit investors by increasing the ability of regulators to surveil, study, and provide oversight of both the securities lending market and individual market participants.[9]

Covered Person Reporting Requirements

SEA Rule 10c–1a prescribes the items of information that covered persons must report to an RNSA regarding a covered securities loan. These reportable data elements include both non-confidential items of information that would be publicly disseminated (*i.e.,* the items of information specified in SEA Rule 10c–1a(c)(1) through (12)) as well as confidential items of information that would not be publicly disseminated (*i.e.,* the items of information specified in SEA Rule 10c–1a(e)(1) through (3)).

Specifically, SEA Rule 10c–1a(c) requires covered persons to report the following non-confidential items of information to an RNSA, if applicable, by the end of the day [10] on which the covered securities loan is effected:

(1) The legal name of the security issuer, and the Legal Entity Identifier ("LEI") of the issuer, if the issuer has a non-lapsed LEI;

(2) The ticker symbol, International Securities Identification Number ("ISIN"), Committee on Uniform Securities Identification Procedures ("CUSIP"), or Financial Instrument Global Identifier ("FIGI") of the security, or other security identifier;

(3) The date the covered securities loan was effected;

(4) The time the covered securities loan was effected;

(5) The name of the platform or venue where the covered securities loan was effected;

(6) The amount, such as size, volume, or both, of the reportable securities loaned;

(7) The type of collateral used to secure the covered securities loan;

(8) For a covered securities loan collateralized by cash, the rebate rate or any other fee or charges;

(9) For a covered securities loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges;

(10) The percentage of collateral to value of reportable securities loaned required to secure such covered securities loan;

(11) The termination date of the covered securities loan; and

(12) Whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

With respect to the confidential items of information, SEA Rule 10c–1a(e) requires covered persons to report the following items of information to an RNSA, if applicable, by the end of the day on which the covered securities loan is effected:

(1) If known, the legal name of each party to the covered securities loan, other than the customer from whom a broker or dealer borrows fully paid or excess margin securities pursuant to Rule 15c3–3(b)(3) of the Exchange Act, Central Registration Depository ("CRD") or Investment Adviser Registration Depository ("IARD") Number, market

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[3] *See* 17 CFR 240.10c–1a ("SEA Rule 10c–1a"); Securities Exchange Act Release No. 98737 (October 13, 2023), 88 FR 75644 (November 3, 2023) (Reporting of Securities Loans) ("Adopting Release").

[4] SEA Rule 10c–1a(j)(1) defines a "covered person" as (i) any person that agrees to a covered securities loan on behalf of a lender ("intermediary") other than a clearing agency when providing only the functions of a central counterparty pursuant to Rule 17Ad–22(a)(2) of the Exchange Act or a central securities depository pursuant to Rule 17Ad–22(a)(3) of the Exchange Act; or (ii) any person that agrees to a covered securities loan as a lender when an intermediary is not used unless paragraph (j)(1)(iii) of this section applies; or (iii) a broker or dealer when borrowing fully paid or excess margin securities pursuant to Rule 15c3–3(b)(3) of the Exchange Act.

[5] SEA Rule 10c–1a(j)(2) defines a "covered securities loan" as a transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person, with exclusions for a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad–22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad–22(a)(3) of the Exchange Act and the use of margin securities, as defined in Rule 15c3–3(a)(4) of the Exchange Act, by a broker or dealer. "Reportable security" is defined in SEA Rule 10c–1a(j)(3) as any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail as required by § 242.613 of the Exchange Act and the CAT NMS Plan ("CAT"), the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine ("TRACE"), or the Municipal Securities Rulemaking Board's Real-Time Transaction Reporting System ("RTRS"), or any reporting system that replaces one of these systems.

[6] SEA Rule 10c–1a(j)(5) defines an RNSA as an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78*o*–3 of the Exchange Act. FINRA currently is the only RNSA.

[7] *See* SEA Rule 10c–1a(g).

[8] *See* Adopting Release, 88 FR 75644, 75692.

[9] *See* Adopting Release, 88 FR 75644, 75692–93.

[10] SEA Rule 10c–1a permits the RNSA to define "end of the day" for the purposes of the rule. *See* Adopting Release, 88 FR 75644, 75648 n.72.

participant identification (''MPID''), and the LEI of each party to the covered securities loan, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower;

(2) If the person lending securities is a broker or dealer and the borrower is its customer, whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer; and

(3) If known, whether the covered securities loan is being used to close out a fail to deliver pursuant to Rule 204 of Regulation SHO or to close out a fail to deliver outside of Regulation SHO.

SEA Rule 10c–1a also requires covered persons to report specified modifications to covered securities loans. Specifically, if a loan modification occurs after the non-confidential data elements for the covered securities loan were reported to an RNSA pursuant to SEA Rule 10c–1a(c), and results in a change to any of the non-confidential data elements previously provided to an RNSA, SEA Rule 10c–1a(d)(1) requires a covered person to provide to the RNSA: (1) the date and time of the modification; (2) the specific modification and the specific non-confidential data element being modified; and (3) the unique identifier assigned by the RNSA to the original covered securities loan. With respect to a modification to a covered securities loan for which reporting under SEA Rule 10c–1a was not required on the date the loan was agreed to or last modified that results in a change to any of the non-confidential data elements required to be provided to an RNSA under SEA Rule 10c–1a(c), SEA Rule 10c–1a(d)(2) requires that the covered person report all of the non-confidential data elements to the RNSA as of the date of the modification, as well as the date and time of the modification.

RNSA Publication of Data

SEA Rule 10c–1a(g) (RNSA publication of data) sets forth the requirements applicable to an RNSA regarding securities loan data publication. Specifically, SEA Rule 10c–1a(g)(1) provides that, following receipt of the non-confidential data elements discussed above, as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected, the RNSA must assign a unique identifier to the covered securities loan, and make publicly available for each covered securities loan effected on the previous business day: (1) the unique identifier assigned by the RNSA; (2) the non-confidential data elements required to be reported pursuant to SEA Rule 10c–1a(c), other than the loan amount; and (3) the security identifier under SEA Rule 10c–1a(c)(1) or 10c–1a(c)(2) that the RNSA determines is appropriate to identify the security (*e.g.,* the security's ticker symbol or CUSIP identifier).

SEA Rule 10c–1a(g)(2) provides that, following receipt of the non-confidential data elements reported pursuant to SEA Rule 10c–1a(c), on the twentieth business day after the covered securities loan is effected, the RNSA must make publicly available the loan amount reported to the RNSA pursuant to SEA Rule 10c–1a(c)(6) along with the applicable loan and security identifying information.

With respect to modifications to covered securities loans previously reported to the RNSA, SEA Rule 10c–1a(g)(3)(i) provides that, following the receipt of information regarding a modification (pursuant to SEA Rule 10c–1a(d)), the RNSA must assign a unique identifier to the covered securities loan (if one has not already been assigned), and as soon as practicable, and not later than the morning of the business day after the covered securities loan is modified, make publicly available information pertaining to any modification to the non-confidential data elements required to be reported pursuant to SEA Rule 10c–1a(c), other than the loan amount. With respect to covered securities loans for which reporting was not required on the date the loan was agreed to or last modified (*i.e.,* a loan for which non-confidential data elements are reported to an RNSA pursuant to paragraph (d)(2) of SEA Rule 10c–1a), the RNSA must make publicly available all of the non-confidential data elements required to be reported pursuant to SEA Rule 10c–1a(c), other than the loan amount.[11]

With respect to loan amounts, SEA Rule 10c–1a(g)(3)(ii) provides that, on the twentieth business day after the covered securities loan is modified, the RNSA must make publicly available the loan amount reported to the RNSA pursuant to SEA Rule 10c–1a(c)(6) along with the applicable loan and security identifying information.

The RNSA is required to keep confidential and not disseminate the confidential data elements reported pursuant to SEA Rule 10c–1a(e).[12]

In addition, SEA Rule 10c–1a(g)(5) provides that, following the receipt of information reported pursuant to SEA Rule 10c–1a(c) when a covered securities loan is effected, or reported pursuant to SEA Rule 10c–1a(d) when a covered securities loan is modified, the RNSA must, as soon as practicable and not later than the morning of the business day after a covered securities loan is effected or modified, make publicly available, on a daily basis, information pertaining to the aggregate loan transaction activity and distribution of loan rates for each reportable security and the security identifier(s) that an RNSA determines is appropriate to identify the security (*e.g.,* the security's ticker symbol or CUSIP identifier).

Reporting Agents

SEA Rule 10c–1a(a)(2) permits a covered person to rely on a reporting agent to fulfill its reporting obligations under Rule 10c–1a. In order to use a reporting agent to fulfill its SEA Rule 10c–1a information reporting obligations, a covered person must: (1) enter into a written agreement with the reporting agent, and (2) provide the reporting agent with timely access to the required SEA Rule 10c–1a information.[13] A reporting agent that assumes the reporting obligation on behalf of a covered person (pursuant to paragraph (a)(2)) is then required to provide the SEA Rule 10c–1a information to an RNSA, in the format and manner required by the applicable rule(s) of such RNSA (and within the time periods specified in SEA Rule 10c–1a(c) through (e)).[14] A reporting agent is also required to enter into a written agreement with an RNSA that permits the reporting agent to provide SEA Rule 10c–1a information to an RNSA on behalf of a covered person[15] and to provide an RNSA with a list naming each covered person on whose behalf the reporting agent is providing SEA Rule 10c–1a information (and provide an RNSA with any updates to the list of such persons by the end of the day such list changes).[16]

RNSA Rules, Fees and Data Retention Requirements

SEA Rule 10c–1a(f) requires an RNSA to implement rules regarding the format and manner of its collection of information described in paragraphs 10c–1a(c) through 10c–1a(e) and make publicly available such information in

[11] *See* SEA Rule 10c–1a(g)(3) and (3)(i).

[12] *See* SEA Rule 10c–1a(g)(4). In addition to keeping the information confidential, an RNSA is required to establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of the confidential information. *See* SEA Rule 10c–1a(h)(4).

[13] *See* SEA Rule 10c–1a(a)(2).

[14] *See* SEA Rule 10c–1a(b)(1).

[15] *See* SEA Rule 10c–1a(b)(3).

[16] *See* SEA Rule 10c–1a(b)(4).

accordance with rules promulgated by the RNSA pursuant to section 19(b) of the Exchange Act and Rule 19b–4 thereunder; SEA Rule 10c–1a(i) also permits an RNSA to establish and collect reasonable fees pursuant to rules established under section 19(b) of the Exchange Act and Rule 19b–4 thereunder.[17] SEA Rule 10c–1a(h) imposes data retention and availability requirements on an RNSA related to its collection of SEA Rule 10c–1a information. Specifically, an RNSA must retain the information collected pursuant to paragraphs (c) through (e) of SEA Rule 10c–1a in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years [18] and make the non-confidential information collected pursuant to paragraphs (c) and (d) of SEA Rule 10c–1a available to the public (in the same manner it is maintained) on an RNSA's website or similar means of electronic distribution, without use restrictions, for a period of at least five years.[19] An RNSA must also make the information collected pursuant to paragraphs (b)(4) and (c) through (e) of SEA Rule 10c–1a available to the Commission; or other persons as the Commission may designate by order upon a demonstrated regulatory need.[20] With respect to the confidential information collected by an RNSA pursuant to paragraph (e) of SEA Rule 10c–1a, paragraph (h)(4) requires an RNSA to establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of such confidential information.

(ii) Proposed Rule Change

Consistent with SEA Rule 10c–1a, FINRA is proposing to adopt the new FINRA Rule 6500 Series (Securities Lending and Transparency Engine (SLATE)) [21] to establish reporting requirements for covered securities loans and to provide for the dissemination of individual and aggregate covered securities loan information and loan rate statistics.[22] Among other things, these proposed rules would define key terms for the reporting of covered securities loans and specify the reporting requirements with respect to both initial covered securities loans and loan modifications, including prescribing required modifiers and indicators. FINRA intends to file separately a proposed rule change to establish covered securities loan reporting fees and securities loan data products and associated fees.

Reporting Initial Covered Securities Loans

Proposed Rule 6530(a) would govern the reporting requirements applicable to Covered Persons for reporting Initial Covered Securities Loans.[23] Proposed Rule 6510(e) would define ''Initial Covered Securities Loan'' as a new Covered Securities Loan not previously reported to SLATE. The definitions of ''Covered Person'' and ''Covered Securities Loan'' for the purposes of this proposed rule change would be the same as set forth in SEA Rule 10c–1a.[24] Initial Covered Securities Loans would be required to be reported within the time periods outlined in proposed Rule 6530(a)(1) (When and How Initial Covered Securities Loans Are Reported). Specifically, for Initial Covered Securities Loans effected on a business day at or after 12:00:00 a.m. Eastern Time (''ET'') through 7:45:00 p.m. ET, the required information must be reported the same day before 8:00:00 p.m. ET.[25] For Initial Covered Securities Loans effected on a business day after 7:45:00 p.m. ET, the required information must be reported no later than the next business day (T+1) before 8:00:00 p.m. ET; [26] and Initial Covered Securities Loans effected on a Saturday, a Sunday, a federal or religious holiday or other day on which SLATE is not open at any time during that day (determined using Eastern Time) must be reported the next business day (T+1) before 8:00:00 p.m. ET.[27]

Proposed Rule 6530(a)(2) (Loan Information To Be Reported) would specify the items of information that must be reported to FINRA. Specifically, proposed Rule 6530(a)(2)(A) through (N) would require that Initial Covered Securities Loan reports must contain the below non-confidential data elements:

(1) The legal name of the security issuer and the LEI of the issuer (if the issuer has a non-lapsed LEI);

(2) Security symbol, CUSIP, ISIN, or FIGI, if any;

(3) The date the Covered Securities Loan was effected;

(4) The time the Covered Securities Loan was effected;

(5) The expected settlement date of the Covered Securities Loan;

(6) The platform or venue where the Covered Securities Loan was effected; [28]

(7) The amount of the Reportable Securities loaned; [29]

(8) The type of collateral used to secure the Covered Securities Loan;

(9) For a Covered Securities Loan collateralized by cash, the rebate rate;

(10) For a Covered Securities Loan not collateralized by cash, the securities lending fee;

(11) Any other fees or charges; [30]

(12) The percentage of collateral to value of Reportable Securities loaned required to secure such Covered Securities Loan;

(13) For a Covered Securities Loan with a specified term, the termination date of the Covered Securities Loan; [31] and

[17] *See* SEA Rule 10c–1a(f) and (i). FINRA does not have regulatory authority over Covered Persons or Reporting Agents that are non-FINRA members. As FINRA does today, FINRA would refer to the SEC potential violations of the federal securities laws and rules by non-members, including failures to comply with SEA Rule 10c–1a and FINRA rules adopted pursuant to SEA Rule 10c–1a (*e.g.,* potential SLATE reporting violations or failures to pay when due any SLATE reporting fees).

[18] *See* SEA Rule 10c–1a(h)(1).

[19] *See* SEA Rule 10c–1a(h)(3).

[20] *See* SEA Rule 10c–1a(h)(2).

[21] SLATE is the automated system developed by FINRA that, among other things, will accommodate reporting and dissemination of loan reports where applicable in covered securities loans. *See* proposed Rule 6510(g).

[22] FINRA may validate and reject submissions to SLATE that FINRA believes are noncompliant or otherwise inconsistent with SEA Rule 10c–1a or with the form and manner specified by FINRA for the data (as provided in FINRA rules, guidance, and technical documents and specifications), and may exclude any such information from disseminated SLATE data. FINRA may also block or reject any activity to the extent such activity puts the normal functioning of the SLATE system at risk.

[23] As discussed above, a Covered Person may engage a Reporting Agent to comply with the reporting obligations on its behalf, consistent with the conditions of SEC Rule 10c–1a. *See* proposed Rule 6510(k) (defining ''Reporting Agent''); *see also infra* n.60.

[24] *See* proposed Rule 6510(k) (among other things, defining ''Covered Person'' and ''Covered Securities Loan'' by reference to SEA Rule 10c–1a, which defines ''covered person'' and ''covered securities loan'' in paragraphs (j)(1) and (2), respectively); *see also supra* notes 4–5.

[25] *See* proposed Rule 6530(a)(1)(A).

[26] *See* proposed Rule 6530(a)(1)(B).

[27] *See* proposed Rule 6530(a)(1)(C).

[28] FINRA will make available a list of platforms/venues and their associated identifiers for reporting purposes. If a loan occurs on a platform/venue not yet included on the FINRA list, the Covered Person must enter the name of the platform/venue in the SLATE report.

[29] Proposed Rule 6530(a)(3) specifies that when reporting the loan amount pursuant to 6530(a)(2)(G), for a Covered Securities Loan of a security reportable to CAT, a Covered Person must report the number of shares loaned. For a Covered Securities Loan of a security reportable to TRACE or the MSRB's RTRS, a Covered Person must report the total par value of the securities loaned.

[30] When reporting a rebate rate or lending fee pursuant to proposed Rule 6530(a)(2)(I) or (J), respectively, a Covered Person must report the rebate rate or lending fee as a percentage, and separately report the dollar cost of any other fees or charges.

[31] This field would remain blank if reporting a Covered Securities Loan without a specified term (*i.e.,* an open-ended loan). However, upon the termination of an open-ended loan, as is the case with a term loan, a Covered Person would be required to submit a Loan Modification appending the terminated loan indicator pursuant to proposed Rule 6530(c)(4). *See infra* n.48 and accompanying text.

(14) Whether the borrower is a Broker [32] or Dealer,[33] a customer (if the person lending securities is a Broker or Dealer), a Clearing Agency,[34] a Bank,[35] a Custodian,[36] or other person.

Consistent with SEA Rule 10c–1a(e), proposed Rule 6530(a)(2)(O) through (U) would also require that Initial Covered Securities Loan reports contain the below confidential data elements:

(1) If known, the legal name of each party to the Covered Securities Loan (other than the customer from whom a Broker or Dealer borrows fully paid or excess margin securities pursuant to SEA Rule 15c3–3(b)(3));

(2) If known, the CRD Number or IARD Number of each party to the Covered Securities Loan, if applicable;

(3) If known, the MPID of each party to the Covered Securities Loan;

(4) If known, the LEI of each party to the Covered Securities Loan;

(5) If known, whether each party to the Covered Securities Loan is the lender, the borrower, or an intermediary between the lender and the borrower;

(6) If the person lending securities is a Broker or Dealer and the borrower is its customer, whether the security is loaned from the Broker's or Dealer's securities inventory to the customer of such Broker or Dealer; and

(7) If known, whether the Covered Securities Loan is being used to close out a fail to deliver pursuant to Rule 204 of SEC Regulation SHO or to close out a fail to deliver outside of Regulation SHO.

Additionally, proposed Rule 6530(a)(2)(V) through (Y) would require a Covered Person to report:

(1) Whether the Covered Person is the lender, borrower or intermediary;

(2) The unique internal identifier assigned to the Covered Securities Loan by the Covered Person responsible for reporting the loan to SLATE;

(3) If the Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal identifier for the associated omnibus loan assigned by the Covered Person responsible for reporting the Covered Securities Loan to SLATE; [37] and

(4) Such modifiers and indicators as required by either the Rule 6500 Series or the SLATE Participant specification.

FINRA intends to use the information required by proposed Rule 6530(a)(2)(V) (requiring Covered Persons to identify whether the Covered Person is the lender, borrower or intermediary), proposed Rule 6530(a)(2)(W) (requiring Covered Persons to report the unique internal identifier it has assigned for the loan), and proposed Rule 6530(a)(2)(X) (requiring, for a loan that is an allocation of an omnibus loan, that Covered Persons report the unique internal identifier it has assigned for the associated omnibus loan) for data validation and regulatory purposes. For example, the Covered Person party type (*i.e.,* lender, borrower or intermediary) would provide necessary information regarding the identity of the Covered Person under the Rule, including in instances where a party other than the Covered Person submits the report to SLATE. The Covered Person's internal identifier for the loan would allow for the identification of a Covered Securities Loan in the audit trail prior to the assignment of a loan identifier by FINRA. For example, the internal identifier assigned by a Covered Person would be used to associate an Initial Covered Securities Loan with a Loan Modification submitted on the same day, prior to the assignment of a loan identifier by FINRA. The Covered Person's unique internal omnibus loan identifier would be used to identify allocations and reallocations of Covered Securities Loans that are associated with an omnibus-level loan arranged by an agent lender. Obtaining this identifier would allow FINRA, for example, to provide the public with more granular insight into the day's loan activity in its disseminated data.[38] FINRA believes that requiring Covered Persons to report unique internal identifiers—in whatever alphanumeric format preferred by the firm—strikes an appropriate balance by ensuring that FINRA receives important information for use in identifying and linking associated reports without requiring firms to assign an identifier using a prescribed format or convention.

The modifiers and indicators—set forth in proposed Rule 6530(c) (Modifiers and Indicators)—apply to specific scenarios where additional

[32] Proposed Rule 6510(j) would define ''Broker'' by reference to Exchange Act section 3(a). Exchange Act section 3(a)(4)(A) defines a ''broker'' as any person engaged in the business of effecting transactions in securities for the account of others, with exceptions for certain bank activities specified in Exchange Act section 3(a)(4)(B).

[33] Proposed Rule 6510(j) would define ''Dealer'' by reference to Exchange Act section 3(a). Exchange Act section 3(a)(5)(A) defines a ''dealer'' as any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise, with exceptions for persons not engaged in the business of dealing (Exchange Act section 3(a)(5)(B)) and for certain bank activities specified in Exchange Act section 3(a)(5)(C).

[34] Proposed Rule 6510(j) would define ''Clearing Agency'' by reference to Exchange Act section 3(a). Exchange Act section 3(a)(23)(A) defines a ''clearing agency'' as any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates. Exchange Act section 3(a)(23)(B) provides exceptions to the definition of a ''clearing agency.''

[35] Proposed Rule 6510(j) would define ''Bank'' by reference to Exchange Act section 3(a). Exchange Act section 3(a)(6) defines a ''bank'' as (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 1462(5)of title 12, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 1462(4)of title 12, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to section 92a of title 12, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this chapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C).

[36] Proposed Rule 6510(c) would define ''Custodian'' by reference to Exchange Act section 3(a)(4)(B)(viii) as a broker or bank that is providing safekeeping or custody services as described in Exchange Act section 3(a)(4)(B)(viii)(I)(aa) or (bb) in connection with the Covered Securities Loan.

[37] Individual participants in agency lending programs generally authorize an agent lender, pursuant to agency lending agreements, to lend their securities on their behalf. As discussed in the Adopting Release, reporting obligations under SEA Rule 10c–1a can depend on how a pool or lending program is structured (*e.g.,* whether the pool or lending program itself or the individual underlying participants are the party or parties identified as the lender for the loan). *See generally* Adopting Release, 88 FR 75644, 75664. If the Initial Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, proposed Rule 6530(a)(2)(W) and (X) would require that the SLATE report include both the Covered Person's unique internal identifier for the Covered Securities Loan (*i.e.,* the report of the allocation) and the Covered Person's unique internal identifier for the associated omnibus loan.

[38] As required by SEA Rule 10c–1a(g)(5), FINRA would make publicly available, on a daily basis, information pertaining to the aggregate loan transaction activity for each Reportable Security based on the prior business day's activity. The omnibus loan identifier would allow FINRA to identify allocations of an omnibus loan arranged by an agent lender and determine when an Initial Covered Securities Loan reported to SLATE is actually a reallocation of some portion of a preexisting omnibus loan. This would allow FINRA to filter the amounts of any such loan reallocations from the aggregate loan volumes that FINRA proposes to disseminate for each Reportable Security on a given day, as specified in proposed FINRA Rule 6540(c)(1).

detail is appropriate to clarify the information required to be reported pursuant to proposed Rule 6530(a)(2) and (b)(2).[39] FINRA intends to use these modifiers and indicators to provide regulators and the public with important information regarding the reported securities loan. Specifically, proposed Rule 6530(c)(1) (Exclusive Arrangement) would require a Covered Person to append an indicator to identify a loan made pursuant to an exclusive arrangement with the borrower or intermediary. An exclusive arrangement is one in which a borrower or intermediary has exclusive access to a lender's portfolio. Because exclusive access to a lender's portfolio can impact the loan rate,[40] the exclusive loan indicator would help to identify loans whose rates may not reflect current market rates.

Proposed Rule 6530(c)(2) (Loan to Affiliate) would require a Covered Person to append an indicator to identify a loan made to an Affiliate of the lender or intermediary. For purposes of this provision, ''Affiliate'' would be defined as ''an entity that controls, is controlled by or is under common control with a Covered Person.'' [41] Because an affiliate relationship between the borrower and lender or intermediary can impact borrowing costs,[42] the affiliate loan indicator would likewise help to identify loans whose rates may not reflect current market rates.[43]

Proposed Rule 6530(c)(3) (Unsettled Loan) would require a Covered Person to append an indicator to identify an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned that did not settle by the close of SLATE System Hours [44] on the expected settlement date reported to SLATE.[45] Loans may be agreed upon but ultimately not settle for a variety of reasons (*e.g.,* the lender is unable to deliver the securities; the loan fails due to mismatched instructions).[46] The unsettled loan indicator would provide clarity that the amount of Reportable Securities loaned reported to SLATE was not transferred to the borrower, which may provide useful insight into the day's loan activity.[47]

Proposed Rule 6530(c)(4) (Terminated Loan) would require a Covered Person to indicate when a Covered Securities Loan has been terminated. The terminated loan indicator would therefore be required to be appended on reports of: (1) an Initial Covered Securities Loan that did not and will not settle; and (2) Loan Modifications reporting the termination of a Covered Securities Loan (whether an open-ended or a term loan).[48]

Proposed Rule 6530(c)(5) (Rate or Fee Adjustment) would require a Covered Person to report the appropriate modifier if a loan rebate rate or lending fee accounts for: (1) a billing adjustment or correction to amounts previously rebated or charged; or (2) the value of a distribution or other economic benefit associated with the Reportable Security, *e.g.,* a corporate action. Similarly, proposed Rule 6530(c)(6) (Basket Loan) would require a Covered Person to report the appropriate modifier if a loan rebate rate or lending fee reflects a rate or fee involving a basket of at least 10 unique Reportable Securities for a single agreed rate or fee for the entire basket. In each of these scenarios, the modifier would help to identify loans where the rate or fee may not reflect the current market. In addition to enhancing the disseminated data and its value to market participants, FINRA plans to use these modifiers for data validation (*e.g.,* in instances where FINRA's data validation logic identifies the reported rate as potentially erroneous).

Reporting Securities Loan Modifications

Proposed Rule 6530(b) would govern the reporting requirements applicable to Covered Persons for reporting Loan Modifications.[49] Proposed Rule 6510(f) would define ''Loan Modification'' as a change to any ''Data Element'' with respect to a Covered Securities Loan (irrespective of whether such Covered Securities Loan was previously reported to SLATE), where ''Data Element'' refers to the required non-confidential data elements and modifiers reported pursuant to proposed Rule 6530(a)(2).[50] Proposed Rule 6530(b)(1) (When and How Loan Modifications Are Reported) would require that Loan Modifications be reported within the same timeframes applicable to the reporting of Initial Covered Securities Loans. Specifically, for Loan Modifications effected on a business day at or after 12:00:00 a.m. ET through 7:45:00 p.m. ET, the required information must be reported the same day before 8:00:00 p.m. ET.[51] For Loan Modifications effected on a business day after 7:45:00 p.m. ET, the required information must be reported no later than the next business day (T+1) before 8:00:00 p.m. ET; [52] and Loan Modifications effected on a Saturday, a Sunday, a federal or religious holiday or other day on which SLATE is not open at any time during that day (determined using Eastern Time) must be reported the next business day (T+1) before 8:00:00 p.m. ET.[53]

Proposed Rule 6530(b)(2) (Loan Modifications—Information To Be Reported) would specify the items of information that must be reported to FINRA. Specifically, proposed Rule 6530(b)(2)(A) through (I) would require that each Loan Modification report contain the information below:

[39] SEA Rule 10c–1a prescribes generally the loan information that parties must report to FINRA (*i.e.,* the data elements listed in SEA Rule 10c–1a(c), loan modifications identified in SEA Rule 10c-1a(d), and confidential data elements listed in SEA Rule 10c–1a(e)), and requires that FINRA establish rules regarding the format and manner of its collection of such information. *See* SEA Rule 10c–1a(f); *see also* Adopting Release, 88 FR 75644, 75667 n.365 (explaining that the Commission is not specifying the details as to the format of the required data, the manner in which rates would be presented, or other detailed information requested, to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the final rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA).

[40] *See* Adopting Release, 88 FR 75644, 75695 n.732.

[41] *See* proposed Rule 6710(a). For the purposes of the definition of ''Affiliate,'' ''control,'' along with any derivative thereof, means legal, beneficial, or equitable ownership, directly or indirectly, of 25 percent or more of the capital stock (or other ownership interest, if not a corporation) of any entity ordinarily having voting rights. *See* proposed Rule 6510(a). The term ''common control'' means the same natural person or entity controls two or more entities. *See* proposed Rule 6510(a).

[42] *See* Adopting Release, 88 FR 75644, 75661 n.278 and accompanying text.

[43] *See* Adopting Release, 88 FR 75644, 75661 n.279 (stating that ''[t]o reduce any potential confusion and misinterpretation of the data, an RNSA could determine to, if it is able, develop methodologies to separate or identify [affiliate] loans'').

[44] Proposed Rule 6510(i) would define ''SLATE System Hours'' as ''the hours SLATE is open, which are 6:00:00 a.m. Eastern Time through 7:59:59 p.m. Eastern Time on a business day, unless otherwise announced by FINRA.''

[45] The unsettled loan indicator would generally not be applicable to Loan Modifications involving a decrease to the loan amount due to the return of securities to the lender. *See infra* n.54.

[46] To the extent an Initial Covered Securities Loan or Loan Modification that was originally reported with the unsettled loan indicator subsequently settled, a Covered Person would be required to report a Loan Modification to remove the unsettled loan indicator to reflect that the previously reported Initial Covered Securities Loan or Loan Modification had settled.

[47] FINRA expects to use the unsettled loan indicator to filter the aggregate data that it would disseminate pursuant to SEA Rule 10c–1a(g)(5), and the indicator would be publicly disseminated with the loan-level data that FINRA would disseminate pursuant to SEA Rule 10c–1a(g)(1) through (3).

[48] *See* proposed Rule 6530(c)(4).

[49] As discussed above, a Covered Person may engage a Reporting Agent to comply with the reporting obligations on its behalf, consistent with the conditions of SEC Rule 10c–1a. *See* proposed Rule 6510(k) (defining ''Reporting Agent''); *see also infra* n.60.

[50] *See* proposed Rule 6510(d).

[51] *See* proposed Rule 6530(b)(1)(A).

[52] *See* proposed Rule 6530(b)(1)(B).

[53] *See* proposed Rule 6530(b)(1)(C).

(1) The unique identifier assigned by FINRA to the Initial Covered Securities Loan, or, if a unique identifier has not yet been assigned by FINRA, the unique internal identifier assigned to the Covered Securities Loan by the Covered Person responsible for reporting the loan to SLATE;

(2) If the Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal identifier for the associated omnibus loan assigned by the Covered Person responsible for reporting the Covered Securities Loan to SLATE;

(3) The MPID of the Covered Person;

(4) The date of the Loan Modification;

(5) The time of the Loan Modification;

(6) The expected settlement date for modifications to the loan amount (if the expected settlement date is a date other than the date of the Loan Modification), or the effective date for all other Loan Modifications (if the effective date is a date other than the date of the Loan Modification); [54]

(7) Whether the Covered Person is the lender, borrower or intermediary;

(8) The modified Data Elements for a Loan Modification to a Covered Securities Loan previously reported to SLATE or all Data Elements for a Loan Modification to a Covered Securities Loan that was not previously required to be reported to SLATE; [55] and

(9) Such modifiers and indicators as required by either the Rule 6500 Series or the SLATE Participant specification.

Proposed Rule 6530.01 (Intraday Loan Modifications) addresses a Covered Person's reporting obligations when multiple Loan Modifications occur on a given day. Specifically, if a Covered Securities Loan (whether or not previously reported to SLATE) is modified multiple times throughout the day, a Covered Person must report each Loan Modification that occurs on a given day as set forth in proposed Rule 6530(b). For example, if Lender A and Borrower X agree at 10:00 a.m. ET to modify the rebate rate for a previously reported Covered Securities Loan from 0.15 percent to 0.20 percent, and then decide at 3:00 p.m. ET to modify the rate to 0.30 percent, the Covered Person must report two Loan Modifications pursuant to proposed Rule 6530(b)(2): one with a Loan Modification time of 10:00 a.m. ET reflecting the change in the rebate rate to 0.20 percent and a second with a Loan Modification time of 3:00 p.m. ET to reflect the change in the rebate rate to 0.30 percent. Because, in this example, the Covered Securities Loan was previously reported to SLATE, the Loan Modification reports must also include the unique identifier assigned by FINRA to the loan.

If, however, the Covered Securities Loan was not previously required to be reported (*e.g.,* because the Initial Covered Securities Loan occurred prior to the effectiveness of the FINRA rule), the Covered Person must still report two Loan Modifications. However, the Loan Modification report reflecting the 10:00 a.m. ET change in the rebate rate to 0.20 percent must also include all of the other Data Elements required by proposed Rule 6530(a)(2) (*i.e.,* the non-confidential data elements) as well as the internal identifier assigned to the Covered Securities Loan by the Covered Person, and, if the Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal identifier for the associated omnibus loan assigned by the Covered Person responsible for reporting the Covered Securities Loan to SLATE. The second Loan Modification report reflecting the 3:00 p.m. ET change would not be required to include all of the other Data Elements required by proposed Rule 6530(a)(2); however, unless a unique identifier has been assigned to the loan by FINRA, the second Loan Modification report must include the internal identifier assigned to the Covered Securities Loan by the Covered Person, and, if the Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal identifier for the associated omnibus loan assigned by the Covered Person responsible for reporting the Covered Securities Loan to SLATE.[56]

A Loan Modification report is also required where a Covered Securities Loan is modified on the day upon which it was effected, even if the modification occurred prior to the submission of the Initial Covered Securities Loan report to SLATE. Thus, for example, Lender A and Borrower X agree to an Initial Covered Securities Loan at 10:00 a.m. ET with terms that include a rebate rate of 0.15 percent. At 3:00 p.m. ET that same day, before the Initial Covered Securities Loan was reported to SLATE, Lender A and Borrower X agree to change the previously agreed upon rebate rate from 0.15 to 0.20 percent. Under the proposed rule, the Initial Covered Securities Loan must be reported reflecting all of the Data Elements and Confidential Data Elements [57] required pursuant to proposed Rule 6530(a)(2), including the date and time the loan was effected of 10:00 a.m. ET as well as the original rebate rate of 0.15 percent. In addition to reporting the Initial Covered Securities Loan, the Covered Person also must separately report the Loan Modification reflecting the modification date and time of 3:00 p.m. ET, the new rate of 0.20 percent, and the internal identifier assigned to the Covered Securities Loan by the Covered Person, and, if the Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal identifier for the associated omnibus loan assigned by the Covered Person responsible for reporting the Covered Securities Loan to SLATE.

As discussed in the Adopting Release, a change to any party to a Covered Securities Loan would constitute the termination of the prior Covered Securities Loan and the initiation of a new loan under proposed Rule 6530.[58] Therefore, Covered Persons must submit two reports to SLATE: (1) a termination report with respect to the prior loan; and (2) an Initial Covered Securities Loan report reflecting all of the Data Elements and Confidential Data Elements required by proposed Rule 6530(a)(2) with respect to the new loan. Thus, proposed Rule 6530.02 (Changes to the Parties of a Covered Securities Loan) provides that, with respect to a previously reported Covered Securities Loan, following the addition or removal of a party required to be identified pursuant to Rule 6530(a)(2)(O) a Covered Person must: (a) report the termination of the previously reported Covered Securities Loan as a Loan Modification pursuant to Rule 6530(b) that reflects the date and time the party

[54] Covered Persons must report a decrease to the loan amount resulting from a return of securities only once the securities have been delivered because returns are not considered ''effected'' until the securities are actually returned. However, Covered Persons must report all other Loan Modifications on the date that the Loan Modification was agreed upon and, in such instances, must report the effective date (pursuant to proposed Rule 6530(b)(2)(F)) unless the effective date is the same as the Loan Modification date (reported pursuant to 6530(b)(2)(D)).

[55] As defined by proposed Rule 6510(d), ''Data Element'' includes any item of information that a Covered Person must report under SEA Rule 10c–1a(c) and proposed Rule 6530(a)(2)(A) through (N) and such modifiers and indicators required by proposed Rule 6530(a)(2)(Y). Accordingly, a modification to a Covered Securities Loan that would require the addition or removal of a modifier or indicator required to be reported pursuant to proposed Rule 6530(a)(2)(Y) would require a Covered Person to report a Loan Modification as set forth in proposed Rule 6530(b).

[56] *See* proposed Rule 6530(b)(2)(A) and (B).

[57] As defined by proposed Rule 6510(b), ''Confidential Data Element'' includes any item of information that a Covered Person must report under SEA Rule 10c–1a(e) and FINRA Rule 6530(a)(2)(O) through (X).

[58] *See* 88 FR 75644, 75664.

was added or removed and select the terminated loan indicator; and (b) report an Initial Covered Securities Loan pursuant to Rule 6530(a) that reflects the new parties to the loan, if known (other than the customer from whom a Broker or Dealer borrows fully paid or excess margin securities pursuant to SEA Rule 15c3–3(b)(3)).

Compliance With Reporting Obligations

Similar to requirements that exist with respect to reporting obligations under other FINRA rules, FINRA is proposing to adopt proposed Rule 6530(d) (Compliance with Reporting Obligations) to implement provisions regarding Covered Persons' ongoing reporting obligations and the use of third parties in meeting SEA Rule 10c–1a and FINRA 6500 Rule Series obligations.[59] Specifically, proposed Rule 6530(d)(1) provides that Covered Persons (other than Covered Persons that engage a Reporting Agent)[60] have an ongoing obligation to report Initial Covered Securities Loans and Loan Modifications to FINRA timely, accurately, and completely. In addition, a Covered Person may employ an agent for the purpose of submitting loan information to SLATE; however, unless the Covered Person has retained a Reporting Agent as permitted under SEA Rule 10c–1a, the primary responsibility for the timely, accurate, and complete reporting of loan information to SLATE remains the non-delegable duty of the Covered Person with the reporting obligation. Also, similar to requirements that exist with respect to reporting obligations under other FINRA rules, proposed Rule 6530(d)(2) provides that a member's pattern or practice of late reporting without exceptional circumstances may be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010.[61]

FINRA also is proposing to adopt a provision to specify that, even where a member employs a Reporting Agent consistent with SEA Rule 10c–1a(a)(2), the member must nonetheless take reasonable steps to ensure that the Reporting Agent is in fact complying with the securities lending reporting requirements of SEA Rule 10c–1a and proposed FINRA Rule 6530 on its behalf.[62] As discussed above, SEA Rule 10c–1a(a)(2) specifies the applicable requirements that permit a Covered Person to rely on a Reporting Agent to fulfill its reporting obligations under the rule. These requirements include that the Covered Person must enter into a written agreement with a Reporting Agent that agrees to report the requisite information to FINRA on behalf of such Covered Person in accordance with the requirements of SEA Rule 10c–1a(b);[63] and provides the Reporting Agent with timely access to the SEA Rule 10c–1a information.[64] In connection with these provisions, proposed Rule 6530(d)(3) would provide that a member relying on a Reporting Agent has an obligation under FINRA Rule 3110 (Supervision) to take reasonable steps to ensure that the Reporting Agent is complying with SEA Rule 10c–1a and FINRA Rule 6530 on its behalf. In executing this obligation, FINRA would expect, for example, that the member review the Covered Securities Loan reporting data made available to it by the Reporting Agent or through FINRA's system to evaluate the accuracy and timeliness of the Covered Securities Loan reports submitted on its behalf by the Reporting Agent.

Finally, proposed Rule 6530(d)(4) would provide that, if a Covered Person makes a good faith determination that it has a reporting obligation under SEA Rule 10c–1a and this Rule 6500 Series, the Covered Person or Reporting Agent, as applicable, must report the Covered Securities Loan as provided in proposed Rule 6530. If the Reportable Security is not entered into the SLATE system, proposed Rule 6530(d)(4) would also require the Covered Person or Reporting Agent, as applicable, to promptly notify and provide FINRA Operations, in the form and manner required by FINRA, the information specified in Rule 6530(a)(2)(A) and (B), along with such other information as FINRA deems necessary to enter the Reportable Security for reporting through SLATE. This requirement would enable FINRA to set the security up in its systems and facilitate reporting of the Covered Securities Loan to SLATE, as required by SEA Rule 10c–1a and proposed Rule 6530.

Participation in SLATE

Proposed Rule 6520 (Participation in SLATE) would establish the requirements applicable to Covered Persons and Reporting Agents with respect to participation in SLATE. Rule 6510(h) would define a ''SLATE Participant'' as ''any person that reports securities loan information to SLATE, directly or indirectly.'' ''SLATE Participant'' therefore would include both persons who connect to SLATE directly to report Covered Securities Loan information, including Reporting Agents, as well as any Covered Person who has engaged a Reporting Agent or other agent.

Paragraph (1) of proposed Rule 6520(a) (Mandatory Participation) would provide that participation in SLATE is mandatory for purposes of reporting Covered Securities Loans. Such mandatory participation would obligate a Covered Person to submit Covered Securities Loan information to SLATE in conformity with the SEA Rule 10c–1a and the FINRA Rule 6500 Series. Proposed Rule 6520(a)(2) would provide that participation in SLATE would be conditioned on the SLATE Participant's initial and continuing compliance with specified requirements. Specifically, SLATE Participants must: (i) obtain an MPID for reporting Covered Securities Loans to SLATE;[65] (ii) execute and comply with the SLATE Participant application agreement and all applicable rules and operating procedures of FINRA[66] and the SEC;[67] and (iii) maintain the physical security of the equipment located on the premises of the SLATE Participant to prevent unauthorized entry of information into SLATE.[68] Proposed Rule 6520(a)(3) would provide that SLATE Participants would be obligated to inform FINRA of non-compliance with, or changes to, any of these mandatory participation requirements.

Proposed Rule 6520(b) (Reporting Agents) would set forth the participation requirements specific to Reporting Agents.[69] Consistent with SEA Rule 10c–1a(b)(4), proposed Rule 6520(b) would require a SLATE Participant acting as a Reporting Agent to provide FINRA with a list naming each Covered Person on whose behalf the Reporting Agent is providing information to SLATE and any changes to the list of such persons by the end of the day on which any such change occurs, in the form and manner specified by FINRA.

Finally, proposed Rule 6520(c) (SLATE Participant Obligations) would

[59] *See e.g.,* Rule 6380A(h); Rule 6622(h); Rule 6730(a)(6).

[60] Proposed Rule 6510(k) would define ''Reporting Agent'' by reference to SEA Rule 10c–1a, which defines ''reporting agent'' in paragraph (j)(4) as a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of SEA Rule 10c–1a.

[61] *See e.g.,* Rule 6380A(a)(4); Rule 6622(a)(4); Rule 6623; Rule 6730(f).

[62] *See* proposed Rule 6530(d)(3).

[63] *See* SEA Rule 10c–1a(a)(2)(i).

[64] *See* SEA Rule 10c–1a(a)(2)(ii).

[65] *See* proposed Rule 6520(a)(2)(A).

[66] For example, the proposed Rule 6500 Series and, if a member, member conduct rules.

[67] *See* proposed Rule 6520(a)(2)(B).

[68] *See* proposed Rule 6520(a)(2)(C).

[69] *See supra* n.60 (noting proposed Rule 6510(k) would define ''Reporting Agent'' by reference to SEA Rule 10c–1a).

provide that, upon execution and receipt by FINRA of the SLATE Participant application agreement, a SLATE Participant may commence input of Covered Securities Loan reports into SLATE. Proposed Rule 6520(c) would also require that a SLATE Participant must report Covered Securities Loan information using its MPID, and would provide that a SLATE Participant may access SLATE via a FINRA-approved facility during SLATE System Hours.

Dissemination of Loan Information

As required by SEA Rule 10c–1a(g), proposed Rule 6540 (Dissemination of Loan Information) would provide for the public dissemination of securities loan data reported to SLATE and information pertaining to the aggregate loan transaction activity and distribution of loan rates for each Reportable Security. The publicly available data would include: (1) next day (T+1) loan-level data dissemination for Initial Covered Securities Loans and Loan Modifications (except for the loan amount); (2) T+20 dissemination of the loan amount for Initial Covered Securities Loans and Loan Modifications; and (3) daily loan statistics (*i.e.,* aggregate loan activity and distribution of loan rates).

T+1 Loan-Level Data Dissemination

Under proposed Rule 6540(a) (Next Day Dissemination), for each Initial Covered Securities Loan and Loan Modification reported to SLATE on a given business day, no later than the morning of the next business day, FINRA would make publicly available: (1) the unique identifier assigned by FINRA to the Covered Securities Loan; (2) the security identifier(s) specified in Rule 6530(a)(2)(A) or (B) that FINRA determines is appropriate to disseminate; and (3) the requisite Data Elements.

With respect to each Initial Covered Securities Loan reported to SLATE, proposed Rule 6540(a)(3)(A) would specify that FINRA make publicly available no later than the morning of the next business day all other reported Data Elements, except the amount of Reportable Securities loaned (reported pursuant to Rule 6530(a)(2)(G)) and any modifier or indicator required by either the Rule 6500 Series or the SLATE Participant specification that FINRA determines shall not be publicly disseminated. Thus, for example, if a Covered Person reports an Initial Covered Securities Loan to SLATE on a Tuesday before 8:00:00 p.m. ET, on Wednesday morning, assuming Wednesday is a business day, FINRA would disseminate the unique identifier assigned by FINRA to the loan, the security identifier, and all other reported Data Elements, except the loan amount and any modifier or indicator required by either the Rule 6500 Series or the SLATE Participant specification that FINRA determines shall not be publicly disseminated.

With respect to each Loan Modification to a Covered Securities Loan reported to SLATE on the same or a prior business day, proposed Rule 6540(a)(3)(B) would specify that FINRA make publicly available no later than the morning of the next business day the modified Data Elements reported to SLATE, except the amount of Reportable Securities loaned and any modifier or indicator required by either the Rule 6500 Series or the SLATE Participant specification that FINRA determines shall not be publicly disseminated. For example, if a Covered Person reports a Loan Modification to SLATE on a Tuesday before 8:00:00 p.m. ET increasing the previously reported loan amount from 500 shares to 700 shares and decreasing the previously reported rebate rate from 0.25 percent to 0.15 percent, on Wednesday morning, assuming Wednesday is a business day, FINRA would disseminate the unique identifier assigned by FINRA to the loan, the security identifier, and the modified rebate rate, *i.e.,* 0.15 percent, but would not disseminate the modified loan amount, which would be subject to delayed dissemination (until 20 business days after the date of the modification to the loan amount) under proposed Rule 6540(b), as discussed below.

Finally, in the case of a Loan Modification to a Covered Securities Loan that was not previously required to be reported to SLATE (*e.g.,* because the Initial Covered Securities Loan occurred prior to the effectiveness of the Rule 6500 Series), proposed Rule 6540(a)(3)(C) would specify that FINRA make publicly available the unique loan identifier assigned by FINRA to the loan, the security identifier, and all other reported Data Elements, except the amount of Reportable Securities loaned and any modifier or indicator required by either the Rule 6500 Series or the SLATE Participant specification that FINRA determines shall not be publicly disseminated.

T+20 Loan Amount Dissemination

Pursuant to Rule 6540(b) (Delayed Dissemination), for each Initial Covered Securities Loan and Loan Modification reported to SLATE, 20 business days after the date on which the Initial Covered Securities Loan was effected or the loan amount was modified, FINRA would make publicly available: (1) the unique identifier assigned by FINRA to the Covered Securities Loan, (2) the security identifier(s) specified in Rule 6530(a)(2)(A) or (B) that FINRA determines is appropriate to disseminate, and (3) the amount of Reportable Securities loaned reported to SLATE. For Initial Covered Securities Loans, the 20-day delay period would begin the day after the Covered Securities Loan is effected (even in the case of late reports). For example, where a Covered Securities Loan is effected on a Monday, the 1st of the month[70] and is reported to SLATE before 8:00:00 p.m. ET that day, the 20-business day period would start to run on the 2nd, and FINRA would disseminate the amount of securities loaned reported to SLATE on the 29th day of the month (20 business days later), along with the unique loan identifier assigned by FINRA and the security identifier. Where a Covered Securities Loan is effected at 10:00 p.m. ET on the 1st of the month and is reported to FINRA the next business day as required by Rule 6530(a)(1)(B), the 20-business day period would still start to run the 2nd of the month (*i.e.,* the next business day after the loan was effected) and FINRA would disseminate the amount of securities loaned reported to SLATE on the 29th day of the month. In either scenario above, if a modification to the loan amount is effected and reported to SLATE prior to the end of the 20-business day delay period, *i.e.,* prior to the 29th of the month, the modified loan amount would be disseminated 20 business days after such Loan Modification is effected.

Daily Loan Statistics

In addition to T+1 loan-level data disseminated pursuant to proposed Rule 6540(a), FINRA would disseminate statistics regarding Covered Securities Loans reported to FINRA, including aggregate loan activity and distribution of loan rebate rates and lending fees.[71]

Aggregate Loan Transaction Activity

Pursuant to paragraph (1) of proposed Rule 6540(c) (Aggregate Loan Transaction Activity), for each Reportable Security for which an Initial Covered Securities Loan or Loan Modification is reported to SLATE on a given business day, FINRA would disseminate, no later than the morning

[70] For purposes of this example, the month is a 30-day month where each weekday is a business day.

[71] *See* proposed Rule 6540(c).

of the next business day, aggregated loan activity in the Reportable Security[72] (along with the security identifier specified in Rule 6530(a)(2)(A) or (B) that FINRA determines is appropriate to identify the relevant Reportable Security).[73] The aggregated data would include, for each Reportable Security, under proposed Rule 6540(c)(1)(A), the aggregate volume of securities (both in total and broken down by collateral type) subject to an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned reported on the prior business day, and, under proposed Rule 6540(c)(1)(B), the aggregate volume of securities (both in total and broken down by collateral type) subject to a rebate rate or fee modification reported on the prior business day. FINRA believes that these data would provide the public with useful information concerning the daily lending activity in Reportable Securities, including insight into how this activity is distributed across collateral types.[74]

Pursuant to Rule 6540(c)(1)(C), FINRA would also disseminate the aggregate volume of securities subject to an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned subject to a term loan (*i.e.,* a loan with a specified term) and subject to an open loan (*i.e.,* a loan without a specified term) reported on the prior business day.[75] FINRA believes that these data would provide the public with useful information concerning the nature of current lending activity.[76] Pursuant to Rule 6540(c)(1)(D), FINRA would also disseminate the aggregate volume of securities subject to an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned broken down by borrower type (as specified in proposed Rule 6530(a)(2)(N)) on the prior business day.[77] These data may provide market participants with information regarding the degree to which loan activity is retail or wholesale, which, in combination with the other aggregate data may provide insight into short selling sentiment.[78]

Pursuant to proposed Rule 6540(c)(1)(E), FINRA would disseminate the aggregate number of Initial Covered Securities Loans and terminated Covered Securities Loans (both in total and broken down by collateral type) reported on the prior business day. FINRA believes that these data would provide the public with useful information concerning current lending activity.

Loan Rate Distributions

Pursuant to paragraph (2) of proposed Rule 6540(c) (Loan Rate Distribution Data), for each Reportable Security for which an Initial Covered Securities Loan or Loan Modification is reported to SLATE on a business day, FINRA would also disseminate, not later than the morning of the next business day, the security identifier (specified in Rule 6530(a)(2)(A) or (B)) that FINRA determines is appropriate to identify the relevant Reportable Security and information pertaining to the distribution of loan rebate rates or lending fees, as applicable,[79] including: the highest rebate rate, lowest rebate rate, and volume weighted average of the rebate rates reported to SLATE for Initial Covered Securities Loans collateralized by cash and, separately, for Loan Modifications collateralized by cash (where the Loan Modification involved a change to the rebate rate). FINRA would also disseminate the highest lending fee, lowest lending fee, and volume weighted average of the lending fees reported for Initial Covered Securities Loans not collateralized by cash and, separately, for Loan Modifications not collateralized by cash (where the Loan Modification involved a change to the lending fee). These rate distribution metrics would provide market participants with both an overall view of the range of daily loan pricing for each Reportable Security, as well as insight into the relationship between loan rates/fees and loan amounts.

Proposed Rule 6540(d) (Loan Transaction Information Not Disseminated) would specify the information reported to FINRA that would not be disseminated. As prescribed by SEA Rule 10c–1a(g)(4), proposed Rule 6540(d)(1) provides that the Confidential Data Elements reported to FINRA would not be disseminated. In addition, proposed Rule 6540(d)(2) would provide that FINRA may determine not to publicly disseminate any modifier or indicator required by either the Rule 6500 Series or the SLATE Participant specification. FINRA may determine not to disseminate a modifier or indicator where the use of such information is intended for regulatory purposes only or its public disclosure may otherwise be inappropriate (*e.g.,* where it may result in information leakage).

Finally, as proposed in Rule 6540.02 (Means of Data Dissemination), FINRA would make the data pursuant to proposed Rule 6540(a) through (c) available on FINRA's website free of charge for personal, non-commercial purposes only. For other uses, FINRA would publish or distribute SLATE data for fees that have been filed with the SEC pursuant to Rule 19b–4 under the Exchange Act.[80]

Other Provisions

Consistent with FINRA's rules governing other reporting facilities that it operates, proposed Rule 6550 (Emergency Authority) would provide that, as market conditions may warrant, FINRA, in consultation with the SEC, may suspend the reporting or dissemination of certain Covered Securities Loans, or the reporting of certain Data Elements or Confidential Data Elements or the dissemination of certain Data Elements for such period of time as FINRA deems necessary.[81]

The Commission's release adopting SEA Rule 10c–1a specified the

[72] In addition to the items of information specified in proposed paragraphs (A) through (E) of proposed Rule 6540(c)(1), FINRA may, in its discretion, publish or distribute additional metrics regarding aggregate transaction activity free of charge. *See infra* n.73 defining "aggregate loan activity." *See also* Adopting Release, 88 FR 75644, 75684.

[73] In its Adopting Release, the Commission stated that the term "aggregate transaction activity" refers to information pertaining to the absolute value of transactions such that net position changes should not be discernable in the data, and is intended to help ensure that only aggregate information about net positions changes, rather than individualized information, is provided to the public. *See* Adopting Release, 88 FR 75644, 75684.

[74] See proposed Rule 6540 Supplementary Material .01 (De Minimis Loan Transaction Activity), which would provide that FINRA may omit from the aggregate loan activity volume information for Reportable Securities for which there were three or fewer types of Initial Covered Securities Loan and Loan Modification events reported to SLATE in total on the prior business day. For example, if a single Covered Securities Loan was subject to 10 Loan Modifications reported to SLATE on a given day, FINRA would omit from the daily loan statistics volume information for that Reportable Security because these events occurred in a single Covered Securities Loan.

[75] *See supra* n.73.

[76] FINRA understands that most securities loans are open-ended, allowing the security on loan to be recalled by the lender. *See* Adopting Release, 88 FR 75644, 75673.

[77] *See supra* n.73.

[78] *See* Adopting Release, 88 FR 75644, 75725 n.1050.

[79] In addition to the items of information specified in proposed paragraphs (A) and (B) of proposed Rule 6540(c)(2), FINRA may, in its discretion, publish or distribute additional metrics regarding loan rebate rates and lending fees free of charge.

[80] FINRA intends separately to file a proposed rule change to establish SLATE reporting fees and fees for fee-liable data products. Interested parties may subscribe to these fee-liable data products. Professionals would not be permitted to access the SLATE data made available free of change on FINRA's website, which is provided for personal, non-commercial purposes only.

[81] *See* Rule 6770.

applicable compliance dates.[82] If the Commission approves the proposed rule change, unless an extension is provided pursuant to Commission order, the implementation date of the proposed FINRA rules establishing the reporting requirements will be January 2, 2026; and the implementation date of the proposed FINRA rules establishing the dissemination requirements will be April 2, 2026. If the SEC extends the compliance dates for SEA Rule 10c–1a's reporting or dissemination requirements, FINRA's proposed rules addressing securities loan reporting and data dissemination would become effective consistent with the SEC's extended timeframe for reporting and data dissemination, respectively.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act, which require that FINRA rules must 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, in general, to protect investors and the public interest and, among other things, must not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.[83] FINRA also believes that the proposed rule change is consistent with SEA Rule 10c–1a, which requires FINRA to implement rules regarding the format and manner of its collection of the securities loan information described in SEA Rule 10c–1a(c) through (e) and for making publicly available such information in accordance with rules promulgated pursuant to section 19(b) of the Exchange Act and Rule 19b–4 under the Exchange Act.[84]

The proposed Rule 6500 Series is designed to improve transparency and efficiency in the securities lending market, consistent with section 15(A)(b)(6) of the Act, SEA Rule 10c–1a, and section 984 of the Dodd-Frank Act.[85] The proposed rule change would do so by facilitating the collection of specified securities loan information from Covered Persons and Reporting Agents, which include non-FINRA members,[86] and providing access to such information to market participants, the public, and regulators. As such, these proposed changes are intended to facilitate the objectives of the Commission and Congress by providing ''borrowers and lenders with better tools to assess the terms of their securities loans and enhance the ability of regulators to oversee the securities lending market,'' and ''result in the public availability of new information for investors and other market participants to consider in the mix of information about the securities lending market and the securities markets generally to better inform their decisions,'' which FINRA believes is consistent with section 15A(b)(6) of the Act, SEA Rule 10c–1a, and section 984 of the Dodd-Frank Act.[87]

FINRA's proposed Rule 6500 Series would also facilitate the availability to regulators of information that may be used to aid in assessing market events—''[f]or example, January 2021 information on market participants' securities lending activity would have provided FINRA and Commission staff a more timely and comprehensive view of who was entering into new loans and who was no longer borrowing securities. This would have facilitated a deeper understanding of how the events were or were not impacting market participants. Such analyses can help determine if further regulatory intervention in markets is warranted and can inform the nature of any intervention.'' [88]

SEA Rule 10c–1a also expressly permits FINRA to establish rules regarding the format and manner of its collection of securities loan information. To that end, FINRA's proposed rule change would require that Covered Persons report, in addition to the specific data elements prescribed in SEA Rule 10c–1a, specified loan identifiers [89] and specified indicators and modifiers,[90] as applicable. As noted above, these additional items would provide regulators and the public with important information regarding reported securities loans. For example, because an affiliate relationship between the borrower and lender (or intermediary) can impact borrowing costs, the affiliate loan indicator, proposed in Rule 6530(c)(2), would help to identify loans whose rates may not reflect current market rates, to the benefit of market participants, the public, and regulators. Similarly, because FINRA would disseminate aggregate loan activity each day, the unsettled loan indicator, proposed in Rule 6530(c)(3), would allow FINRA to filter unsettled loans, which is intended to provide the public with more granular insight into the day's loan activity.[91] FINRA believes that the securities loan reporting and data dissemination requirements proposed in the Rule 6500 Series, including the proposed identifiers and indicators and modifiers, are designed to promote greater transparency in the securities lending market, consistent with the objectives of section 15A(b)(6) of the Act, SEA Rule 10c–1a, and section 984 of the Dodd-Frank Act.[92]

As noted above, SEA Rule 10c–1a(g) also mandates that FINRA publicly disseminate specified securities loan data reported to SLATE, along with information pertaining to the aggregate loan activity and distribution of loan rates for each Reportable Security. To that end, pursuant to proposed Rule 6540, FINRA would make SLATE data available on FINRA's website free of charge for personal, non-commercial purposes only. FINRA believes that making securities loan information available free of charge for personal,

[82] *See* Adopting Release, 88 FR 75644, 75691.

[83] 15 U.S.C. 78*o*–3(b)(6).

[84] *See* SEA Rule 10c–1a(f); *see also* Adopting Release, 88 FR 75644, 75648.

[85] As noted above, SEA Rule 10c–1a requires FINRA, as the sole RNSA, to propose rules consistent with the Commission's mandate. *See* SEA Rule 10c–1–a(f). section 984(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') added section 10(c)(1) to the Exchange Act to provide the Commission with authority over securities lending. *See* 15 U.S.C. 78j(c)(1). Section 984(b) of the Dodd-Frank Act mandates that the Commission increase the transparency of information available to brokers, dealers, and investors with respect to the loan or borrowing of securities. *See* Public Law 111–203, 124 Stat. 1376 (2010). *See also* 15 U.S.C. 78*o*–3(b)(6).

[86] As defined in SEA Rule 10c–1a(j), ''Covered Persons'' and ''Reporting Agents'' may include non–FINRA members.

[87] *See* Adopting Release, 88 FR 75644, 75648. *See also* 15 U.S.C. 78*o*–3(b)(6); SEA Rule 10c–1a; and 15 U.S.C. 78j(c)(1).

[88] *See* Adopting Release, 88 FR 75644, 75717.

[89] Covered Persons would be required to report to SLATE: (1) the unique internal identifier assigned to the Covered Securities Loan by the Covered Person responsible for reporting the Covered Securities Loan to SLATE; and (2) if the Covered Securities Loan is an allocation of an omnibus loan effected pursuant to an agency lending agreement, the unique internal identifier for the associated omnibus loan. *See* proposed Rules 6530(a)(2)(W)–(X) and (b)(2)(A)–(B).

[90] Covered Persons would be required to append the following modifiers and indicators, as applicable, to all SLATE reports to identify: (1) a loan pursuant to an exclusive arrangement; (2) a loan to an affiliate; (3) a loan that did not settle on the expected settlement date; (4) a loan that has been terminated; (5) a loan with a rebate rate or lending fee adjustment (*e.g.,* to account for a billing correction or the value of a distribution); and (6) a loan that is part of a basket of securities loaned for single agreed rate or fee. *See* proposed Rules 6530(c)(1)–(6).

[91] *See supra* n.47.

[92] *See* 15 U.S.C. 78*o*–3(b)(6); SEA Rule 10c–1a; and 15 U.S.C. 78j(c)(1).

non-commercial purposes would promote transparency and reduce information asymmetries in the securities lending market for retail investors. For other uses, FINRA would offer SLATE data products at a fee that would be filed with the SEC pursuant to Rule 19b–4 under the Exchange Act.[93] FINRA believes that this approach is both reasonable and consistent with existing FINRA rules governing other transparency regimes, *e.g.,* TRACE.[94] Therefore, FINRA believes that proposed FINRA Rule 6540 is designed to protect investors and the public interest and would not unfairly discriminate between customers, issuers, brokers, or dealers.[95]

Finally, the proposed rule change would include provisions designed to facilitate the timeliness, accuracy and completeness of the information reported to SLATE and provide additional clarity to members regarding their obligations under FINRA rules—consistent with section 15A(b)(6) of the Act, SEA Rule 10c–1a, and section 984 of the Dodd-Frank Act.[96] Specifically, while the proposed Rule 6500 Series generally applies to Covered Persons and, where engaged, Reporting Agents,[97] the language of proposed Rules 6530(d)(2) and (d)(3), is limited to the conduct of members. Specifically, proposed Rule 6530(d)(2) would provide that ''[a] member's pattern or practice of late reporting without exceptional circumstances may be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010.'' In addition, proposed Rule 6530(d)(3) would provide that ''[a] member relying on a Reporting Agent to report Covered Securities Loan information to SLATE has an obligation under FINRA Rule 3110 to take reasonable steps to ensure that the Reporting Agent is complying with SEA Rule 10c–1a and FINRA Rule 6530 on its behalf.'' While these requirements are not explicitly provided for in SEA Rule 10c–1a, they embody standards that FINRA applies to its members generally in the conduct of their affairs—Rule 3110 (Supervision) and Rule 2010 (Standards of Commercial Honor and Principles of Trade) are foundational provisions applicable to members.[98] FINRA has previously provided similar clarification regarding how these rules apply in the context of other reporting regimes, such as in the fixed income and equity trade reporting rules.[99] A member's obligation to report timely, accurately and completely and to take reasonable steps to ensure that it supervises agents retained in connection with its reporting obligations also applies in the securities lending context. As such, proposed FINRA Rules 6530(d)(2) and (d)(3) are consistent with the objectives of section 15A(b)(6) of the Act, SEA Rule 10c–1a, and section 984 of the Dodd-Frank Act and would not unfairly discriminate between customers, issuers, brokers, or dealers.[100]

B. Self-Regulatory Organization's Statement on Burden on Competition

As stated in the Commission's Adopting Release, SEA Rule 10c–1a, which the proposed rule change is designed to implement, is expected to reduce information asymmetries and to ''increase competition between broker-dealers and between lending programs.'' [101] The Commission also stated in its Adopting Release that ''the increased ability for broker-dealers to monitor conditions in the lending market may encourage new broker-dealers to enter the market, further increasing competition for broker-dealer services.'' [102] Thus, FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In addition, FINRA notes that the proposed rule change would treat all similarly situated members equally, and the provisions that also address non-member obligations pursuant to SEA Rule 10c–1a likewise apply equally to similarly situated Covered Persons, Reporting Agents, and SLATE Participants, as applicable.

Economic Impact Assessment

Based on the regulatory need discussed above and summarized below, FINRA has undertaken an economic impact assessment, as set forth below, to analyze the potential economic impacts of the proposed rule change, including potential costs, benefits, and distributional and competitive effects, relative to the current baseline.

Regulatory Need

On October 13, 2023, the SEC adopted SEA Rule 10c–1a, requiring Covered Persons to report Covered Securities Loan information to an RNSA, and the RNSA to make publicly available specified information regarding those reported securities loans. In its Adopting Release, the SEC stated, among other things, that SEA Rule 10c–1a was designed to increase the transparency and efficiency of the securities lending market.[103]

As required by SEA Rule 10c–1a(f), FINRA, currently the only RNSA, is proposing to establish rules specifying the format and manner of its collection of information on Covered Securities Loans. As required by SEA Rule 10c–1a(g), FINRA also is proposing rules to make Covered Securities Loan information publicly available. Below FINRA discusses the potential economic impacts of FINRA's proposed changes specifying the format and manner of reporting for Covered Securities Loans and the dissemination of aggregate transaction activity and distribution of loan rates for each Reportable Security.

Economic Baseline

In the Commission's Adopting Release, the SEC outlined the baseline and considered the economic effects of Rule 10c–1a and how its costs and benefits impacted the economic baseline.[104]

In its Adopting Release, the Commission noted that various types of entities participating in the securities lending market will be impacted by SEA Rule 10c–1a, including those that may need to enter into contracts and develop recording and reporting systems to comply with the rule.[105] Table 1 shows

[93] Consistent with SEA Rule 10c–1a(i) and the Commission Adopting Release, FINRA intends separately to file a proposed rule change establishing fees for SLATE data products, and interested parties may subscribe to these fee-liable data products. *See* Adopting Release 88 FR 75644, 75687. *See also* proposed Rule 6540.02 (''Nothing in this Rule shall prohibit FINRA from also publishing or distributing SLATE data at a charge for fees that have been filed with the SEC pursuant to Rule 19b–4 under the Exchange Act.'').

[94] *See generally,* FINRA Rule 7730.

[95] *See* 15 U.S.C. 78*o*–3(b)(6).

[96] *See* Adopting Release, 88 FR 75644, 75648. *See also* 15 U.S.C. 78*o*–3(b)(6); SEA Rule 10c–1a; and 15 U.S.C. 78j(c)(1).

[97] The defined terms ''Covered Person'' and ''Reporting Agent'' include FINRA members and non-members. The defined term ''SLATE Participant'' would include both Covered Persons and Reporting Agents. *See* proposed Rule 6510.

[98] FINRA Rule 2010 provides that ''[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.'' FINRA Rule 3110 requires, *inter alia,* that FINRA members establish and maintain an effective supervisory system, which includes overseeing, supervising, and monitoring the activities or functions performed by third-party vendors, that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules. *See also Regulatory Notice* 21–29 (August 2021).

[99] *See e.g.,* FINRA Rule 6380A(a)(4); Rule 6622(a)(4); Rule 6623; Rule 6730(f).

[100] *See* 15 U.S.C. 78*o*–3(b)(6); SEA Rule 10c–1a; and 15 U.S.C. 78j(c)(1).

[101] *See* Adopting Release, 88 FR 75644, 75723.

[102] *See* Adopting Release, 88 FR 75644, 75723.

[103] *See* Adopting Release, 88 FR 75644.

[104] *See* Adopting Release, 88 FR 75644, 75692, 75694–75723.

[105] *See* Adopting Release, 88 FR 75644, 75717.

the estimated number of entities that will be affected by SEA Rule 10c–1a and the breakdown by type according to the estimates provided by the SEC.[106] In the Adopting Release, the SEC estimated that a total of 609 Covered Persons and Reporting Agents would be affected by SEA Rule 10c–1a, of which 503 were Covered Persons and 106 were Reporting Agents.[107]

TABLE 1—ESTIMATED NUMBER OF COVERED PERSONS AND REPORTING AGENTS AFFECTED BY SEA RULE 10c–1a

Providing Covered Persons	255
—Persons that effect a covered securities loan as the lender when an intermediary is not used	217
—Broker-dealers borrowing fully paid or excess margin securities	34
—Broker-dealer intermediaries	4
Non-Providing Covered Persons	248
—Persons that effect a covered securities loan as the lender when an intermediary is not used	217
—Non-broker-dealer intermediaries	31
Reporting Agents	106
—Broker-dealers	97
—Clearing agencies	9
Total	609

Economic Impacts

In the Adopting Release, the SEC discussed its consideration of the economic effects of SEA Rule 10c–1a.[108] Below, FINRA considers the potential costs, benefits, and competitive impact of FINRA's proposal specifying the format and manner of reporting for Covered Securities Loans not explicitly prescribed in SEA Rule 10c–1a. On balance, FINRA believes the costs are appropriate in light of the anticipated benefits to the SLATE reporting, transparency, and regulatory framework.

Reporting of Information to FINRA

Expected Settlement Date. The proposed rule change requires information regarding the expected settlement date for an Initial Covered Securities Loan or a modification to the loan amount. This information would enhance the quality of the audit trail available to regulators for surveillance. Covered Persons may incur a cost to track and report this information.

Covered Person Party Type. The proposed rule change requires SLATE Participants to report whether the Covered Person is the lender, borrower, or intermediary. This information would improve the utility of the data for regulatory purposes, as it will provide necessary information regarding the identity of the Covered Person, including in instances where a party other than the Covered Person submits a loan report to SLATE. Covered Persons may incur a cost to track and report this information.

Loan Identifiers. For Initial Covered Securities Loans, the Covered Person responsible for reporting the loan would be required to report a unique internal identifier assigned by the Covered Person for the loan. For Loan Modifications, the Covered Person would be required to report a unique identifier assigned by FINRA to the Initial Covered Securities Loan, or if FINRA has not yet assigned an identifier, the Covered Person must provide a unique internal identifier assigned by the Covered Person for the loan. The internal identifier requirement would allow linkage of loan reports where a FINRA identifier has not yet been assigned and improve the completeness of audit trail data available to regulators. For Covered Securities Loans that are allocations of omnibus loans, the Covered Person would also be required to report a unique internal identifier assigned by the Covered Person for the associated omnibus loan. The ability to link allocations that are components of an omnibus loan would improve the completeness of the audit trail and allow FINRA to provide additional granularity in the loan activity statistics disseminated to the public. FINRA would include only the FINRA-assigned identifier when disseminating loan transaction data; FINRA will not publicly disseminate the unique internal identifier or unique omnibus loan identifier reported by Covered Persons. FINRA understands that some Covered Persons already create and maintain unique loan identifiers, which should mitigate the cost associated with the requirement to report this information to FINRA.[109]

Modifiers/Indicators. The proposed rule change would require the reporting of six modifiers and indicators; specifically: (1) Covered Securities Loans with affiliates; (2) loans associated with exclusive arrangements; (3) loans with rate or fee adjustments; (4) basket loans; (5) unsettled loans; and (6) terminated loans. As discussed above, the pricing of some Covered Securities Loans may not be indicative of the current market rates available in the securities lending market. Covered Persons would incur costs for establishing processes to identify when the required modifiers must be appended and reporting such modifiers to SLATE. FINRA believes that these proposed modifiers and indicators would provide context to market participants when assessing pricing and other loan terms, helping to facilitate the usefulness of the publicly disseminated data. These proposed modifiers and indicators also would increase the usefulness of the audit trail data available to regulators as well as provide mechanisms for validating the accuracy of the reported data.

Timing of End-of-Day Reporting. As discussed above, the proposed rule change would require that Covered Securities Loans effected on a business day at or after 12:00:00 a.m. ET through 7:45:00 p.m. ET be reported to SLATE before 8:00:00 p.m. ET on the same day. FINRA believes that this reporting timeframe is reasonable because most Covered Securities Loans entered into on a given business day would have settled before 8:00:00 p.m. ET, which would provide time for Covered Persons to review the reportable information to facilitate accurate and complete reporting. In addition, FINRA understands that 8:00:00 p.m. ET is generally consistent with the reporting deadline used by commercial vendors to which some Covered Persons currently voluntarily submit securities lending information. A similar reporting deadline may help mitigate costs for Covered Persons that may leverage

[106] *See* Adopting Release, 88 FR 75644, 75718.

[107] *See* Adopting Release, 88 FR 75644, 75717.

[108] *See* Adopting Release, 88 FR 75644, 75706–24.

[109] *See* Adopting Release, 88 FR 75644, 75685.

existing systems or that submit securities loan information to commercial vendors.

Furthermore, permitting the reporting of Initial Covered Securities Loans and Loan Modifications effected on a business day after 7:45:00 p.m. ET by no later than next business day (T+1) before 8:00:00 p.m. ET will provide Covered Persons with time to review the reportable information for end-of-day loans to facilitate accurate and complete reporting. FINRA believes that the proposed reporting timeframes strike an appropriate balance between providing Covered Persons with sufficient time to review and report the day's loan activity and providing FINRA with the time necessary to process the reported information for next-day dissemination.

SLATE Participation Obligations. The proposed rule change would require each Covered Person or Reporting Agent to comply with SLATE participation obligations, including execution and compliance with the SLATE Participant application agreement. The SLATE participation requirements would help ensure that Covered Persons and Reporting Agents understand their obligations with regard to SLATE participation, including requiring SLATE Participants to obtain an MPID if they do not currently have one, and use it when reporting Covered Securities Loans to SLATE. The MPID requirement would provide information that would make it more efficient for FINRA to validate SLATE reports, contact firms as necessary, and troubleshoot SLATE Participant-specific technical issues. The Covered Person and Reporting Agent would incur upfront administrative costs in terms of time and effort required to enter into the SLATE Participant application agreement and costs to comply with the SLATE participation requirements on an ongoing basis. For example, Covered Persons and Reporting Agents that do not currently have an MPID for SLATE use must complete an MPID request form and incur a cost to incorporate the SLATE Participants' and counterparties' MPIDs into their systems.

Dissemination of Aggregated Loan Activity

SEA Rule 10c–1a(g)(5) generally requires that FINRA make publicly available information pertaining to the aggregate loan transaction activity and the distribution of loan rates on a daily basis. FINRA has proposed specific aggregation buckets, as described in detail above. The dissemination of these data, which would be compiled from the Data Elements required to be reported to SLATE pursuant to SEA Rule 10c–1a and proposed Rule 6530, does not impact the reporting requirements applicable to Covered Persons and, therefore, does not contribute to the direct costs of reporting for Covered Persons. Further, as FINRA would make these data available on its website free of charge for personal, non-commercial use, the dissemination of this information will similarly not contribute to any direct costs for such use.

Among other things, FINRA proposes to disseminate the aggregate volume of securities (both in total and by collateral type) subject to an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned reported on the prior business day, which would provide varied perspectives on the loan activity for the Reportable Security, including over time. FINRA also proposes to disseminate the aggregate volume of securities (both in total and by collateral type) subject to a rebate rate or fee modification reported on the prior business day, to provide insight into the frequency of rate changes for a Reportable Security. FINRA similarly proposes to disseminate the aggregate volume of securities subject to an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned with a specified term and, separately, without a specified term, reported on the prior business day, as well as the aggregate volume of securities subject to an Initial Covered Securities Loan or modification to the amount of Reportable Securities loaned to one or more borrower types specified in Rule 6530(a)(2)(N) reported on the prior business day. These categorizations would permit analysis of volume differences between loans that do not have a defined end date and those that have a defined term date, and volume differences between the wholesale versus end-customer market.

De Minimis Loan Transaction Activity. To address concerns regarding potential information leakage, FINRA proposes to omit from the daily loan statistics volume information for Reportable Securities for which there are three or fewer types of Initial Covered Securities Loans and Loan Modifications reported to SLATE in total on a given day. However, the proposed *de minimis* threshold may be viewed by some as reducing the transparency value of the disseminated information. FINRA believes the threshold of three or fewer Initial Covered Securities Loans and Loan Modifications appropriately balances these considerations.

Alternatives Considered

In specifying the format and manner of reporting for Covered Securities Loans and the dissemination of aggregate transaction activity and distribution of loan rates for Reportable Securities, FINRA considered various alternatives and the potential costs and benefits of those alternatives. On balance, FINRA believes the requirements in the proposed rule are appropriate in light of the anticipated benefits to the SLATE reporting, transparency, and regulatory framework.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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–FINRA–2024–007 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–FINRA–2024–007. 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 such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2024–007 and should be submitted on or before May 28, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[110]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09847 Filed 5–6–24; 8:45 am]

BILLING CODE 8011–01–P

[110] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100044; File No. SR–NYSEARCA–2024–23]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of a Proposed Rule Change To Modify the NYSE Arca Options Fee Schedule

May 1, 2024.

On February 29, 2024, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–NYSEARCA–2024–23) to establish fees relating to OTPs utilized by Floor Market Makers.[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on March 19, 2024.[5] On April 26, 2024, the Exchange withdrew the proposed rule change (SR–NYSEARCA–2024–23).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09846 Filed 5–6–24; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 99729 (Mar. 13, 2024), 89 FR 19613 (Mar. 19, 2024) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–563, OMB Control No. 3235–0656]

Proposed Collection; Comment Request; Extension: Rule 17g–7

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17g–7 (17 CFR 240.17g–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17g–7 requires each nationally recognized statistical rating organization (''NRSROs'') to publish certain items, including a form containing specified information, when taking a rating action with respect to a credit rating[1] and to disclose rating histories for free on an easily accessible portion of its corporate internet website.[2] There are currently 10 NRSROs registered with the Commission, and it is estimated that NRSROs will take collectively approximately 1,908,530 rating actions per year.

Based on staff experience, the Commission estimates that the total annual hour burden to comply with Rule 17g–7 will be 641,673 hours. The Commission further estimates that this annual hour burden will result in a total annual cost of $238,688,856, reflecting the cost of preparing the form required to be published by Rule 17g–7 and standardizing and tailoring certain required disclosures, as well as the cost of maintaining a database of rating histories to comply with Rule 17g–7.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; 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. Consideration will be given to comments and suggestions submitted by July 8, 2024.

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. Please direct your written comments to: Dave Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F St. NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*.

Dated: May 1, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09848 Filed 5–6–24; 8:45 am]

BILLING CODE 8011–01–P

[1] *See* 240.17g–7(a).

[2] *See* 240.17g–7(b).

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m. CT on May 9, 2024.

PLACE: Lipscomb University's George Shinn Event Center, Nashville, Tennessee.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Meeting No. 24–02

The TVA Board of Directors will hold a public meeting on May 9, at the

George Shinn Event Center, 3906 Belmont Boulevard, Nashville, Tennessee.

The meeting will be called to order at 9:00 a.m. CT to consider the agenda items listed below. TVA management will answer questions from the news media following the Board meeting.

On May 8, at the George Shinn Event Center, the public may comment on any agenda item or subject at a board-hosted public listening session which begins at 2:00 p.m. CT and will last until 4:00 p.m. Preregistration is required to address the Board.

Agenda

1. Approval of minutes of the February 14, 2024 Board Meeting
2. Governance Items
3. Report of the Operations and Nuclear Oversight Committee
4. Report of the Finance, Rates, and Portfolio Committee
   A. FY24 Strategic Initiatives Funding
5. Report of the People and Governance Committee
   A. Executive Compensation Review
6. Report of the External Stakeholders and Regulation Committee
7. Report of the Audit, Risk, and Cybersecurity Committee
8. Information Item
   A. Committee Assignments
9. Report from President and CEO

CONTACT PERSON FOR MORE INFORMATION: For more information: Please call TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: May 2, 2024.

Edward C. Meade,

Agency Liaison.

[FR Doc. 2024–10066 Filed 5–3–24; 4:15 pm]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Rescinding the Notice of Intent To Prepare an Environmental Impact Statement: Shelby County, Tennessee

AGENCY: Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Notice.

SUMMARY: The FHWA is issuing this notice to advise the public that it is rescinding its Notice of Intent (NOI) and will not be preparing an Environmental Impact Statement (EIS) for a proposed highway project in Shelby County, Tennessee. A NOI to prepare an EIS was published in the **Federal Register** on February 9, 2009.

FOR FURTHER INFORMATION CONTACT: For FHWA: Gilberto De León, P.E.; Acting Division Administrator; Federal Highway Administration; Tennessee Division Office; 404 BNA Drive, Building 200, Suite 508, Nashville, TN 37217; Telephone: 615–426–3214; email: *gilberto.deleon@dot.gov.* The FHWA Tennessee Division Office's normal business hours are 7:30 a.m. to 4:00 p.m. (Central Time), Monday through Friday. For TDOT: Sharon Schutz, P.E.; Environmental Division Director; Tennessee Department of Transportation; James K. Polk Building, Suite 900, 505 Deaderick Street, Nashville, TN 37243; Telephone: 615–350–4208; email: *sharon.schutz@tn.gov.* The TDOT Environmental Division's normal business hours are 8 a.m. to 5 p.m. (Central Time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Tennessee Department of Transportation (TDOT), initiated an EIS with a NOI published in the **Federal Register** on February 9, 2009, at 74 FR 6203. The project would have improved North Second Street and North Third Street to form a one-way pair from I–40 to Chelsea Avenue and would have constructed a four-lane two-way roadway from Chelsea Avenue to the intersection of U.S. 51 and Whitney Avenue north of downtown Memphis. The TDOT has determined continued preparation of the EIS for the North Second Street Improvements (Project) is no longer feasible. The primary reason for this determination is the financial impact of the costs required to fund the remaining phases of the project. Therefore, the preparation of the EIS is being terminated.

Gilberto De León,

Acting Division Administrator, Nashville, Tennessee.

[FR Doc. 2024–09916 Filed 5–6–24; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0181]

Agency Information Collection Activities; Renewal of an Approved Information Collection Request: Motor Carrier Records Change Form

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. The information collected is required by the Office of Registration to process name changes, address changes, and reinstatements of operating authority for motor carriers, freight forwarders, and brokers. On December 14, 2023, FMCSA published a notice in the **Federal Register** with a 60-day comment period to announce its intention to submit this ICR to OMB for renewal. FMCSA received no comments in response to the published notice.

DATES: Comments on this notice must be received on or before June 6, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted 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: Mr. Jeffrey Secrist, Office of Registration, Chief, Registration Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 385–2367; *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Motor Carrier Records Change Form.

OMB Control Number: 2126–0060.

Type of Request: Renewal of a currently approved ICR.

Respondents: For-hire motor carriers, brokers, and freight forwarders.

Estimated Number of Respondents: 64,673.

Estimated Time per Response: 15 minutes per response.

Expiration Date: July 31, 2024.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 16,168.

Background

FMCSA registers for-hire motor carriers under 49 U.S.C. 13902, surface freight forwarders under 49 U.S.C. 13903, and property brokers under 49 U.S.C. 13904. Each registration is effective from the date specified under 49 U.S.C. 13905(c). ''Procedures for changing the name or business form of a motor carrier, freight forwarder, or property broker,'' (49 CFR 365.413T) states that motor carriers, forwarders, and brokers must submit the required information to FMCSA's Office of Registration requesting the change. Paragraph (f) of § 360.3T mentions fees that FMCSA collects for ''petition for reinstatement of revoked operating authority,'' but does not provide any specifics for the content that petition should take.

Motor carriers, freight forwarders, and property brokers are required to use Form MCSA–5889 to request a name or address change and to request reinstatement of a revoked operating authority. Respondents can submit the form online through the Licensing and Insurance (L&I) website, by fax, or by mail. According to data collected between 2020 and 2022, annually, approximately 1 percent of forms are submitted by mail; 7 percent are submitted by fax; and 92 percent are submitted online. The information collected is then entered in the L&I database by FMCSA staff.

Form MCSA–5889 enables FMCSA to maintain up-to-date records so that the Agency can recognize the entity in question in case of enforcement actions or other procedures required to ensure that the carrier is willing and able to provide for-hire transportation services, and so that entities whose operating authority has been revoked can resume operation if they are not otherwise blocked from doing so. This multi-purpose form, filed by registrants on a voluntary, as-needed basis, simplifies the process of gathering the information needed to process the entities' requests in a timely manner, with the least amount of effort for all parties involved.

The form prompts users to report the following data points (whichever are relevant to their records change request):

1. Requestor's fax number, email address, and applicant's oath.
2. Entity's legal/doing business as names, USDOT number, docket MC/MX/FX number, current street address, and phone number(s).
3. Affiliations with FMCSA-licensed entities.
4. Requested changes to the entity's address.
5. Requested changes to the entity's name and/or ownership, management, or control.
6. Type(s) of operating authority the entity wishes to reinstate.
7. Credit card information (name, number, expiration date, address, date) if filing a name change or reinstatement.

Changes From Previous Estimates

The currently approved version of this ICR estimated the average annual burden to be 6,781 annual burden hours, with 27,122 total annual respondents. For this renewal the estimated average annual burden is 16,168, with 64,673 total average annual respondents. The annual burden hour increase of 9,387 is due to the increase in the average number of annual respondents.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2024–09894 Filed 5–6–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0179]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Licensing Applications for Motor Carrier Operating Authority

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) requesting a renewal of an approved information collection for review and approval. This ICR applies to: Existing registrants (*i.e.,* entities that already have a USDOT number and/or operating authority) that are subject to FMCSA's licensing, registration, and certification regulations that wish to apply for additional authorities; and Mexico-domiciled carriers that wish to operate beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones. Existing registrants seeking additional authorities must use forms OP–1, OP–1(P), OP–1(FF), and OP–1(NNA), to apply for such authority. Mexico-domiciled carriers seeking the authority described above must apply for such authority using Form OP–1(MX).

DATES: Comments on this notice must be received on or before June 6, 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: Mr. Jeffrey Secrist, Office of Registration, Chief, Registration Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 385–2367; *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION: No comments were received from the 60-day **Federal Register** publication on December 14, 2023 at 88 FR 86722.

Title: Licensing Applications for Motor Carrier Operating Authority.

OMB Control Number: 2126–0016.

Type of Request: Renewal of a currently approved ICR.

Respondents: Carrier compliance officer or equivalent from motor carriers, motor passenger carriers, freight forwarders, brokers, and certain Mexico-domiciled motor carriers subject to FMCSA's licensing, registration, and certification regulations.

Estimated Number of Respondents: 159,312.

Estimated Time per Response: 2 hours for forms OP–1, OP–1(P), and OP–1(FF); 4 hours for forms OP–1(MX) and OP–1(NNA).

Expiration Date: May 31, 2024.

Frequency of Response: Other (as needed).

Estimated Total Annual Burden: 318,656.

Background

FMCSA registers for-hire motor carriers of regulated commodities and of passengers under 49 U.S.C. 13902(a); surface freight forwarders under 49 U.S.C. 13903; property brokers under 49 U.S.C. 13904; and certain Mexico domiciled motor carriers under 49 U.S.C. 13902(c). These motor carriers may conduct transportation services in the United States only if they are registered with FMCSA. Each registration is effective from the date specified and remains in effect for such period as the Secretary of Transportation (Secretary) determines by regulations.

Prior to 2015, all entities seeking authority (both first-time applicants and registered entities seeking additional authorities) were required to apply for such authority using the OP–1 series of forms, including OP–1, OP–1(P), OP–1(FF), OP–1(NNA), and OP–1(MX) (for Mexico-domiciled carriers only).

The final rule titled ''Unified Registration System,'' (78 FR 52608) dated August 23, 2013, implemented statutory provisions for an online registration system for entities that are subject to FMCSA's licensing, registration, and certification regulations. The Unified Registration System (URS) streamlines the registration process and serves as a clearinghouse and repository of information on motor carriers, brokers, freight forwarders, intermodal equipment providers, hazardous materials safety permit applicants, and cargo tank facilities required to register with FMCSA. When developing URS, FMCSA planned that the OP–1 series of forms—except for OP–1(MX)—would ultimately be folded into one overarching electronic application (MCSA–1) which would be used by all motor carriers seeking authority.

FMCSA began a phased rollout of URS in 2015. The first phase, which went into effect on December 12, 2015, impacted only first-time applicants seeking an FMCSA-issued registration. FMCSA had planned subsequent rollout phases for existing registrants; however, there were substantial delays, and subsequent phases have not been rolled out to date.

On January 17, 2017, FMCSA issued a final rule titled ''Unified Registration System; Suspension of Effectiveness,'' which indefinitely suspended URS effective dates for existing registrants only (82 FR 5292). Pursuant to this final rule, FMCSA is still accepting forms OP–1, OP–1(P), OP–1(FF), and OP–1(NNA) for existing registrants wishing to apply for additional authorities. Separately, FMCSA requires Form OP–1(MX) for new and existing Mexico-domiciled motor carriers that wish to operate beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones. Information collected through URS, utilizing the MCSA–1, does not include registration form OP–1(MX), which continues to remain a paper form outside URS.

Forms in the OP–1 series request information to identify the applicant, the nature and scope of its proposed operations, a narrative description of the applicant's safety policies and procedures, and information regarding the drivers and vehicles it plans to use in U.S. operations. The OP–1 series also requests information on the applicant's familiarity with relevant safety requirements, the applicant's willingness to comply with those requirements during its operations, and the applicant's willingness to meet any specific statutory and regulatory requirements applicable to its proposed operations. Information collected through these forms aids FMCSA in determining the type of operation a company may run, the cargo it may carry, and the resulting level of insurance coverage the applicant will be required to obtain and maintain to continue its operating authority.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2024–09893 Filed 5–6–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2023–0096]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on November 13, 2023, Union Pacific Railroad Company (UPRR) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 231 (Railroad Safety Appliance Standards). FRA assigned the petition Docket Number FRA–2023–0096.

Specifically, UPRR requested a waiver from 49 CFR 231.27(h), *Uncoupling levers,* to disable the uncoupling levers on prototype rail tie cars used solely in ''Rail Train'' service, which is UPRR's non-revenue service to maintain its rail network. UPRR seeks to disable the uncoupling levers when moving both loaded and empty cars. The cars would be used solely for delivering rail ties to maintenance-of-way (MoW) employees through the UPRR network, and they are equipped with additional air and electrical train lines that risk damage if the cars become inadvertently uncoupled. In support of its request, UPRR states that the ''prototype cars reduce risk for MoW personnel by eliminating the current risks associated with machine unloading of ties from gondola cars.''

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by July 8, 2024 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. 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 *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov*.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2024–09867 Filed 5–6–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8976

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning, Notice of Intent to Operate.

DATES: Written comments should be received on or before July 8, 2024, to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include ''OMB Number 1545–2268–Notice of Intent to Operate Under Section 501(c)(4)'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Martha R. Brinson, at (202) 317–5753, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice of Intent to Operate Under Section 501(c)(4).

OMB Number: 1545–2268.

Form Number: 8976.

Abstract: The Protecting Americans from Tax Hikes Act of 2015 (the PATH Act) section 506 to the Internal Revenue Code (Code) requires an organization described in section 501(c)(4), no later than 60 days after the organization is established, to notify the Secretary that it is operating as a section 501(c)(4) organization (the notification). Section 506(b) provides that the notification must include: (1) The name, address, and taxpayer identification number of the organization; (2) the date on which, and the State under the laws of which, the organization was organized; and (3) a statement of the purpose of the organization.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2,500.

Estimated Time per Respondent: 45 minutes.

Estimated Total Annual Burden Hours: 1,875.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments will be of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency'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 of information on 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.

Approved: April 30, 2024.

Martha R. Brinson,

Tax Analyst.

[FR Doc. 2024–09942 Filed 5–6–24; 8:45 am]

BILLING CODE 4830–01–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on May 23, 2024 on ''Key Economic Strategies for Leveling the U.S.-China Playing Field: Trade, Investment, and Technology.''

DATES: The hearing is scheduled for Thursday, May 23, 2024 at 9 a.m.

ADDRESSES: Members of the public will be able to attend in person at a location TBD or view a live webcast via the Commission's website at *www.uscc.gov. Visit the Commission's website for updates to the hearing location or possible changes to the hearing schedule. Reservations are not required to view the hearing online or in person.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Jameson Cunningham, 444 North Capitol Street NW, Suite 602, Washington, DC 20001; telephone: 202–624–1496, or via email at *jcunningham@uscc.gov. Reservations are not required to attend the hearing.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Jameson Cunningham via email at *jcunningham@uscc.gov.* Requests for an accommodation should be made as soon as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Background: This is the fifth public hearing the Commission will hold during its 2024 reporting cycle. The hearing will initially assess U.S. trade strategies to address China's nonmarket practices. Next, the hearing will review U.S. measures to limit the flow of key technologies to China and assess the United States' export control mechanisms. Then, the hearing will consider the design of U.S. outbound investment restrictions, the relevant review processes, and their role in strategic competition with China. Finally, the hearing will assess the

United States approach to coordinating its economic strategy with key trade partners in the Indo-Pacific, Europe, and Latin America and the Caribbean.

The hearing will be co-chaired by Commissioner Leland Miller and Commissioner Michael Wessel. Any interested party may file a written statement by May 23, 2024 by transmitting it to the contact above. A portion of the hearing will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: May 2, 2024.

Christopher Fioravante,

Director of Operations and Administration, U.S.-China Economic and Security Review Commission.

[FR Doc. 2024–09911 Filed 5–6–24; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0270]

Agency Information Collection Activity: Financial Counseling Statement

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 8, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0270'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0270'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 3732.

Title: Financial Counseling Statement, VA Form 26–8844.

OMB Control Number: 2900–0270.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–8844 provides for recording comprehensive financial information concerning the borrower's net income, total expenditures, net worth, suggested areas for which expenses can be reduced or income increased, the arrangement of a family budget and recommendations for the terms of any repayment agreement on the defaulted loan.

Affected Public: Individuals and households.

Estimated Annual Burden: 3,750 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 5,000 per year.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–09861 Filed 5–6–24; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 89 Tuesday,

No. 89 May 7, 2024

Part II

Department of Housing and Urban Development

24 CFR Parts 5, 8, 42, et al.

Housing Opportunity Through Modernization Act of 2016—Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 8, 42, 50, 91, 92, 93, 247, 290, 882, 888, 891, 903, 908, 943, 945, 960, 972, 982, 983, 985, and 1000

[Docket No. FR–6092–F–03]

RIN 2577–AD06

Housing Opportunity Through Modernization Act of 2016—Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations to implement changes to the Housing Choice Voucher (HCV) tenant-based program and the Project-Based Voucher (PBV) program made by the Housing Opportunity Through Modernization Act of 2016 (HOTMA). HOTMA made several amendments to the HCV and PBV programs, including establishing a statutory definition of public housing agency (PHA)-owned housing, and amending several elements of both programs. In response to public comments, HUD has also included additional regulatory changes in this final rule that are intended to reduce the burden on public housing agencies, by either modifying requirements or simplifying and clarifying existing regulatory language.

DATES:

Effective date: June 6, 2024, except the following sections, which are delayed indefinitely: instruction 69, § 982.451(c); instruction 98, § 983.154(g) and (h); instruction 100, § 983.157; and instruction 103, § 983.204(e).

For more information, *see* **SUPPLEMENTARY INFORMATION.**

Compliance dates: Compliance with this rule is required no later than June 6, 2024, except for the following requirements:

1. *90 days after effective date.* PHAs are not required to comply with changes to the requirements in the following sections until September 4, 2024: 24 CFR 982.301; 24 CFR 982.503; 24 CFR 982.625–641; 24 CFR 983.58(b); 24 CFR 983.252; 24 CFR 983.260; and 24 CFR 985.3.

2. *180 days after effective date.* PHAs are not required to comply with the new requirements in the following section until December 3, 2024: 24 CFR 982.505.

3. *One year after the effective date.* Several sections in this final rule require PHAs to update their Administrative Plans. PHAs are not required to update their Administrative Plans in compliance with these new requirements until June 6, 2025. Additionally, PHAs are not required to comply with the new requirements in the following sections until June 6, 2025: 24 CFR 983.57; 24 CFR 983.155(b); 24 CFR 983.251(e); and 24 CFR 983.262.

FOR FURTHER INFORMATION CONTACT: Ryan Jones, Director, Housing Voucher Management and Operations Division, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20011; telephone number 202–708–1112 (this is not a toll-free number); email *HOTMAVoucher@hud.gov.* HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as from individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION:

I. Background

The HOTMA Statute

On July 29, 2016, HOTMA was signed into law (Pub. L. 114–201, 130 Stat. 782). HOTMA makes numerous significant changes to statutes that govern HUD programs, including section 8 of the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437f).

The Proposed Rule

On October 8, 2020, HUD issued a proposed rule [1] to codify the HOTMA provisions that HUD implemented through the HOTMA Implementation Notices [2] in the **Federal Register**. The proposed rule also sought to make changes to regulatory provisions unrelated to HOTMA to eliminate obsolete regulatory provisions and reduce the burden on public housing agencies, by either modifying requirements or simplifying and clarifying existing regulatory language. The proposed rule sought to codify the following HOTMA provisions:

- *Section 101:* In accordance with HOTMA section 101(a)(1), the proposed rule included a provision regarding non-life-threatening deficiencies and an alternative inspections requirement in HOTMA section 101(a)(1) at §§ 982.405, 982.406, and 983.103. The proposed rule also proposed to revise the definition of life-threatening deficiencies at § 982.401. Additionally, the proposed rule sought to include regulations to enforce Housing Quality Standards (HQS) in section 101(a)(3) at §§ 982.404 and 983.208.
- *Section 105:* In accordance with HOTMA section 105, the proposed rule sought to modify and align the definition of ''PHA-owned unit'' with HOTMA's revised definition of the term at §§ 982.4 and 983.3.
- *Section 106:* In alignment with HOTMA sections 106(a)(2) and 106(a)(3), the proposed rule proposed to include regulations on PBV program cap, PBV units not subject to project cap or program cap, and PBV project cap in §§ 983.6, 983.54, and 983.59.
- *Section 106:* Additionally, to conform to the changes in HOTMA section 106(a)(4), the proposed rule included regulations on entering into a PBV Housing Assistance Payments (HAP) contract for rehabilitated and newly constructed housing projects without an agreement to enter into HAP contract at § 983.154. The proposed rule sought to codify regulations surrounding PBV additional contract conditions and tenant-based assistance for families at termination/expiration without renewal of PBV HAP contract; PBV priority of assistance contracts; PBV adding units to HAP contract without competition; and PBV initial term of HAP contract and extension of term, in sections 106(a)(4) and 106(a)(5) throughout Part 983. The proposed rule sought to codify regulations that allow for rent adjustments using an operating cost adjustment factor (OCAF) in HOTMA section 106(a)(6) at § 983.302.
- *Section 106:* Further, to conform to the changes in HOTMA sections 106(a)(7) through (a)(9), the proposed rule sought to codify HOTMA's changes to PBV preference for voluntary services in section 106(a)(7) at § 983.251 and owner-maintained waiting lists in section 106(a)(7) at § 983.251. The proposed rule also sought to codify changes to environmental requirements for existing housing in section 106(a)(8) at § 983.56 and attaching PBVs to projects where the PHA has an ownership interest in section 106(a)(9) at § 983.51.

The proposed rule also sought to implement the following HOTMA HCV provision:

- *Section 112:* In accordance with HOTMA section 112, the proposed rule proposed to include the manufactured

[1] Housing Opportunity Through Modernization Act of 2016-Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes, 85 FR 63664 (Oct. 8, 2020).

[2] *See* 81 FR 73030 (Oct. 24, 2016); 82 FR 5458 (Jan. 18, 2017); 82 FR 32461 (Jul. 14, 2017); additional guidance was provided in Notices PIH 2017–18, PIH 2017–20, and PIH 2017–21.

home space rent calculation in section 112 at § 982.623, and to address the PHA option to make housing assistance payments directly to families instead of an owner for manufactured home space rentals in a proposed change to § 982.623.

HUD also proposed changes that were not statutorily required, to better clarify or revise existing regulatory requirements, including changing the current requirements to refine the Davis-Bacon wage requirements and inserting references to obligations under Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA). Through these changes, HUD sought to improve the administration of the program, simplify program rules, and reduce administrative burden and cost. For additional information, please see the proposed rule.[3]

HUD received 44 comments on the proposed rule, which were considered and are discussed in Section IV of this preamble. Additional details about the proposed changes may be found in the ''Housing Opportunity Through Modernization Act of 2016-Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes'' proposed rule at 85 FR 63664 (Oct. 8, 2020).

The NSPIRE Rulemaking

On May 11, 2023, after the proposed rule was published, HUD published the ''Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE) final rulemaking (''the NSPIRE final rule'').[4] The NSPIRE final rule established a new approach to defining and assessing housing quality by consolidating and modernizing inspection standards for public housing, multifamily housing, Community Planning and Development programs, and the HCV and PBV programs. Several of the changes made in this final rule from the proposed rule are designed to incorporate or be consistent with the NSPIRE final rule, and some additional changes are made to build upon changes made by the NSPIRE final rule.

II. The Final Rule

After considering the public comments received on the October 8, 2020, proposed rule, and after further review, HUD makes the following changes at this final rule stage. Where a section has been relocated either from the prior regulations or from what HUD proposed, the section numbers shown in the headings of this preamble refer to the regulation sections as they appear in this final rule.

Notes concerning application of this rulemaking to projects underway.

HUD wishes to clarify that no change in this rulemaking requires a PHA, or any other party, to repeat a stage in the selection or development process which has already been completed for a PBV project prior to the compliance date of this rulemaking. If, for instance, a PHA has selected a site under the prior site selection standards before the effective date of this rulemaking, the PHA is not required to complete a new selection. Similarly, an Agreement to enter into HAP contract signed before the effective date of this rulemaking does not need to be amended to incorporate changes to this rulemaking.

Additionally, if parties wish to amend an existing Agreement to enter into HAP contract to take advantage of changes made by this rulemaking, such as the changes made to include a description of broadband infrastructure work in the Agreement, nothing in this rulemaking prevents such an amendment after the rule is in effect. However, HUD notes that if a project is under an Agreement to enter into HAP contract as of the effective date of this rule, parties cannot nullify the Agreement to enter into HAP contract to proceed without an Agreement as will be otherwise allowed under this rule when § 983.154(f) and (g) take effect.

§ 888.113 Fair Market Rents for Existing Housing: Methodology

In response to public comments, HUD revises § 888.113 to increase flexibility for PHAs. This final rule will provide PHAs the option in the HCV program to use Small Area Fair Market Rents (SAFMRs) in a non-metropolitan area with notification to their local HUD field office, which provides PHAs operating in non-metropolitan counties the same opportunity to establish payment standards that better align with rents that vary significantly between zip code areas within the non-metropolitan counties. In paragraph (a) this final rule modifies the requirement under § 888.113 that the FMR calculation exclude newly built units. HUD no longer publishes separate FMRs for newly constructed rental units; therefore, the FMRs calculated under § 888.113 should be reflective of the entire rental market. This final rule also clarifies existing practice in paragraph (c)(3) that where a PHA that elects to use SAFMRs may exercise this option in one metropolitan area or non-metropolitan county, and is not required to exercise this option in other metropolitan areas or non-metropolitan counties. This final rule changes paragraph (c)(3) which will allow PHAs to notify HUD when opting-in to use SAFMRs, rather than require HUD's approval.

This final rule revises paragraph (h) to align with the change to paragraph (c)(3) described above and to improve readability. Paragraph (h) is also revised to include a cross-reference to separate requirements regarding applicability of exception payment standards based on Small Area FMRs to PBV projects, to more clearly signal that Small Area FMRs may impact PBVs both as described in paragraph (h) and where HUD approves use of exception payment standards. This final rule also revises paragraph (h)(1) to clarify that the PHA and owner may mutually agree to apply the SAFMR to a PBV project where the project was selected before ''either or both'' the SAFMR designation and the PHA administrative policy. The intent of this provision, as explained in the preamble to the Small Area FMR final rule (81 FR 80567, published November 16, 2016), was to permit a PHA that had established an Administrative Plan policy to apply Small Area FMRs to all future PBV projects to also establish a policy permitting the PHA to apply the Small Area FMRs to current PBV projects, provided the owner was willing to mutually agree to do so. This approach was intended to offer ''maximum flexibility'' to the PHA for varied circumstances. However, the prior language the use of ''both'' inadvertently created confusion with respect to projects selected between the two events (the Small Area FMR designation and the PHA administrative policy extending Small Area FMRs to future PBV projects). Consequently, HUD is making a technical correction to paragraph (h)(1) to clarify that if the PHA is applying the Small Area FMRs to future PBV projects, the PHA may also establish a policy to extend the use of Small Area FMRs to current PBV projects, including those projects selected after the Small Area FMR designation but prior to the effective date of the PHA administrative policy, if the owner is willing to do so.

This final rule also makes minor revisions to paragraphs (h)(1) and (h)(2). First, the final rule includes ''county-wide FMRs,'' for consistency with other changes in the regulation that allow voluntary use of SAFMRs in non-

[3] 85 FR 63664 (Oct. 8, 2020), *https://www.federalregister.gov/documents/2020/10/08/2020-21400/housing-opportunity-through-modernization-act-of-2016-housing-choice-voucher-hcv-and-project-based.*

[4] See 88 FR 30442.

metropolitan areas and to avoid any implication that the PBV Small Area FMR flexibilities in paragraph (h) would not be available in non-metropolitan counties where HUD publishes SAFMRs. Second, this final rule changes ''designation'' to ''designation/implementation'' to improve clarity; this is not a substantive change, but rather it reflects that the applicable date for a PHA that chooses to implement Small Area FMRs under paragraph (c)(3) of this section would more appropriately be termed the date of ''implementation.'' This final rule also clarifies the effective date of a rent increase due to Small Area FMR. The proposed rule left unchanged a provision stating that the effective date of a rent increase would occur on the ''first annual anniversary'' of the HAP contract, but this final rule replaces ''first annual anniversary'' with ''next annual anniversary'' to clarify that the effective date of a rent increase occurs on the next annual anniversary after the agreement, even if that is not the first anniversary of the project.

Finally, this final rule revises paragraph (i)(2) to reflect the renumbering of § 982.503(e) to (f). This final rule also revises paragraph (i)(3) to reflect the phase-out of success rate payment standards in 982.503(f).

§ 903.3 What is the purpose of this subpart?

This final rule clarifies HUD's intent regarding applicability of part 903 to the project-based voucher program. Previously, § 903.4(a)(2)(i) defined tenant-based assistance to broadly mean assistance provided under section 8(o) of the 1937 Act, which included project-based assistance under section 8(o)(13). When § 903.12 was amended to make express reference to project-based assistance under section 8(o)(13), an unintended consequence was confusion regarding whether the term ''tenant-based assistance'' should still be interpreted to include project-based assistance under section 8(o)(13). In § 903.3(b)(2), the term ''project-based'' is added to the reference of participants who benefit from PHA plans as a source to locate basic PHA policies, rules and requirements concerning the PHA's operations, programs and services.

§ 903.4 What are the public housing agency plans?

This final rule revises and defines both tenant-based assistance and project-based assistance under 903.4(a)(2)(i) to address confusion regarding whether the existing regulatory language also covers project-based assistance under section 8(o)(13). HUD now also makes specific reference to tenant-based assistance, project-based assistance, and/or tenant and project-based assistance throughout part 903 to bring clearer meaning to each provision.

§ 903.6 What information must a PHA provide in the 5-Year Plan?

HUD adds paragraph (c) to § 903.6 to clarify that when a PHA intends to select one or more projects for project-based assistance without competition, the PHA must first include a statement of this intent in its 5-Year Plan to put the public on notice. The proposed rule referenced this requirement in 983.51(c)(1) but only generically referenced the PHA Plan.

§ 903.7 What information must a PHA provide in the Annual Plan?

This final rule clarifies the requirements for PHAs that provide project-based assistance under section 8(o)(13) with respect to what information a PHA must provide in the Annual Plan. HUD now makes specific references to project-based assistance in paragraphs (a)(1), (c), (d), (e)(4), (f), and (l)(1)(iii) and (2). HUD also inserts a new paragraph (r) which contains text that was previously located in § 903.12, as HUD determined that the project-based assistance statement requirement in that section was not appropriately located.

Finally, in the **Federal Register** notice published on January 18, 2017 (82 FR 5458), HUD stated, ''The HOTMA amendments permit a PHA to establish a preference based on who qualifies for voluntary services, including disability-related services, offered in conjunction with the assisted units.'' HUD further provided ''The revised statute permits such a preference to be established if it is consistent with the PHA Plan. As part of the PHA Plan review process, the Office of Fair Housing and Equal Opportunity, in consultation with the Office of General Counsel, will review each proposed preference for consistency with fair housing and civil rights requirements. As part of this process, HUD may request the PHA or owner provide any additional documentation necessary to determine consistency with the PHA Plan and all applicable Federal fair housing and civil rights requirements.'' In this final rule, HUD clarifies that the Office of Fair Housing and Equal Opportunity, in consultation with the Office of General Counsel, may review proposed preferences as part of the PHA Plan review process. Approval of a PHA Plan does not constitute compliance with federal fair housing and civil rights requirements. As stated in the comment discussion of § 983.251, adoption of such preferences cannot conflict with Section 504 or other federal civil rights requirements. Further explanation of these issues is located in that discussion and in HUD's January 2017 notice.

§ 903.11 Are certain PHAs eligible to submit a streamlined Annual Plan?

HUD makes a minor revision to § 903.11(c)(1) and (3) to include the requirement that a PHA must identify its participation in the project-based assistance program in the streamlined Annual Plan consistent with the changes to § 903.7 made by this final rule.

HUD is also revising paragraphs (a)(3) and (c)(3). These paragraphs allow PHAs to submit a streamlined Annual Plan if they do not own or operate public housing. This final rule clarifies that PHAs that participate in the project-based assistance program are still eligible to submit a streamlined Annual Plan.

§ 903.12 What are the streamlined Annual Plan requirements for small PHAs?

In this final rule, HUD moves the PBV requirements previously located in § 903.12 to § 903.7 as described above. HUD makes a minor revision to § 903.12 to include the requirement that in the streamlined Annual Plan for Small PHAs, a PHA must identify its participation in the PBV program consistent with the changes to § 903.7 made by this final rule. HUD also makes express reference to project-based assistance in paragraph (b).

§ 903.13 What is a Resident Advisory Board and what is its role in development of the Annual Plan?

This final rule clarifies in § 903.13(b)(1) and (3) the requirements that Resident Advisory Board composition provides for reasonable representation of families receiving project-based assistance, in addition to families receiving tenant-based assistance.

§ 903.15 What is the relationship of the public housing agency plans to the Consolidated Plan and a PHA's Fair Housing requirements?

This final rule clarifies in paragraph (c) that all admission and occupancy policies for section 8 project-based housing programs, in addition to public housing and section 8 tenant-based must comply with Fair Housing Act requirements and other civil rights laws and regulations and with a PHA's plans to affirmatively further fair housing.

§ 982.4 Definitions

In this final rule, HUD has revised the organizational structure of the cross-references for clarity and consistency with cross references in other sections. In addition, this final rule makes the following changes to definitions:

HUD adds the definition of ''building,'' to clarify that a building is a structure with a roof and walls that contains one or more dwelling units.

HUD adds the definitions of ''foster adult'' and ''foster child'' to the HCV program to clarify that foster adult and foster child are members of the household, but not members of a family. These definitions are identical to the definitions added by the Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104 final rule.[5]

HUD revises the definition of ''housing quality standards'' to make a technical correction to the existing definition and eliminate confusion regarding the use of the alternative inspection option. Under the statute, the term ''housing quality standards'' (HQS) refers to the standards prescribed by HUD under section 8(o)(8)(B)(i) or variations approved by HUD under section 8(o)(8)(B)(ii) of the United States Housing Act of 1937. While the alternative inspection option at § 982.406 allows a PHA to comply with the initial and regular inspection requirements by relying on an alternative inspection (*i.e.,* an inspection conducted for another housing program), that does not mean the standards of the alternative inspection become the applicable HQS for the HCV program. For example, assume a PHA places a unit under a HAP contract by using the alternative inspection option for initial inspections under § 982.406(e). Under that option, the PHA may place a unit under HAP contract on the basis that the unit passed an alternative inspection for a different housing program if certain conditions are met prior to conducting its own inspection. However, the PHA must still conduct its own HQS inspection within 30 days of receiving the Request for Tenancy Approval (RFTA) and may not make housing assistance payments to the owner until the PHA has inspected the unit. The PHA conducts its inspection of the unit based on the HQS established by HUD for the HCV program, not the housing standards that were applicable under the alternative inspection. Likewise, any interim inspection conducted by the PHA for a unit under HAP contract is to determine that the unit meets the HQS established by HUD for the HCV program, regardless of whether the PHA is relying on an alternative inspection of another housing program (that may have different standards) for regular inspections. For these same reasons, HUD is also revising the definition of HQS for the PBV program at § 983.3 and making conforming changes to §§ 982.401, 982.605(a), 982.609(a), 982.614(a), 982.618(b), 982.621, and 983.101(a) in this final rule.

HUD revises the definition of ''independent entity'' from the definition in the proposed rule to clarify when the unit of general local government meets the definition of an independent entity and more clearly explain the requirements and prohibited connections for a HUD-approved entity.

HUD revises the proposed definition of ''Request for Tenancy Approval (RFTA)'' to make clear that the RFTA may be submitted not just by the family, but also on behalf of a family.

HUD revises the definition of ''Small Area Fair Market Rents'' from the proposed rule to remove language suggesting that the definition only applies to areas meeting the definition at § 888.113(d)(2). HUD removed this reference because the SAFMRs in part 982 are not meant to be limited to the mandatory Small Area FMR metropolitan areas, and as such the ''Small Area Fair Market Rents'' definition deleted the citation to § 888.113(d)(2), which only covers mandatory metropolitan areas designated as Small Area FMR areas.

HUD revises the definition of ''tenant-paid utilities'' by stating that utilities and services may include those required by HUD through **Federal Register** notice with opportunity for comment.

§ 982.54 Administrative Plan

This final rule revises the requirements for the PHA Administrative Plan. Specifically, this final rule requires PHAs at § 982.54(d)(22) to specify in the Administrative Plan the PHA's policy for withholding HAP for units that do not meet HQS. This final rule also requires at § 982.54(d)(4)(iv) that the PHA Administrative Plan include the PHA's policy concerning residency for foster children and adults and requires at § 982.54(d)(23) that the PHA's Administrative Plan include the PHA's policy on assisting families with relocating and finding a new unit. This final rule also modifies § 982.54(d)(4)(iii) to include §§ 982.552, 982.554, and 982.55 as regulations that PHAs must follow in establishing their standards for denying admission or terminating assistance based on criminal activity or alcohol abuse and which must be included in their Administrative Plan. HUD's directives and guidance on a PHA's use of criminal activity as an admission screening factor are contained in PIH Notice 2015–19, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.* Through this notice and other issuances, such as the 2016 Office of General Counsel's Guidance on the Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, HUD has required PHAs to adopt admission policies that do not intentionally discriminate against members of a protected class or otherwise have an unjustified discriminatory effect on members of a protected class, even when the PHA has no intent to discriminate. HUD urges PHAs to achieve a sensible and effective balance between allowing individuals with a criminal record to access HUD-subsidized housing and ensuring the safety of all residents of such housing.

Consistent with the NSPIRE final rule, HUD modifies § 982.54(d)(21)(i) to require the PHA to include in its Administrative Plan any life-threatening deficiencies adopted by the PHA. Under the proposed rule, the PHA's Administrative Plan had to include the specific life-threatening conditions that would be identified through the PHA's inspections, including the HUD required life-threatening conditions and any life-threatening deficiencies adopted by the PHA prior to January 18, 2017. Since the deficiencies that HUD requires must be considered life-threatening are mandatory and not a matter of PHA administrative policy, requiring the PHA to list the HUD-required life-threatening deficiencies in the Administrative Plan is unnecessary and burdensome. In addition, singling out life-threatening deficiencies adopted by the PHA prior to January 18, 2017, which was related to how HUD initially implemented the non-life-threatening initial inspection option in the HOTMA Implementation **Federal Register** notice (82 FR 5458, published January 18, 2017), may create confusion. The revised text in this final rule clarifies that the Administrative Plan must include a list of any PHA designated life-threatening deficiencies that, in addition to all HUD-required life-threatening deficiencies, will be applied

[5] See ''Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104'' final rule at 88 FR 9600 (Feb. 14, 2023).

by the PHA, regardless of date that the PHA designated the deficiency as life-threatening.

§ 982.301 Information When Family Is Selected

This final rule makes changes to the information provided to a family when they are selected. For transparency and to ensure equal access, this section specifies that PHAs must provide information in a way that ensures meaningful access to individuals with limited English proficiency. Additionally, the final rule expands upon the requirement in the proposed rule to provide information on reasonable accommodation policies and procedures in the information packet, by also requiring that the packet specifically address an increase in the payment standard as a reasonable accommodation. The final rule also includes a requirement that reasonable accommodations must also be covered in the oral briefing. In this section, this final rule removes all references to the welfare to work program, since it no longer exists. Finally, this rule reorganizes paragraph (a) so that paragraph (a)(1) represents a list of what must be provided in an oral briefing, moving some content from paragraphs (a)(2) and (3); this reorganization does not change the requirements of paragraph (a) in any way.

§ 982.305 PHA Approval of Assisted Tenancy

This final rule reorganizes § 982.305(b) of the proposed rule by relocating paragraph (b)(2)(iii) of the proposed rule to a new paragraph (b)(3) and moving the previous paragraph (b)(3) to a new paragraph (b)(4). For clarity and simplicity, this final rule removes the requirement that the PHA determine that the unit is covered by the alternative inspection and simplifies this provision to state that an alternative inspection is allowed and alternatively cross references what the PHA is subject to and the alternative inspection option at § 982.406. In addition, this final rule does not make the proposed non-substantive change to paragraph (c)(3).

§ 982.352 Eligible Housing

This final rule changes proposed § 982.352(b)(1)(v)(A)(*3*) by removing the exception of applicability of § 982.405(e), acknowledging that sometimes independent entities schedule inspections, and in those cases, they must consider complaints and any other information brought to their attention.

§ 982.401 Housing Quality Standards

NSPIRE includes the new standards for setting HQS at § 5.703 for all HUD programs including the standards for life-threatening and non-life-threatening conditions and the amount of time required to correct such deficiencies. Other than a conforming change related to the revised definition of HQS discussed previously in the description of the changes to § 982.4, this final rule makes no change to the section as codified in the NSPIRE rule (88 FR 30442 (May 11, 2023)).

§ 982.404 Maintenance: Owner and Family Responsibility; PHA Remedies

HUD makes several clarifying revisions to this section, which includes changes to certain terminology such as changing ''fails to comply'' to ''has HQS deficiencies'' and consistently changing ''defect'' to ''deficiency.'' These clarifying changes also make it clear that a unit is ''not in compliance with HQS'' when it has deficiencies that are not remedied within the appropriate timeframe. This final rule also revises paragraph (a)(2) to provide clarifying changes from the proposed rule text that ensure the paragraph is clear that it does not provide a different requirement from the remainder of the section, and amends paragraph (a)(4) to align with the HOTMA statutory text. HUD provides in paragraph (b)(4) that, in the case of a family being responsible for HQS deficiency repairs, the family need not itself make the repairs but rather is responsible for taking all steps permissible under the lease and State and local law to ensure the deficiency is corrected. This is in response to commenters who pointed out that in some cases the lease or local law may prevent the family from undertaking the repairs itself.

The proposed rule used varying terminology to explain HQS inspections throughout parts 982 and 983. To promote clarity, this final rule replaces the varied terminology to explain HQS inspections and consistently uses the inspection terms outlined in § 982.405. This rule specifically names each type of inspection that exists within its respective section and specifies when actions or provisions apply to specific inspections. As such, this final rule also removes references to ''regular inspection'' since it was undefined in the proposed rule, and this final rule clarifies that § 982.404(d) applies to every inspection type other than initial inspections. This final rule also adds the requirement at paragraph (d)(1) that a PHA's Administrative Plan contains the conditions for withholding HAP from an owner for such deficiencies, to align with § 982.54.

In paragraph (d)(2)(i), this final rule clarifies that the abatement requirement includes amounts that had previously been withheld. To better protect families from homelessness, in paragraph (d)(2)(ii), HUD outlines the timeframe in which a PHA must issue a family its voucher to include at least 30 days prior to the termination of the HAP contract. In paragraph (d)(3), this final rule specifies that the family has discretion to terminate their lease and that the termination will occur either immediately or when the family vacates the unit, whichever is earlier. This final rule also includes the requirement that PHAs promptly issue the family a voucher to move. In paragraph (e)(3), HUD expands what is included in costs associated with relocating to include temporary housing costs. The final rule further provides that if the PHA uses the withheld and abated assistance payments to assist with the family's relocation costs, the PHA must provide security deposit assistance to the family as necessary, and that PHAs must assist families with disabilities in locating available accessible units in accordance with 24 CFR 8.28(a)(3).

Lastly, in paragraph (f), HUD provides that the revised § 982.404 applies to HAP contracts that are executed on or after the effective date of this final rule, as well as HAP contracts renewed after the rule's effective date.

§ 982.405 PHA Initial and Periodic Unit Inspection

HUD has made technical organizational changes to § 982.405 by dividing paragraphs and changing the headers to consistently use identifiable names for each inspection type. New paragraph (d) splits up the proposed paragraph (g) to specifically outline the types of interim inspections to include life-threatening, non-life-threatening, and extraordinary circumstances.

§ 982.406 Use of Alternative Inspections

HUD revises § 982.406 primarily to address issues with respect to compatibility between parts 982 and 983. Paragraph (a) now applies only to HCV, part 982 as HUD moved generally applicable language at proposed paragraph (a)(2) to paragraph (d) and removed the language at proposed paragraph (a)(3) applicable only to PBV. HUD also revises paragraph (c)(2)(ii) to align with the renumbering in § 982.405. This final rule revises paragraph (d) regarding use of alternative inspections to apply to both HCV and PBV, by removing specific citations to § 982.405.

These changes continue to require that any alternative inspection standard be identified in the PHA Administrative Plan for both HCV and PBV.

§ 982.451 Housing Assistance Payments Contract

In this final rule, the text from paragraph (c)(1)(i) has been moved under paragraph (c)(1), resulting in a renumbering of paragraphs (c)(1)(i)(A)–(E) from the proposed rule to (c)(1)(i)–(v) in the final rule. Paragraph (c)(1) now expressly states the requirement that the separate legal entity must execute the HAP contract with the PHA if it chooses the option of establishing a separate legal entity to serve as the owner. HUD deletes paragraph (c)(1)(ii) of the proposed rule and moves the text of proposed (c)(2)(i) under paragraph (c)(2) in the final rule. This final rule also revises paragraph (c)(2)(i) to clarify that the PHA-owned certification obligates the PHA, as the owner, to all of the requirements of the HAP contract. This revision prevents confusion with other regulations that reference HAP contracts, but not the PHA-owned certification. Finally, other minor changes were made in paragraph (c) to align with corresponding requirements in § 983.204(e).

§ 982.503 Payment Standard Areas, Schedule, and Amounts

HUD makes clarifying edits to paragraph (a)(1) to reflect HUD's practice of setting SAFMRs for ZIP codes outside designated SAFMRs. HUD also revises paragraph (d)(1) to explain the areas in which an exception payment standard may be established. In addition, in response to public comment, HUD revises paragraph (d)(2) to allow PHAs to set SAFMR-based exception payment standards above 110 percent of the FMR for non-metropolitan counties, just as they are currently permitted to do for metropolitan areas. This ensures parity between metropolitan and non-metro PHAs and provides non-metropolitan PHAs with the ability to establish exception payment standards that better reflect actual market conditions based on HUD's SAFMR determinations. In paragraph (d)(2), this final rule also allows PHAs that qualify for exception payment standards above 110 percent of the applicable FMR to set exception payment standards up to the same percentage of the SAFMR for the applicable ZIP code. HUD also divides proposed paragraph (d)(3) into paragraphs (d)(3) and (4) and moves proposed paragraph (d)(4) to (d)(5). In order to provide PHAs more flexibility to respond to rapidly changing rental markets, paragraph (d)(3) now provides set situations in which HUD will allow PHAs the discretion to establish an exception payment standard amount between 110 percent and 120 percent of applicable FMR upon notification to HUD that the PHA meets a specified criterion instead of requiring prior HUD approval. The PHA must meet one of three criteria: (i) Fewer than 75 percent of the families to whom the PHA issued tenant-based rental vouchers during the most recent 12-month period for which there is success rate data available have become participants in the voucher program; (ii) More than 40 percent of families with tenant-based rental assistance administered by the agency pay more than 30 percent of adjusted income as the family share; or (iii) Such other criteria as the Secretary establishes by notice. This change will allow PHAs to more quickly respond to changing rental market conditions, which will help them better manage program utilization, success rates, and rent burdens. New paragraph (d)(4) outlines how the PHA must request approval from HUD to establish payment standards above 110 percent of the applicable FMR except as provided in paragraphs (d)(2), (d)(3), and (d)(5). This new paragraph consolidates requirements related to exception payment standards for PHAs in designated SAFMR areas and for PHAs subject to the metropolitan area or non-metropolitan county FMRs. It also establishes criteria for designated SAFMR PHAs to request an exception payment standard over 110 percent of the SAFMR, which the current regulation previously stated would be provided in a separate **Federal Register** notice. Further, HUD revises paragraph (d)(4) to explain the application of the exception payment standard to the entire fair market rent area and the use of rental market data, specifically allowing the use of local rental market data. HUD provides clarifying changes to relocated paragraph (d)(5), which now specifies existing policy that PHAs may establish an exception payment standard of up to 120 percent of the applicable FMR without prior notification to HUD if they are seeking a reasonable accommodation for a person with a disability.

HUD also amends paragraph (e) by establishing a modified standard for approving payment standards below the basic range which will require a projection of rent burden based on the lower payment standard, rather than measuring rent burden based on current program participants prior to that reduction. The standard does allow HUD to approve a payment standard below the basic range to help prevent termination of assistance in the case of a PHA budget shortfall. In this final rule, HUD does not adopt the proposed rule modification to paragraph (e) and removes the PHA's option to go below the basic payment standard range for Small Area FMR ZIP code areas without HUD approval. In addition, HUD amends paragraph (f) to eliminate the option to establish success rate payment standards. HUD determined that the new flexibility provided in the rule to set payment standards up to 120 percent of the FMR makes this option unnecessary. In paragraph (h), this final rule specifies that HUD will monitor rent burdens only of families assisted with tenant-based rental assistance, because PBV tenants are unlikely to have rent burdens above 30 percent.

§ 982.505 How To Calculate Housing Assistance Payment

In this final rule, HUD revises paragraph (c)(3)(iv) to eliminate the option in the proposed rule for PHAs to adopt different policies related to applying decreases in payment standards in different geographic areas out of concern that this could result in discriminatory policies. Additionally, in response to public comment, HUD revises paragraph (c)(4)(ii) to require PHAs to apply payment standard increases at the family's next regular reexamination or the next interim recertification (in addition to the other events listed) and adds paragraph (c)(5) to give PHAs the flexibility to adopt policies to apply increases in the payment standard earlier than required. HUD also revised paragraph (c)(6), which was previously paragraph (c)(5), to clarify that while the new family unit size must be used in the recalculation by the first regular reexamination following the change, it may be used immediately.

§ 982.517 Utility Allowance Schedule

In response to public comments HUD is not going forward with the proposed § 982.517(a)(2), which would have required PHAs to provide the utility allowance schedule to HUD only when HUD requests it, and instead maintains the current requirement that the PHA provide HUD with the utility allowance schedule regardless of whether HUD requests it, and to only require the PHA to provide information or procedures used in preparation of the schedule when HUD requests it. HUD also revises paragraph (b)(1)(i) to allow for the possibility of an expansion of utility allowances in the future through a **Federal Register** notice. Additionally, in

paragraph (b)(1)(ii), this final rule expands the category of utilities and services to include applicable surcharges. In paragraph (b)(1)(iv), HUD removed wireless internet from the list of non-essential utility costs so that HUD could consider such inclusion of wireless internet as essential in a **Federal Register** notice under paragraph (b)(1)(i).

In paragraph (b)(2)(ii), HUD expands the utility allowance standards to include criteria for applying utility allowance to retrofitted units. The revised paragraph (b)(2)(ii) clarifies that while the entire building must meet Leadership in Energy and Environmental Design (LEED) or Energy Star standards, in the future HUD may provide by notice, when an energy-efficient utility allowance (EEUA) may be used for retrofitted units even if the entire building does not meet the standard. The revisions notes that there are only two design standards that can be used for energy-efficient utility allowance (EEUA) to prevent EEUAs from being applied broadly. HUD also moves paragraph (b)(2)(iv) to paragraph (b)(2)(v) and adds a new paragraph (b)(2)(iv) to state that the PHA must use the project-specific utility allowance schedule for tenant-based participants in projects that have an approved project-specific utility allowance under § 983.301(f)(4). This requirement was previously in § 983.301(f)(4) of the proposed rule and § 983.301(f)(2)(ii) of the previous regulatory text but has been moved from part 983. The Administrative Plan requirements to include PHAs state their policy for utility allowance payments are consistent with § 982.54.

§ 982.552 PHA Denial or Termination of Assistance for Family

This final rule makes a conforming change to remove § 982.552(c)(1)(viii), which denies housing assistance for a family's failure to comply with the FSS contract of participation, to align with a statutory amendment to the Family Self-Sufficiency (FSS) program authorizing language and the program's regulations, which amended 24 CFR 984.303(b)(5) through a final rule effective on June 16, 2022 (87 FR 30020). This change is in accordance with the Economic Growth, Regulatory Relief, and Consumer Protection Act (''the Economic Growth Act'') (Pub. L. 115–174) [6] which states that, ''Housing assistance may not be terminated as a consequence of either successful completion of the contract of participation or failure to complete such contract.''

§§ 982.605; 982.609; 982.614; 982.618; 982.621

The final rule makes a conforming change to §§ 982.605; 982.609; 982.614; 982.618; and 982.621 to align the text with the revised definition of HQS discussed previously in the description of the changes to § 982.4.

§ 983.2 When the Tenant-Based Voucher Rule (24 CFR Part 982) Applies

HUD revises § 983.2(c) to outline the specific part 982 provisions that do not apply to PBV assistance and revises paragraphs (c)(1) and (2) to specify that the HAP contract retention provisions at § 983.158(e)(2) do not apply to PBV assistance. HUD also clarifies in paragraph (c)(5) which provisions of part 982, subpart I do not apply to PBV assistance and in paragraph (c)(7)(i) which provisions of § 982.503 do not apply.

§ 982.641 Homeownership Option: Applicability of Other Requirements

The final rule amends paragraph (d) to clarify that § 982.406 (Use of alternative inspections), along with § 982.405 (PHA unit inspection) as the CFR previously provided, does not apply to the homeownership option. Because no HAP or downpayment assistance may be paid until the PHA inspects a family's homeownership unit and determines it passes HQS (see 24 CFR 982.631(a)), §§ 982.405 and 982.406 describing inspection requirements particular to rental assistance are incompatible with the homeownership option. HUD notes that this is not a substantive change.

§ 983.3 PBV Definitions

In response to public comment about the utility of establishing SAFMRs in some non-metropolitan counties, this final rule revises the definition of ''area where vouchers are difficult to use'' to include areas where 90 percent of the SAFMR exceeds 110 percent of FMR not just for metropolitan areas, but also for non-metropolitan counties. HUD determines that, when used in a non-metropolitan context, the difference between the SAFMR and FMR remains an easily identifiable and consistent data point for determining if an area is one in which vouchers are difficult to use.

This final rule also revises the definition of an ''area where vouchers are difficult to use'' to include a census tract with a poverty rate of 20 percent or less. This is not a substantive change, but rather a reorganization of the rule text for streamlining. In the proposed rule, § 983.54(b), regarding the project cap (income-mixing requirement), contained two separate categories of projects that were subject to a higher project cap: these categories were projects ''located in a census tract with a poverty rate of 20 percent or less'' and projects ''located in an area where vouchers are difficult to use.'' Similarly, § 983.6(d), regarding the program cap (percentage limitation), included both units ''located in a census tract with a poverty rate of 20 percent or less'' and units ''located in an area where vouchers are difficult to use'' as two separate categories of units eligible for an increased cap. For both the program cap and project cap, there was no difference between the requirements applicable to the two categories of projects and units. To simplify §§ 983.54(b) and 983.6(d), HUD examined whether the 1937 Act permitted the PBV regulatory definitions to consider a project or unit ''located in a census tract with a poverty rate of 20 percent or less'' to be a type of project or unit ''located in an area where vouchers are difficult to use.'' In the case of the program cap, section 8(o)(13)(B)(ii) of the 1937 Act provides for a specific 10 percent authority category for areas where vouchers are difficult to use ''as specified in subparagraph (D)(ii)(II),'' which is the subparagraph applying an exception to the project cap for areas where vouchers are difficult to use and for census tracts with a poverty rate of 20 percent or less. As a result, HUD determines that the authority for an exception to the program cap for census tracts with a poverty rate of 20 percent or less derives from the program cap exception for areas where vouchers are difficult to use, and therefore it would be more appropriate to include census tracts with a poverty rate of 20 percent or less within the definition of ''areas where vouchers are difficult to use.'' While the project cap exceptions for census tracts with a poverty rate of 20 percent or less and areas where vouchers are difficult to use are both mandated by section 8(o)(13)(D)(ii)(II) of the 1937 Act, given that the exception is identical for each category HUD determines the streamlining benefit makes placing census tracts with a poverty rate of 20 percent or less in the definition of ''areas where vouchers are difficult to use'' appropriate for purposes of codification of the project cap categories in the CFR.

Also, in response to public comment, HUD in this final rule changes the term ''comparable rental assistance'' to

[6] See The Economic Growth, Regulatory Relief, and Consumer Protection Act (''the Economic Growth Act'') (Pub. L. 115–174).

''comparable tenant-based rental assistance,'' amends the definition consistent with section 8(o)(13)(E) of the 1937 Act, and outlines the minimum requirements for assistance to qualify as comparable tenant-based rental assistance. HUD also finds that the proposed definition of ''development activity,'' in referring to both rehabilitation and new construction done for the project to receive PBV assistance and for other work occurring later during the term of the PBV HAP contract, produced significant confusion. As a result, HUD removes work occurring later during the term of the HAP contract from the proposed definition of ''development activity'' in this final rule and instead covers this work under a definition of ''substantial improvement.'' HUD revises the content of the term ''substantial improvement'' for additional clarity. This final rule also revises the definition of ''excepted units'' to clarify that excepted units exclusively serve certain families in accordance with § 983.54(c)(2) and to distinguish its definition from ''excluded units,'' which is a newly added definition that excludes units that meet certain requirements from the program and project cap.

As suggested by commenters, HUD revises the definition of ''existing housing'' to mean housing that meets or substantially complies with HQS, which housing is distinct from housing that will soon undergo development activity. ''Substantial compliance'' in this definition provides specific limitations to ensure the deficiencies in the project require minor work that can reasonably be completed within a 30-day period of time. These revisions reflect the need to better distinguish rehabilitated housing from existing housing so PHAs can comply with the distinct program requirements applicable to each housing type while also recognizing that HQS corrections may take a longer time than the period noted in the proposed rule. HUD changes the relevant time period in which existing housing is not expected to undergo or need substantial improvement from five years to two years after the HAP contract effective date in response to public comment. HUD also revises the definitions of ''newly constructed housing'' and ''rehabilitated housing'' by establishing a standard determined on a project-basis, rather than the prior unit-basis which was in the proposed rule, consistent with prior HUD guidance that a project can only be one type overall, and therefore specifying between the two types on a per-unit basis was impractical. HUD further amends the definition of ''rehabilitated housing'' to more directly note the difference between such projects and ''existing housing.'' HUD also clarifies the definition of ''independent entity'' to specify how it relates to the PBV program and revises the definition of ''waiting list admission'' to include owner-maintained waiting lists.

This final rule added to the definition of ''project'' to more clearly describe the discretion PHAs already have to modify the definition of project in their Administrative Plans. This final rule adds a definition of ''tenant rent'' as applicable to the PBV program. This final rule also adds the definitions for building, gross rent, manufactured home, PHA Plan, program receipts, total tenant payment, utility allowance, and utility reimbursement to clarify that these terms apply to the PBV program.

This final rule removes the term ''eligible'' from the definition of ''in-place family,'' and instead discusses the eligibility of an in-place family in § 983.251. HUD also changes ''proposal selection date'' to ''proposal or project selection date'' to align with changes made to § 983.51 (described below).

This final rule makes a conforming change to align the PBV program definition of ''housing quality standards'' with the revised HCV program definition discussed previously in the description of the changes to § 982.4.

In addition, this final rule removes the definition of ''project-based certificate (PBC) program'' because it is no longer in existence. Finally, this final rule removes the definition of ''request for release of funds and certification'' and moves the relevant information that was contained in the proposed rule to a more appropriate location, § 983.56.

§ 983.4 Cross-Reference to Other Federal Requirements

HUD proposed to revise HUD's labor standards cross-reference regarding applicability of regulations implementing the Davis-Bacon Act, but HUD at this final rule removes this change. As explained in the summary of changes to § 983.153, HUD requires Davis-Bacon compliance regardless of whether an Agreement (referring to an Agreement to enter into a HAP contract) is used in this final rule so the change to this section is no longer necessary. HUD notes that under section 12(a) of the 1937 Act, the labor standards provisions cross-referenced in § 983.4 only apply where there is an agreement for section 8 use before construction or rehabilitation is commenced. As discussed in reference to the changes to § 983.153, the PHA's pre-construction offer and owner's acceptance of PBV assistance to be provided once the units are constructed or rehabilitated constitutes an agreement triggering Davis-Bacon requirements on projects with 9 or more assisted units, in accordance with section 12(a) of the 1937 Act, regardless of whether an Agreement is used.

Finally, as a technical matter, HUD has revised § 983.4 to remove the reference to the definitions in 24 CFR part 5, subpart D. Because HUD has revised § 982.4(a)(2) to properly incorporate the relevant definitions in 24 CFR part 5, subpart D, and because § 983.4 incorporates 982.4, this incorporation is not necessary.

§ 983.5 Description of the PBV Program

HUD makes a minor revision to the proposed § 983.5(a)(1) to include the citation to the consolidated annual contributions contract (ACC). This final rule also revises paragraph (a)(3) to better describe the options available for development of newly constructed and rehabilitated housing, including adding reference to the option added in this final rule to § 983.157 (which is described in greater detail below). HUD revises paragraph (c) to require PHAs to provide notice to HUD when the PHA executes, amends,[7] or extends a HAP contract, to align with system development already in progress,[8] and makes changes to align with the language in § 983.10, to require the PHA to address all PBV related matters over which the PHA has policymaking discretion.

§ 983.6 Maximum Amount of PBV Assistance (Percentage Limitation)

This final rule revises paragraphs (a) and (e) to explain how to calculate the maximum number of PBV units to prevent the possibility of the PHA miscalculating the cap and project-basing more units than it should. This change reflects that the cap is 20 percent *as adjusted,* and not a flat 20 percent of all Annual Contributions Contract (ACC) units because the PHA must remove excluded units when calculating the cap. This final rule also corrects the date in paragraph (a)(2), and in paragraph (a)(3) expands the conditions under which the PHA may not add units to PBV HAP contracts to include

[7] Amendments in this context refers to changes such as those that add or substitute contract units, rather than substantive revisions to contractual text. The general requirement per 24 CFR 982.162 to use HUD-prescribed forms, including PBV HAP contracts, without modification remains in place.

[8] *See* 84 FR 70986 (Dec. 26, 2019); 85 FR 60249 (Sep. 24, 2020); 88 FR 28594 (May 4, 2023).

paragraph (e). In paragraph (b), HUD clarifies that the PBV assistance percentage limitation applies to all PBV units which the PHA has selected, and that selection takes place from the time of the proposal or project selection date.

This final rule also revises language in paragraph (d)(1)(iii) to require that the Administrative Plan describe the availability of supportive services in alignment with the language in § 983.10. HUD amends paragraph (d)(1)(iv) to remove the separate exception category for census tracts with a poverty rate of 20 percent or less, given the revised definition of an ''area where vouchers are difficult to use'' now includes a census tract with a poverty rate of 20 percent or less, as explained further in the discussion of § 983.3 above, and moves the proposed paragraph (d)(1)(v) to (d)(1)(iv). HUD adds a new exception in response to public comment to paragraph (d)(1)(v) for units that replace, on a different site, the units removed from the housing types listed in § 983.59(b)(1)–(2) (see discussion of comments received regarding § 983.59). HUD revises paragraph (d)(2) to increase the program cap and project cap for PBV units to include the Fostering Stable Housing Opportunity (FSHO) authority enacted in section 103 of division Q of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260, 134 Stat. 1182).[9] Pursuant to section 103(c)(1) of FSHO, the percentage limitation (*i.e.,* the program cap) now includes units that are exclusively made available to eligible youth receiving FUP/FYI assistance under the 10 percent increased cap. This final rule adds a new paragraph (d)(3) to clarify requirements to fill units under certain 10 percent increased cap categories with the appropriate families.

This final rule also revises paragraph (e) by explaining that units previously subject to federally required rent restrictions or that received long-term rental assistance from HUD are removed for purposes of calculating the percentages under paragraphs (a) and (d) of this section.

This final rule also revises paragraph (1)(ii) by adding ''space service'' to the definition of ''veteran'' to accurately include types of service encompassed within the current statutory definition of ''veteran'' found in the Department of Veterans Affairs governing statutes (*i.e.,* 38 U.S.C. 101(2)). By adding ''space service,'' it will ensure that no type of service for a veteran or veteran family goes unaccounted for.

[9] *See* 87 FR 3570 (Jan. 24, 2022).

§ 983.10 PBV Provisions in the Administrative Plan

HUD revises the structure of § 983.10 to outline the areas in which PHAs have policymaking discretion specific to the PBV program and requires these policies be included in the PHA Administrative plan. The PHAs' policymaking discretion is noted throughout part 983 consistent with this section. Section 983.10 includes a brief description of the provisions that must be in the Administrative Plan for a PHA that operates a PBV program and a citation in each provision to the regulation that provides complete details about the requirement. However, HUD notes that the policies listed in § 983.10 are the minimum that the PHA must include in its Administrative Plan. There are additional areas, beyond those listed in § 983.10, where a PHA may properly exercise policy-making discretion consistent with language in other sections in this part. In cases where a PHA exercises this discretion, these additional policies must be included in the PHA's Administrative Plan.

§ 983.11 Project-Based Certificate (PBC) Program

In the proposed rule, HUD proposed to move § 983.10, dealing with Project-Based Certificates (PBC), to § 983.11. However, the PBC program was replaced by the PBV program in 2001 and no units remain in the PBC program.[10] Therefore, in this final rule, references to the PBC program have instead been removed. The currently codified § 983.10, dealing with PBC, is instead being removed entirely. Because the previous § 983.10 is not being moved to § 983.11, the proposed § 983.12 is, in this final rule, moved up to § 983.11. Section 983.12 of this final rule is new to this final rule and discussed further below.

§ 983.11 Prohibition of Excess Public Assistance

In response to public comments, HUD revises paragraph (d)(2) dealing with subsidy layering review. Instead of requiring Subsidy Layering Review (SLR) any time new funding of any amount or percentage is added to the project during the term of the HAP contract, HUD will specify when a new SLR is required via a **Federal Register** notice, consistent with current practice. HUD concluded that finalizing paragraph (d)(2) as proposed would be administratively burdensome.

[10] Units under a PBC Agreement executed by the PHA and Owner prior to January 16, 2001, remained in the PBC program. The maximum term for PBCs under standard-form PBC HAP contracts was an aggregate 15 years (generally, three 5-year terms). Therefore, no more valid PBC HAP contracts should exist. Upon expiration of a PBC HAP contract, a PHA and Owner could agree to renew the PBC contract as a PBV contract, consistent with section 6904 of the Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28, and the now repealed 24 CFR 983.310(b)(1)(ii).

§ 983.12 Project Record Retention

This final rule adds a new § 983.12 to cover program accounts and records for the PBV program (§ 982.158 continues to apply to records applicable to both the tenant-based and project-based programs, except as now specified in § 983.2). While these documents should already be maintained for compliance with HUD's regulations, this section provides a specific list of documents, location, and time period for retention of the PBV HAP contract and any PBV-specific documents (*e.g.,* Agreement to enter into HAP contract (Agreement), completion documents, SLR, environmental review, selection materials), including records demonstrating the independent entity's review of a PHA-owned project selection. This section includes retention provisions for records newly required under new PBV program components of this final rule.

§ 983.51 Proposal and Project Selection Procedures

This final rule amends § 983.51 throughout to clarify the distinction between competitive selection of proposals versus noncompetitive selection of projects since selection without competition does not entail solicitation or selection of competing proposals. As recommended by commenters, this final rule revises paragraph (a) by allowing entities that have site control to submit PBV proposals. HUD intends to provide further guidance on what HUD considers to be ''site control'' through PIH notice.

Paragraph (a) also specifies that an owner may submit PBV proposals to cover multiple projects where each consists of a single-family building. Consistent with § 983.10, HUD clarifies the requirement that the PHA Administrative Plan must describe the procedures for submission and selection of PBV proposals under the methods of competitive selection in paragraph (b) and selection of projects under an exception to competitive selection under paragraph (c), including under what circumstances the PHA will use the selection methods described in paragraphs (b) and (c).

HUD amends paragraph (b)(1) to address the methods the PHA must use for competitive selection of PBV

proposals. This change clarifies that the PHA request for proposal (RFP) selection method can be a part of another competition or run simultaneously with another competition. This change also addresses public concerns about the inability or difficulty of awarding PBVs to projects that also compete and receive other funds, specifically development dollars through Low-Income Housing Tax Credits (LIHTC), Housing Trust Fund (HTF), and HOME investment partnerships program. HUD also makes clarifying changes to paragraph (b)(2) to remove the language concerning LIHTC and HOME to avoid confusion because, in practice, LIHTC and HOME almost always require the PBVs to be awarded prior to receiving applications.

HUD clarifies in paragraph (c) that prior to a PHA selecting one or more projects for PBV assistance without competition, the PHA must notify the public of its intent to do so in its 5-Year Plan. HUD also reorganizes paragraph (c)(1) in the proposed rule by moving applicable requirements to new paragraphs (c)(1)(i)–(ii). Further, in response to public comments, HUD adds clarifying language to paragraphs (c)(1) and (c)(2) to better align with the statutory language in section 8(o)(13)(N) of the 1937 Act as amended by HOTMA, including a clarification under (c)(1)(i) and a new paragraph at (c)(2)(iv) regarding the number of units permitted to be replaced.

This final rule also adds a new paragraph (c)(3), which provides increased flexibility for PHAs to noncompetitively select a project comprised of PHA-owned units. HOTMA expressly allows PHAs to attach PBVs to projects in which the PHA has an ownership interest without following a competitive process in cases where the PHA is engaged in an initiative to improve, develop, or replace a public housing property or site. HUD implemented this provision in 2017. Based on HUD's experience with these noncompetitive selections and after careful consideration, HUD believes that it is advisable to extend the exception to PHA-owned units in general. The main benefit of this final rule change is to strengthen the PHA's ability to preserve and expand affordable housing by increasing the viable options and paths available to the PHA through strategies such as acquisition followed by rehabilitation. HUD further adds paragraph (c)(4) to streamline the process of project-basing units when a family chooses to relinquish their enhanced voucher for PBV assistance. The new paragraph extends the types of housing that can be selected without going through a competition. HUD also notes that PIH Notice 2013–27 provides essential background on the voluntary relinquishment of enhanced voucher assistance (and regular housing choice voucher assistance) in exchange for PBV assistance.

HUD clarifies paragraph (e)(2)(i) to state that all contract units must fully or substantially comply with HQS on the proposal or project selection date. HUD also restructures and amends paragraph (f) of the proposed rule to add new paragraphs (1) through (5) to address the separate notice requirements depending upon whether a proposal is selected competitively, or a project is selected without competition and to provide a cross-reference to applicable language that must be in the notice for certain projects. Finally, HUD clarifies in paragraph (h) that under no circumstances may a HAP contract be effective for any of the subsidized housing types set forth in § 983.53(a).

§ 983.52 Prohibition of Assistance for Ineligible Units

HUD clarifies the meaning of paragraphs (a), (a)(3), (b), and (d) by replacing the term ''attach'' with clearer statements of the prohibited actions for the listed units, to align with the changes to § 983.53 described below. This final rule creates an exception to the total prohibition in the original PBV rule on project-basing for manufactured homes under paragraph (a)(5) where both the manufactured home is permanently attached to the ground and the owner owns both the manufactured home and the land. Allowing PBVs for manufactured homes will likely decrease the cost to build, allow PBVs to be in areas where traditional building would be difficult, and avoid requiring changes to construction plans solely for the purpose of compliance.

Paragraph (c) provides that a PHA may attach assistance to an occupied unit only if the occupant is eligible. HUD amends paragraph (c) to specify what ''eligible'' means in this context, and to clarify when eligibility is determined. Eligibility of the family is determined in accordance with § 982.201 prior to attaching assistance to the unit (*i.e.,* executing a HAP contract or amending a HAP contract by adding or substituting a unit). For the unit to be eligible, the unit must be appropriate for the size of the family and the tenant's total tenant payment (TTP) must be lower than the gross rent. These changes in paragraph (c) ensure PHAs are aware of existing requirements, including that the family's TTP cannot be so high as to eliminate the need for assistance (commonly calling being ''zero-HAP'') at admission.

HUD updates the exceptions applicable to paragraph (d), adding that the requirements are not applicable if the PHA is undertaking rehabilitation after HAP contract execution per § 983.157 of this final rule. Also, because an Agreement may be executed prior to its effective date, HUD revises paragraph (d) to be clear that the construction or rehabilitation is prohibited prior to the Agreement's effective date rather than the execution date. HUD also modifies paragraph (d) to allow PHAs to approve exceptions, in recognition that there may be circumstances in which the prohibition is inappropriate.

§ 983.53 Prohibition of Assistance for Units in Subsidized Housing

For better readability, in this final rule, HUD restructures the list of subsidized housing that is prevented from receiving PBV assistance. In paragraph (a), HUD replaces the introductory text with ''A HAP contract may not be effective and no PBV assistance may be provided for any of the following:'' for several reasons. First, HUD determines that PBV program requirements should not prevent execution of an Agreement for the listed subsidized housing types, as this reduces administrative flexibility even though no HAP is paid when an Agreement is executed. HUD notes that this is a change from the prior regulatory requirement and use of this flexibility will be subject to any requirements of the relevant non-PBV subsidy program. Second, because a HAP contract must be executed prior to the effective date of the contract (when HAPs may begin), there was no need to separately specify that the HAPs cannot be made for the subsidized housing types. Finally, HUD believes the wording changes improve readability. This final rule also removes proposed rule paragraphs (e) and (j) concerning rental assistance payments (RAP) and rent supplement projects (Rent Supp) because the Rent Supp and RAP programs have ended. However, unlike the Rent Supp program, there were some RAP projects remaining less than five years prior to the effective date of this final rule. Consequently, units in a few former RAP projects may still qualify for a limited period of time as excepted units from the program cap and project cap under the requirements at § 983.59. Please see the related discussion in the description of § 983.59 below regarding the reference to units in former RAP projects in that section.

§ 983.54 Cap on Number of PBV Units in Each Project (Income-Mixing Requirement)

In this final rule, HUD clarifies in § 983.54(a) that a PHA cannot select a proposal where the project cap is not being met, in addition to the prohibition on entering the Agreement or HAP contract. HUD amends paragraph (b) to remove the separate exception categories, given the revision of the definition of an ''area where vouchers are difficult to use'' to include a census tract with a poverty rate of 20 percent or less, as explained previously in the discussion of § 983.3 above. HUD further clarifies in paragraph (c) that exception categories in a project may be combined; expands the exception categories to include eligible youth using Family Unification Program (FUP) assistance in paragraph (c)(2)(ii); and provides that supportive services must be made available in a reasonable period of time not to exceed 120 calendar days in paragraph (c)(2)(iii). Additionally, in paragraph (c)(2)(iii), which was paragraph (c)(2)(ii) in the proposed rule, this final rule does not include a requirement that a PHA offering FSS must not solely rely on FSS to meet the exception to the project cap. HUD revises paragraph (c)(3) to specify that units covered by a PBV HAP contract under § 983.59 will not count towards the project cap and that these units are removed to ensure accuracy when calculating the percentages of dwelling units. In paragraph (d), HUD updates and expands provisions applicable to HAP contracts already in effect to include HAP contracts in effect prior to December 27, 2020, when the FUP exception became available.

§ 983.55 Site Selection Standards

HUD revises paragraph (b)(3) to include the site selection standards that were formerly found in § 982.401(l) and were removed in the NSPIRE final rule (88 FR 30442 (May 11, 2023)). HUD also takes this opportunity to amend the standards to add a specific reference to contamination, which is particularly important to the health of occupants, and to add a qualification that the serious adverse environmental conditions at issue are those that could affect the health or safety of the project occupants. As recommended by commenters, use of these standards provides an important protection for families, especially in cases in which an environmental review is not performed. HUD also revises paragraph (e)(7) to remove a typo concerning ''new construction,'' which appears in the current regulations and the proposed rule.

§ 983.56 Environmental Review

In the proposed rule, HUD proposed to revise the environmental review requirements for existing housing in accordance with section 106(a)(8) of HOTMA to exempt existing housing from further environmental review if an existing housing project has ever undergone an earlier environmental review pursuant to receiving any form of Federal assistance. In other words, if a project that meets the definition of ''existing housing'' as defined in the PBV regulations for program purposes has not previously undergone a Federal environmental review because it did not receive Federal assistance, then the project would not be exempt from an environmental review.

In endeavoring to give full effect to the words of section 8(o)(13)(M)(ii) of the 1937 Act, HUD recognizes the statute provides only a partial exemption to environmental reviews. Specifically, the applicability of the provision is limited to ''existing projects.'' Environmental reviews continue to be applicable to PBV rehabilitation and new construction projects. The limited scope of the proposed exemption from environmental reviews reflects Congress's continuing emphasis on the importance of Federal assistance being used in an environmentally sound manner.

Upon consideration of comments, HUD revises paragraph (a)(2) to better balance the words of the amended section 8(o)(13)(M)(ii) of the 1937 Act with Congress's continued environmental emphasis by excusing existing housing from undertaking an environmental review before entering into a HAP contract, except where a Federal environmental review is required by law or regulation relating to funding other than PBV housing assistance payments. This paragraph (a)(2) applies to projects selected using the site selection standards applicable upon the effective date of this final rule. In paragraph (a)(2), HUD changes the characterization of the exception for existing housing so as not to imply that the project has been determined to be ''exempt'' pursuant to an environmental review.

HUD makes minor technical revisions throughout the section, such as to consistently use the phrasing of paragraph (a) of the proposed rule that environmental reviews apply to ''activities'' (see responses to comment on § 983.56 for further discussion of technical changes). HUD amends the description of the ''responsible entity'' in paragraph (b) to explain more clearly which unit of general local government serves as the responsible entity. HUD also removes the final sentence of paragraph (b) of the proposed rule, as it was duplicative of text that appeared later in the regulation. HUD also removes the proposed rule's reference in paragraph (d) to amending a HAP contract, to conform to changes described below relating to § 983.207. Further, HUD clarifies in (d)(2) that HUD will approve the Request for Release of Funds and Certification by issuing a Letter to Proceed or form HUD–7015.16 when a responsible entity must complete an environmental review. In paragraph (e), HUD clarifies that the reference to the prohibited activities refers only to the listed actions by the PHA, the owner, or its contractors, rather than the actions by described in paragraphs (d)(1)–(3) that are taken by the responsible entity or HUD. Lastly, HUD revises paragraph (f) to require PHAs to document mitigating measures in accordance with part 50 or 58 of title 24, as applicable, and to complete or require the owner to carry out such measures and conditions.

§ 983.57 PHA-Owned Units

This final rule makes an edit to paragraph (b) to remove superfluous words. HUD also revises paragraph (b)(1) to clarify that the independent entity calculates the amount of reasonable rent and any rent adjustments by an OCAF, due to confusion the wording in the proposed rule raised given that HUD determines the OCAF. In response to comments received, HUD removes paragraph (b)(2) from the proposed rule, which results in a renumbering of paragraphs (b)(3) and (b)(4) to paragraphs (b)(2) and (b)(3) in this final rule. HUD also revises redesignated paragraph (b)(3) to clarify that the independent entity is responsible for not only reviewing the work completion certification, but also determining if the units are compliant with § 983.156. This final rule also makes this change to align redesignated paragraph (b)(3) with corresponding § 983.212 (which was § 983.157 in the proposed rule), per changes to § 983.212 described below. This final rule adds paragraph (b)(4) to expand the independent entity functions to include determining whether to approve substantial improvement to units under a HAP contract, since PHAs are required to perform this function for substantial improvement on units under a HAP contract for non-PHA-owned units.

Finally, HUD reorganizes and slightly modifies the language at paragraph (c) to

achieve consistency with a similar provision at 982.352(b)(1)(v)(B) regarding compensation of independent entities.

§ 983.58 PHA Determination Prior to Selection

In this final rule, HUD revises proposed § 983.58 for clarity purposes, to avoid any misinterpretation that budget authority is intertwined with the program cap. HUD also adds a new paragraph (b) to require that PHAs analyze the impact of having a high percentage of vouchers committed as PBVs. The PHA should consider the needs of the community, including families on the waiting list and eligible PBV families that wish to move under § 983.261. The analysis performed by the PHA must be available as part of the public record.

§ 983.59 Units Excepted From Program Cap and Project Cap

HUD clarifies in paragraph (b) that excluded units must fall into one of the outlined categories provided that the units are removed from all categories by the time of execution of the Agreement or HAP contract. This clarification aligns with the statutory language stating, ''units previously subject to federally required rent restrictions or receiving another type of long-term subsidy'' and means that the units must no longer be subject to the rent restriction or receiving subsidy.

This final rule removes paragraph (b)(1)(v), because the Rent Supplement Program ended more than five years ago and no longer exists. HUD notes that the Rental Assistance Program (RAP) (section 236(f)(2) of National Housing Act of 1965) also expired, but, unlike the Rent Supplement Program, the RAP expired at the end of 2019, less than 5 years ago. Because paragraph (b) of § 983.59 allows project-basing of units that were removed from the listed programs up to 5 years prior to the request for proposals (RFP) or the proposal or project selection date, RAP units may still be eligible for project-basing under paragraph (b).

HUD has amended § 983.59(b)(2) and included two additional types of units in the list of units ''previously subject to federally required rent restrictions'' that were not included in the list of excepted units implemented under the HOTMA Implementation Notices[11] in the **Federal Register**: (1) units financed with Low-Income Housing Tax Credits (26 U.S.C. 42) and (2) units subsidized with Section 515 Rural Rental Housing Loans (42 U.S.C. 1485). The final rule also amends § 983.59(b)(2) to provide that the list of excepted units ''previously subject to federally required rent restrictions'' shall also include any other program subsequently identified by HUD through a **Federal Register** notice that is subject to public comment.

Further, to provide regulatory streamlining, this final rule removes proposed rule paragraph (c) which provided that other excluded units include both HUD's Rental Assistance Demonstration (RAD) program and HUD VASH set-aside vouchers from the PBV program and project caps (these programs continue to be governed by the applicable notices and waivers therein). Instead, HUD redesignates proposed rule paragraph (d) as paragraph (c), which discusses replacement units. In redesignated paragraph (c), HUD clarifies that replacement units can be built on the original project site, instead of the ''public housing development.'' This clarification removes the limitation of ''public housing development'' and expands the qualification of an original project site to include all of the formerly assisted or restricted projects covered by this section. In new paragraph (e), this final rule clarifies that the 10 percent exception under § 983.6 and the project cap exception under § 983.54(c)(2) are inapplicable to units excluded under this section.

§ 983.101 Housing Quality Standards

This final rule makes a conforming change to align paragraph (a) with the revised PBV program definition of HQS at § 983.3.

§ 983.103 Inspecting Units

HUD revises § 983.103(a) to clarify that the regulatory inspection provisions of paragraph (c) of this section apply only when the pre-selection inspection determines the project meets the definition of existing housing.

HUD amends paragraph (b) to specify the times at which an initial inspection is required for newly constructed or rehabilitated housing or for units that underwent substantial improvement prior to being added to the HAP contract. The times at which an initial inspection is required, and the specific units which are to be inspected, depend on whether the work was development activity or substantial improvement, and, in the case of rehabilitation, whether the development activity occurs before or after HAP contract execution. HUD believes separating the requirements in this final rule will improve readability. HUD also revises paragraph (c)(1) to better explain the Administrative Plan provisions that are applicable.

Paragraph (c)(2)(ii) of the proposed rule provided that the PHA must give a notice to families offered a unit with non-life-threatening deficiencies that explains, among other things, that the owner's failure to correct the deficiencies within the cure period will result in removal of the unit from the HAP contract. This final rule revises paragraph (c)(2)(ii) to also require the PHA to provide a similar notice to families offered units without deficiencies, if some units in the project have non-life-threatening deficiencies and the PHA's Administrative Plan provides that the PHA will terminate the entire PBV HAP contract if the owner fails to correct the deficiencies within the cure period.

In paragraph (c)(2)(iv), HUD revises the regulatory language to be clear that PHAs must release the withheld payment to the owner once the deficiencies are corrected within the cure period, as required by section 8(o)(8)(G)(ii) the 1937 Act. This statutory requirement provides that the PHA must resume assistance payments and must cover the withheld period if the owner made the repairs before the cure period ends. This change to align the regulations with the statute is also reflected in paragraphs (c)(3)(vii), (c)(4)(iv), and (c)(4)(v).

This final rule also modifies paragraph (c)(2)(v) (which was mistakenly labeled as paragraph (c)(2)(iv) in the proposed rule) by requiring PHAs to provide any affected family tenant-based assistance when the PHA terminates the PBV HAP contract or removes the unit from the HAP contract due to the owner's failure to correct deficiencies. The provision of tenant-based assistance in this circumstance is required by section 8(o)(13)(F)(iv) of the 1937 Act and was inadvertently omitted from the proposed rule's description of the process. This final rule makes the same modification to paragraphs (c)(3)(viii) and (c)(4)(vi).

HUD revises paragraphs (c)(3) and (c)(4) to align with changes in § 982.406 that apply to PBV. This final rule subjects the PHA's adoption of an alternative inspection option to the procedures and requirements outlined in § 982.406(b), (c), (d), and (g). The changes in paragraph (c)(3)(v) provide clarifying changes to existing established policy. To ensure that the PHA is transparent to families that are referred to and provided a unit with non-life-threatening deficiencies, this final rule revises paragraph (c)(4)(i) to require that PHAs provide these families

[11] *See* 81 FR 73030 (Oct. 24, 2016); 82 FR 5458 (Jan. 18, 2017); 82 FR 32461 (Jul. 14, 2017).

a list of those deficiencies and inform them of the option to decline the unit without losing their place on the PBV waiting list.

In paragraph (c)(4)(v), HUD clarifies that PHAs make retroactive payments upon correction of deficiencies beginning at the later of the effective date of the HAP contract or the PBV lease effective dates. This final rule revises paragraph (c)(4)(v) and (c)(4)(vi) explaining the PHA's requirements when the owner fails to make repairs within the applicable time periods. For the safety of the family, this final rule adds a requirement to paragraph (c)(4)(v) that explicitly prohibits PHAs from referring families from the PBV waiting list to occupy units with life-threatening deficiencies. In alignment with § 983.10, paragraph (c)(4)(vi)(B) clarifies that the PHA's Administrative Plan must specify whether the PHA will remove only a unit with deficiencies from the HAP contract for the owner's failure to correct the deficiencies, as opposed to terminating the entire HAP contract (only the latter, terminating the contract, had been included in paragraph (c)(4)(vi)(B) of the proposed rule).

This final rule also amends paragraph (e) concerning periodic inspections, to provide that the alternative inspection option is available for periodic inspections and to specify which provisions of § 982.406 apply. HUD makes changes to paragraph (e) to specify how to comply with the sampling requirement in the event that fewer than 20 percent of contract units are available for occupancy in accordance with development activity occurring under § 983.157. HUD also makes changes to align with the NSPIRE final rule (88 FR 30442 (May 11, 2023)) in paragraph (e), which incorporates the requirement that small rural PHAs inspect random sample units at least once every three years. This final rule makes changes to paragraph (f), which specifies the PHAs' timing and inspection requirements for life-threatening deficiencies, non-life-threatening deficiencies, and extraordinary circumstances, to align with § 982.405, which covers PHA inspections. The changes in paragraph (i) are a change in terminology to avoid conflict with the term ''mixed finance'' as used in public housing projects.

§ 983.152 Nature of Development Activity

This final rule revises § 983.152(a)(2) to remove discussion of substantial improvement to add previously unassisted units and instead provide reference to the development activity applicable to a rehabilitated project undergoing work after HAP contract execution per § 983.157 of this final rule. As discussed in the description of changes to § 983.3 above, HUD determines that ''development activity'' should be clearly distinguished from ''substantial improvement.'' As a result, HUD removes the corresponding reference to activities now classified as ''substantial improvement'' in (a)(2) and deletes paragraph (b)(2), moving pertinent requirements applicable to substantial improvement to add or substitute units to § 983.207(d) of this final rule. The new language of paragraph (a)(2) is added to clearly describe the nature of the development activity under § 983.157, which is completed following HAP contract execution instead of beforehand. HUD also updates paragraph (b) to appropriately reference the new requirements applicable to § 983.157.

§ 983.153 Development Requirements

This final rule makes several minor revisions to citations in § 983.153 for consistency with the changes to § 983.152 described above. Also, this final rule makes a minor clarifying revision to the first sentence in paragraph (b)(2), by requiring subsidy layering review before a PHA attaches assistance to a project, instead of subsidy layering review occurring before a PHA commits to provide assistance to a project. This clarifying change is to prevent any possible ambiguity about whether the subsidy layering review is required before the proposal or project selection date; in other words, HUD makes clear that the rule only requires that the subsidy layering review occur no later than execution of an Agreement or HAP contract.

This final rule requires in § 983.153(b)(4) that the owner disclose changes to the information provided for the subsidy layering review, to ensure that the change(s) may be reviewed and that it does not result in excessive public assistance to the project.

This final rule revises paragraph (c) of the proposed rule to require Davis-Bacon compliance regardless of whether an Agreement is used. The PBV program is subject to statutory labor standards provisions in section 12(a) of the 1937 Act. Section 12(a) of the 1937 Act requires the applicability of Davis-Bacon prevailing wages to the development of low-income housing projects containing nine or more section 8-assisted units, where there is an agreement for section 8 use before construction or rehabilitation is commenced. In reconsidering both HUD's current position and the alternative suggested in the proposed rule with respect to the meaning of ''agreement'' in section 12(a), HUD has determined that an ''agreement'' under section 12(a) encompasses more than the PBV Agreement (*i.e.,* Form HUD–52531) and includes the agreement that consists of the PHA's project selection and resulting offer of assistance to the owner, and the acceptance of PBV assistance by the owner. HUD also recognizes the importance of Davis-Bacon prevailing wage requirements to the workers in the community where the owner has sought a commitment of PBVs in advance of development, as commenters suggested. Consequently, HUD will require the notice of proposal selection to require payment of Davis-Bacon prevailing wages for development of newly constructed or rehabilitated projects containing nine or more section 8-assisted units regardless of whether the PHA and owner will be using an Agreement. This final rule also makes a slight modification to paragraph (c)(1) to correct the citation in paragraph (c)(1). HUD also consolidates paragraphs (c)(2) and (c)(3) of the proposed rule into a single paragraph (c)(2), to better reflect that the labor requirements at issue apply in the case of development involving nine or more contract units. This final rule adds a citation to § 983.51(f) in paragraph (c)(3) (which had been paragraph (c)(4) in the proposed rule) and makes paragraph (c)(3) consistent with § 983.51(f), which discusses a PHA's written notice of proposal selection.

This final rule revises the development requirements that apply to PBV development activity by removing the reference that section 3 of the HUD Act of 1968 [12] applies (proposed rule paragraph (d)), since section 3 no longer applies to PBV per the final rule on Enhancing and Streamlining the Implementation of Section 3 Requirements for Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses (85 FR 61524 (Sep. 29, 2020)). As a result of this removal, this final rule also redesignates proposed rule paragraphs (e) through (g) as final rule paragraphs (d) through (g). Additional citation corrections occur in redesignated paragraphs (d), (e), and (f). Further, consistent with § 983.51(k), this final rule expands paragraph (g) to include in the list of participants ineligible to participate in Federal programs and activities those who are debarred, suspended subject to a limited denial of participation, or otherwise excluded

[12] 12 U.S.C. 1701u.

under 2 CFR part 2424. Finally, HUD adds a cross-reference § 982.161 to paragraph (g)(2) of this final rule, to clarify the existing requirement of the conflict of interest provision.

§ 983.154 Development Agreement

This final rule amends paragraph (a) to clarify project-basing of single-family scattered sites. As commenters suggested, paragraph (a) allows one Agreement to cover multiple projects that each consist of a single-family building. Finally, this final rule makes minor amendments to paragraph (a) to remove reference to § 983.152, consistent with changes to that section as described above, and to add reference to the new paragraph (g).

This final rule specifies in paragraph (b) that paragraph (f), concerning PHA discretion to execute an Agreement after construction or rehabilitation in compliance with § 983.153, is an exception for the timing of the Agreement. HUD also adds clarification that the Agreement must be executed on the same day as or in advance of its effective date.

This final rule inserts a new paragraph (c) to specify that the PHA and owner may agree to amend the Agreement per paragraph (e). In paragraph (d), this final rule clarifies that paragraphs (f) and (g) provide exceptions to the prohibition on entering into an Agreement if development activity has commenced. HUD also makes additional changes in paragraph (d) to clarify the timing of the Agreement that correspond to the change to paragraph (b) described above. This final rule revises paragraph (e) to expand the content of the agreement to include a description of any rehabilitation work agreed to, a deadline for the completion of work, and any additional design, architecture or quality requirements placed on the owner by the PHA. The addition of a deadline for completion of work addresses the oversight in the proposed rule wherein § 983.155(a) of the existing regulation was removed rather than relocated.

This final rule clarifies in paragraph (f) when the PHA may execute an Agreement later than the timing provided in paragraph (b) and corrects the applicability of requirements in the case of a project that is noncompetitively selected. The changes in paragraph (f) also provide PHAs with discretion to not use an Agreement or execute an Agreement after construction or rehabilitation for development activity in compliance with the requirements under § 983.153. Paragraph (f) also requires that the PHA explain the circumstances under which the PHA will enter a PBV HAP contract without first entering into an Agreement and the circumstances the PHA will enter into an Agreement after construction or rehabilitation in the Administrative Plan. This paragraph also requires that the PHA comply with the new requirement at § 983.153(c)(3) and confirm owner compliance with the owner's requirements under § 983.153. Finally, this final rule makes a minor amendment to paragraph (f) to remove reference to § 983.152, consistent with changes to that section as described above.

This final rule adds paragraph (g) to explain the exception to the requirement to enter into an Agreement established in § 983.157. Paragraph (g) also explains the relationship between the Agreement and the HAP contract in the event that some work occurs under an Agreement before the PHA exercises the option at § 983.157.

Lastly, this final rule adds paragraph (h) explaining the PHA's options when the units are PHA-owned with no separate legal entity to serve as the owner. A PHA cannot execute an Agreement with itself. In the proposed rule, HUD stated that a PHA-owned agreement certification is not needed as an alternative to an Agreement because projects may now be developed without an Agreement. Upon further review, HUD determined that there may be situations in which development without an Agreement is not feasible, such as when a lender requires use of an Agreement or equivalent commitment prior to development. Therefore, this final rule provides that unless a PHA is exercising its discretion not to use an Agreement, the PHA will need to follow a process similar to the process adopted in this final rule for executing the HAP contract or an equivalent certification (see § 983.204). For consistency with § 983.204 of this final rule, HUD provides that PHAs have the option to either establish a separate legal entity to execute the Agreement or use a PHA-owned agreement certification in this final § 983.154(h).

§ 983.155 Completion of Work

In tandem with requiring the owner to submit evidence and certify to the PHA that development activity or substantial improvement is completed, this final rule adds that a PHA must review the owner's completion evidence and determine whether development activity or substantial improvement was completed. This final rule also adds a new paragraph (b) for consistency throughout part 983 and to specifically address completion of work for PHA-owned units. Paragraph (b) provides in the case of a PHA-owned unit, the PHA must submit that evidence to the independent entity and the review is the responsibility of the independent entity. Finally, HUD clarifies that the form and manner of the submission and certification is specified in the PHA's Administrative Plan.

§ 983.156 PHA Acceptance of Completed Units

This final rule makes a minor revision to paragraph (a) to clarify that the PHA inspection is to determine whether the units comply with HQS and additional PHA requirements. HUD revises paragraph (b) to provide specific instruction with regard to completion of units, depending on whether the units are completed prior to HAP contract execution, following HAP contract execution, or in order to be added to the HAP contract. These changes to paragraph (b) accommodate changes to §§ 983.152 and 983.157, as discussed further in the description of changes to those sections. In response to public comments, this final rule adds a new paragraph (c) to provide that HAP contracts for projects that are not subject to § 983.157 may be executed in stages, as units in a newly constructed or rehabilitated project are completed. This final rule also adds paragraph (d) for consistency throughout part 983, to separate PHA-owned units from other units. Under new paragraph (d), this final rule requires that independent entities inspect units and determine whether those units are HQS-compliant.

§ 983.157 Rehabilitated Housing: Option for Development Activity After HAP Contract Execution

In the proposed rule, HUD proposed to include provisions on substantial improvements (previously termed ''development activity,'' as explained in the discussion of § 983.3 above) to units under a HAP contract in § 983.157. However, HUD determines that such provisions are inappropriate under subpart D of part 983 (Requirements for Rehabilitated and Newly Constructed Units), as placing the provision there produced confusion about the distinction between development activity for newly constructed and rehabilitated projects and work to improve units well after a HAP contract is in effect (which could be performed in any type of project). Therefore, in this final rule, the provisions proposed to be in § 983.157 have been moved to § 983.212 and are discussed in that section below. Section § 983.157, as codified in this final rule, instead is new

to this final rule and discussed further here.

This final rule adds the new provisions of § 983.157 in response to public comment. Commenters described situations in which development activity would be undertaken in rehabilitated projects that are already occupied and may meet HQS. HUD determined that occupants of such projects, if they qualify for PBV assistance, would benefit from receipt of assistance as soon as possible. Accordingly, and in addition to the options already available to the PHA under current regulations and in this final rule, § 983.157 of this final rule provides that the PHA may allow an owner of a rehabilitated housing project to conduct some or all of the development activity during the term of the HAP contract. Under this option, the PHA and owner place all proposed PBV units under the HAP contract before the owner completes development activity, subject to the limitations established in § 983.157 of this final rule. During the period of development activity, the PHA makes assistance payments to the owner for the contract units that are occupied and meet HQS. HUD determines this option is permissible in accordance with section 106(a)(4) of HOTMA.

Section 983.157 of this final rule provides for the PHA to exercise its discretion to use this option in accordance with the PHA's Administrative Plan. It establishes conditions that must be met to use this option and a contract framework, which applies a contract rider during the development period. Section 983.157 of this final rule also establishes requirements applicable to the occupancy of units during the rehabilitation period, completing the rehabilitation, and PHA-owned units. Under this option, the owner agrees to develop the contract units to comply with HQS, and the PHA agrees that, upon timely completion of such development activity in accordance with the terms of the rider, the rider will terminate and the HAP contract will remain in effect. HUD makes conforming changes throughout part 983 to accommodate this option (discussed further in the review of general technical changes below). The final rule clarifies that existing households be given an absolute selection preference to return to the project when a household needed to vacate for development activity. HUD notes that the leasing of units in a PBV project must comply with federal fair housing and related requirements, including ensuring that any designated accessible units are occupied by households who need the accessibility features, and that emergency transfers under VAWA are provided.

§ 983.202 Purpose of HAP Contract

In response to public comments, HUD revises paragraph (a) to better clarify the existing flexibility that allows PHAs and owners to place multiple projects that each consist of a single-family building under one HAP contract.

§ 983.203 HAP Contract Information

HUD in this final rule revises § 983.203(h) to require that the HAP contract include units that are restricted to certain occupants via the project cap or program cap. The purpose of the change is in hopes of minimizing the possibility of PHAs losing track of what units must be set aside by ensuring that the HAP contract clearly specifies units that are restricted to certain occupants by virtue of the project cap *or program cap*. The changes in this section are consistent with the Fostering Stable Housing Opportunities (FSHO) notice,[13] which notes that the increased program cap applies only if a family eligible for that 10 percent authority resides in the unit—this means PHAs need to keep track of the units that are under the increased program cap that must be set aside for occupancy by qualifying families (as was already required for the project cap).

§ 983.204 Execution of HAP Contract or PHA-Owned Certification

This final rule amends § 983.204(b) and (c) to clarify that HAP contracts must be promptly executed and effective as described. This final rule also amends paragraph (c) to specify requirements applicable to projects undergoing development activity after HAP contract execution, as described further above in the discussion of changes to § 983.157. This final rule inserts a new paragraph (d) to clarify that the effective date of a PBV HAP contract must be on or after the execution date of the PBV HAP contract. HUD also amends and reorganizes paragraph (e), which was paragraph (d) in the proposed rule, to align with corresponding requirements in § 982.451(c). Redesignated paragraph (e)(1) now expressly states the requirement that the separate legal entity must execute the HAP contract with the PHA, and HUD deletes paragraph (d)(1)(ii) from the proposed rule. HUD has revised paragraph (e)(2)(i) of this final rule to clarify that the PHA-owned Certification obligates the PHA, as owner, to all of the requirements of the HAP contract. This revision prevents ambiguity with other regulations that reference HAP contracts but not the PHA certifications.

§ 983.205 Term of HAP Contract

HUD amends the extension of term provision in § 983.205(b) to clarify the process for HAP contract term extensions and, while it retained the maximum extension term of 20 years that was in the proposed rule, provides a mechanism to execute multiple extensions concurrently as supported by commenters. Also, HUD removes the proposed paragraph (c) concerning independent entity oversight of the contract term and extensions for PHA-owned units, in response to public comments.

§ 983.206 Contract Termination or Expiration and Statutory Notice Requirements

HUD makes changes in this final rule to clarify the process for when a PHA manages the issuance of tenant-based vouchers to tenants at PBV contract termination, and related issues. Specifically, for § 983.206(a)(3), this final rule expands the definition of the term ''termination'' to include termination of the HAP contract by agreement of PHA and owner. As a necessary precondition of the statutory right to remain, in paragraph (b), this final rule also adds provisions specifying that the right to remain in a unit depends on the unit continuing to be used for rental housing and clarifies procedures for voucher issuance. As suggested by public comments, HUD provides additional clarification in paragraph (b) to specify that the PHA must issue vouchers, provide a timeframe for issuance, and require units to be removed from the contract if the family moves. HUD also moved the language in proposed paragraphs (b)(4) and (b)(5) into paragraph (b) to cover all families that are issued a voucher as the result of a PBV contract termination or expiration. This final rule made this change because the language in paragraphs (b)(4) and (b)(5) are applicable regardless of whether the family uses the voucher in the same project or in other housing.

After consideration of public comments, this final rule revises paragraph (b)(4) (proposed paragraph (b)(6)) to expand upon the exceptions in which an owner may refuse to initially lease and to limit ''other good cause'' to tenant misconduct and where the owner uses the unit for a non-residential purpose or renovates the unit. However, HUD provides a process by which families must be permitted to remain in

[13] *See* 87 FR 3570 (Jan. 24, 2022).

or return to the project, if possible, when a renovation occurs, to best fulfill the PBV statutory requirement allowing the family to remain, as provided by HOTMA section 106(a)(4). This final rule also changes paragraph (c) to clarify that expiring funding increments, which are a normal part of PHA operations, do not constitute insufficient funding. Paragraph (c)(2) includes a change specifying the respective section and paragraph that applies for HAP contract breaches involving failure to comply with HQS and other contract breaches. Lastly, this final rule adds paragraph (e), which provides the PHA and owner the discretion to terminate and how the owner and PHA can terminate their HAP contract.

§ 983.207 HAP Contract Amendments (To Add or Substitute Contract Units)

This final rule clarifies in paragraph (a) that substituted units may be vacant or, subject to paragraph (c), occupied. The final rule also removes the phrase ''and subject to all PBV requirements'' from paragraph (a) since the phrase is unnecessary and created confusion as to what requirements were at issue. HUD notes that this textual change is made for clarity only, and substitutions under paragraph (a) remain subject to all PBV requirements. HUD also clarifies the HQS and reasonable rent requirements to affirm that the unit must meet HQS and the rent must be reasonable in order to substitute the unit. Finally, the final rule includes in paragraph (a) a cross-reference to the requirements regarding units undergoing repairs or renovation before substitution (paragraph (d) in this final rule) and units that are newly built (paragraph (e) in this final rule).

HUD adds a requirement in paragraph (b), which provides that prior to adding a unit, the PHA must inspect the unit to determine that it complies with HQS, and the PHA must determine the reasonable rent for the unit. These additional requirements correspond to the same requirements that apply when substituting a unit. This final rule removes from paragraph (b)(1), which covers excluded and excepted units to the program or project cap, the citation to § 983.6, which discusses the percentage limitation for PBV units and discusses the types of units that will count toward the program cap.

HUD also revises paragraph (b)(3), moving the content of the proposed paragraph (b)(3) to a new paragraph (d) and including in paragraph (b)(3) only a cross-reference to paragraph (d). Paragraph (d) also contains significantly different text than that which appeared in proposed paragraph (b)(3). In accordance with the change to the definition of ''development activity'' described above in the discussion of changes to §§ 983.3 and 983.152, HUD replaces reference to ''development activity'' with reference to ''substantial improvement.'' Because projects containing units needing substantial improvement within the first two years must be categorized as rehabilitated housing (per discussion of changes to § 983.3 above), this final rule establishes that units may not undergo substantial improvement to be added to the project during this timeframe, barring extraordinary circumstances. For units that will undergo substantial improvement, HUD adds explanation of applicable requirements within paragraph (d), rather than referencing § 983.152 as proposed.

HUD similarly revises paragraph (b)(4) by moving the content of the proposed paragraph (b)(4) to a new paragraph (e) and instead including in paragraph (b)(4) only a cross-reference to paragraph (e). Paragraph (e) of this final rule also contains additional criteria beyond those that appeared in paragraph (b)(4) of the proposed rule. This final rule adds, in paragraph (e)(2), an amendment to the proposed requirement to address instances in which contract units are completed in stages. Further, the rule adds, in paragraph (e)(3), that a unit can be added to a HAP contract under certain situations in which part of the building is reconfigured into additional units. This latter addition expands the type of units that may be added to a HAP contract.

To clarify the requirements for adding units that are occupied, this final rule adds paragraph (b)(5), which cross-references the requirements regarding occupied units found in paragraph (c) of this final rule. This final rule moves paragraph (c) of the proposed rule to paragraph (g) and adds new paragraph (c) to address the requirements for substituting or adding occupied units and provide PHAs with the flexibility to place occupied units on the HAP contract.

In alignment with the requirements under § 983.10, HUD adds paragraph (f) requiring that PHAs describe in their Administrative Plan under what circumstances they will add or substitute contract units.

Finally, this final rule adds a new paragraph (h) explaining that HUD may establish procedures via **Federal Register** notice for a PHA and owner to merge two or more HAP contracts or bifurcate a single HAP contract. Allowing merger would facilitate administrative efficiency, to avoid a PHA having to repeat the same administrative actions for multiple contracts with the owner of a single project. It also follows from the HOTMA provision allowing units to be added to a contract at any time. Under the prior policy, HUD is aware that there may be projects for which the PHA and owner were unable to add units to a HAP contract due to the three-year limitation and therefore selected the project again for a separate HAP contract. This change would enable the contracts to be aligned going forward. Allowing bifurcation would provide administrative relief in other scenarios, such as if there is cause to establish separate ownership or management of two or more portions of a project.

§ 983.208 Condition of Contract Units

HUD revises § 983.208(a)(3) to require that the PHA specify conditions under which it will require additional housing quality requirements in its Administrative Plan consistent with § 983.10. To ensure that housing is decent, safe, and sanitary, this final rule requires in paragraph (b)(1) that the PHA take enforcement action against owners who fail to maintain a dwelling unit in accordance with HQS. HUD revises paragraph (b)(2) to align with § 982.404, and to remove the unclear phrasing ''considered to be.'' This final rule also specifies in paragraph (b)(2)(i) that ''other inspector'' is a person who is authorized by the State or local government. The proposed rule cross-referenced to §§ 982.401(a)(5) and 982.401(o) to cover the timeframes for units in noncompliance with HQS; however, in this final rule HUD outlines the timeframes for noncompliant units in paragraphs (b)(2)(iii)(A) and (B) in place of the cross-references. HUD clarifies in paragraph (b)(3) that the HAP is not withheld or abated in cases where the PHA waives the owner's responsibility for repairs, and revises the paragraph to better align with HOTMA in terms of when the waiver may be applied, namely for an HQS deficiency that the PHA determines is caused by the tenant, any member of the household, or any guest or other person under the tenant's control, other than damage resulting from ordinary use. HUD adds paragraphs (b)(4) and (5) to provide flexibility for PHAs to conduct substantial improvement in the case of an HQS deficiency caused by an extraordinary circumstance or to conduct development activity after HAP contract execution, respectively, and requires that the PHA withhold or abate HAP and remove or terminate HAP as long as the contract unit with deficiencies is occupied by an assisted family.

HUD also inserts a new paragraph (c) addressing family obligation. The addition of paragraph (c) reflects the contents of § 982.404, as § 982.404 is no longer applicable to PBVs in accordance with § 983.2 of this final rule. The changes in paragraph (c) outline how a family may be held responsible for a breach of the HQS, the family's required actions to cure the deficiency if the HQS breach is life-threatening, and the actions that the PHA must take in case of a breach of the HQS.

In revised paragraph (d), proposed paragraph (c), HUD replaces the use of the undefined term ''regular inspections'' with the specific inspections referred to, consistent with changes throughout this final rule. Consistent with § 983.10, revised paragraph (d) also requires that the PHA specify the conditions under which it will withhold HAP and abate HAP or terminate the contract for units other than the unit with HQS deficiencies in its Administrative Plan. Revised paragraph (d) also outlines the PHA's remedies when HQS deficiencies are identified in an inspection, excluding pre-selection, initial, or turnover inspections. In accordance with the 1937 Act as amended by HOTMA, this final rule revises paragraph (f) discussing the applicability of § 983.208 to HAP contracts. Per the statute, HUD determines that paragraph (f) applies to any dwelling unit for which a HAP contract is entered into or renewed after the effective date of this final rule, with ''renew'' under the statute meaning the earlier of agreement to extend or effective date of extension in the case of PBV.

§ 983.210 Owner Certification

To clarify the meaning of the certification in paragraph (a), given that compliance with HQS can include complying with requirements under part 983 to take specific actions in certain circumstances in which units do not fully meet HQS, HUD amends paragraph (a) to specify that the owner's compliance with HQS is subject to the requirements of part 983. To prevent a possible conflict with §§ 983.157 and 983.212, which allow the family to be temporarily housed while development activity or substantial improvement occurs, this final rule revises § 983.210(d) to specifically provide §§ 983.157(g)(6)(ii) and 983.212(a)(3)(ii) as an exception to the requirement that the unit be the family's only residence.

§ 983.211 Removal of Unit From HAP Contract

HUD moves from § 983.211(c) to paragraph (b) the requirement that reinstatement or substitution must be permissible under § 983.207. For clarification, HUD revises this requirement to reference § 983.207(a) and (b) specifically. This final rule also adds clarifying changes to paragraph (c) to require that the anniversary and expiration dates match all other units under the HAP contract. This clarification prevents the PHA and owner from matching the dates on the HAP contract for all other units with the dates for the reinstated or substituted units.

§ 983.212 Substantial Improvement to Units Under a HAP Contract

In this final rule, HUD moves the proposed § 983.157 to § 983.212 (as discussed further in the description of changes to § 983.157). HUD revises this section to address commenters' concerns over the timing of substantial improvement under a HAP contract. Specifically, HUD is breaking paragraph (a) into its components and revises paragraph (a) to outline the conditions under which the PHA may approve substantial improvement. The changes in paragraph (a)(1) set a reasonable expectation that the condition of housing placed under a PBV HAP contract should not need substantial improvement within the first two years of the HAP contract, barring the extraordinary circumstances subject to the exception in paragraph (a)(1)(i). To prevent tenants from being permanently displaced, paragraph (a)(1)(i) allows the PHA to approve the owner to undergo substantial improvement after a natural disaster or other ''extraordinary circumstances'' on a previously compliant unit and clarifies that ''extraordinary circumstances'' are unforeseen events that are not the fault of the owner. In paragraph (a)(1)(ii), HUD changes the relevant time period from five years to two years in response to public comment. Under paragraph (a)(2), HUD expands the description of the expected HQS deficiencies that must be reported to include the items at § 5.703(a)(2): components within the primary and secondary means of egress, common areas, and systems equipment. Further, HUD clarifies in paragraph (a)(2) the substantial improvement at issue must not include demolition and new construction of replacement units.

The changes in paragraph (a)(3) allow HUD to provide families with greater protection against being moved from the unit or project unnecessarily and against being required to remain in unsafe conditions. For paragraph (a)(3), this final rule adds several subsections to instruct the PHA and owner on what to do when families occupy units that will not comply with HQS during the substantial improvement. Paragraph (a)(3) also clarifies under what circumstances the family has to entirely vacate a unit during substantial improvement, which would only be when both in-place substantial improvement and temporary relocation cannot be achieved. HUD, in this final rule, explains whether families remain PBV participants or tenants under lease during re-housing and provides sufficient procedural information for a PHA and owner to carry out the moves. Paragraph (a)(3)(iii)(A) adds a requirement that a family that must be re-housed be offered an available vacant contract unit if there is one. In the case that the PHA issues the family a tenant-based voucher, paragraph (a)(3)(iii)(B) provides that the PHA must, either through voucher issuance based on family eligibility and willingness to request a voucher pursuant to § 983.261 or through removal of the unit from the HAP contract, issue the family its voucher to move. Finally, paragraph (a)(3)(iii)(C) requires that families that vacate the project be offered an opportunity to return. HUD notes that the leasing of units in a PBV project must comply with federal fair housing and related requirements, including ensuring that any designated accessible units are occupied by households who need the accessibility features, and that emergency transfers under VAWA are provided.

HUD clarifies that HAP and vacancy payments must be abated once the unit has any HQS deficiency during substantial improvement under paragraph (a)(4). This final rule adds paragraph (a)(5) to specify that vacant units are the units that may be temporarily removed from the contract and that failure to complete the substantial improvement as approved is a cause for a breach subject to § 983.206(c)(2). Paragraph (a)(5) also requires that the contract specify the terms of the PHA approval, to facilitate the PHA options for breach if the owner fails to comply.

This final rule amends the proposed paragraphs (b) and does not finalize the proposed paragraph (c) to conform to changes made across part 983 to separately characterize ''development activity'' and ''substantial improvement'' and remove descriptions of requirements applicable to substantial improvement from subpart D of part 983. Accordingly, paragraph (b) describes requirements that apply to substantial improvement. This final rule also adds a new paragraph (c) to require that for PHA-owned units an independent entity must make the

determinations otherwise made by the PHA in this section, to avoid a conflict.

§ 983.251 How Participants Are Selected

In this final rule, HUD clarifies in paragraph (a)(2) that the PHA determination of eligibility for a particular family must use information received and verified by the PHA. This is not a change to existing requirements, but the addition is necessary to ensure there is no confusion as a result of the explicit reference in § 983.2 that § 982.201(e) is inapplicable to the PBV program. This final rule also revises paragraphs (a)(2) and (b)(2) to clarify an existing requirement that the family cannot be zero-HAP at admission to the unit, and clarifies under paragraph (b)(1) that the eligibility of an in-place family is determined prior to attaching assistance to the unit (*i.e.,* executing a HAP contract or amending a HAP contract by adding or substituting units), not at the time the project or unit is initially selected to receive PBV assistance. This final rule clarifies paragraph (b)(3)(ii) regarding when an owner chooses to terminate or not to renew the tenant-based lease to remove language that may have implied the tenant-based voucher rules on termination or non-renewal function differently in the case of a unit proposed to be project-based. Consistent with § 983.10, this final rule also made changes to require that the PHA identify in the Administrative Plan details about how it structures the waiting list for the PBV program throughout paragraph (c). HUD also revises paragraph (c)(7)(x) for consistency and comprehensiveness with respect to the Department's nondiscrimination and equal opportunity regulations. Additionally, for organizational reasons, HUD relocates the requirement for PHAs to have some mechanism for referring to accessible PBV units a family that includes a person with a mobility or sensory impairment from § 983.252(c)(2) to § 983.251(c)(9).

To prevent the tenant from being subject to an impermissible requirement to accept services involuntarily, this final rule revises paragraph (d)(2) to state that the PHA must not require families to show they participate in their own equivalent services if they decline voluntary services. Consistent with § 983.10, in added paragraph (e)(2)(iii), HUD requires the PHA define ''good cause'' in the Administrative Plan, which, at a minimum, must include HQS deficiencies; a unit that is inaccessible or otherwise does not meet the disability-related needs of a household member with disabilities; circumstances beyond the family's control; and health or safety risk due to being a victim of domestic violence, dating violence, sexual assault, or stalking covered by 24 CFR part 5, subpart L. To benefit the tenants and based on public comments, HUD determines that PHAs cannot remove families from the waiting list when they reject units for any reason but must allow families to reject units for ''good cause'' without losing their place on the waiting list. This protects families from being penalized when a unit is not truly available to the family because the unit does not meet the family's needs.

§ 983.252 PHA Information for Accepted Family

HUD restructures proposed § 983.252(a), and moves the requirements previously at paragraph (c)(1) to paragraph (a)(2) so that the requirements that PHAs take appropriate steps to ensure effective communication in accordance with 24 CFR 8.6 and 28 CFR part 35, subpart E, and provide information on the reasonable accommodation process, applies for all families, and not only where the family head or spouse is a person with a disability. HUD further revises proposed § 983.252 to add the requirement that the PHA include in the family information packet information about the family's right to move in a new paragraph (b)(5). HUD has also moved the requirement at paragraph (c)(2) regarding accessible PBV units to § 983.251(c)(9), as discussed in the previous section. HUD also adds a new paragraph (c) to clarify the requirement that the PHA and family sign the statement of family responsibility. In accordance with Title VI of the Civil Rights Act of 1964 and HUD's implementing regulation at 24 CFR part 1, this final rule clarifies in redesignated paragraph (e) that it is a requirement that PHAs take reasonable steps to ensure meaningful access by persons with limited English proficiency. PHA's may reference HUD's *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (72 FR 2732) for additional information about how to ensure meaningful access to persons with limited English proficiency.

§ 983.254 Vacancies

HUD aligns § 983.254(a)(1) with the new requirements of § 983.157, as described in the discussion of changes to that section. HUD also makes minor changes to paragraphs (a)(1)(i) and (ii) of this section to specify that PHAs should make every reasonable effort to make eligibility determinations and refer sufficient numbers of families to owners within thirty days.

§ 983.255 Tenant Screening

For consistency purposes and to align this section with § 983.10, HUD revises § 983.255(a)(2) and (c)(4) to require that the PHA's tenant screening policies are in accordance with the policies in the PHA's Administrative Plan.

§ 983.257 Owner Termination of Tenancy and Eviction

This final rule revises § 983.257 to add that the owner may terminate the tenancy in accordance with §§ 983.157(g)(6)(iii) and 983.212(a)(3)(iii).

§ 983.260 Overcrowded, Under-Occupied, and Accessible Units

After considering public comments, HUD creates additional flexibilities as requested, while ensuring units do not continue to remain overcrowded, underoccupied, or, in the case of accessible units, occupied by families that do not require accessibility features. Accordingly, in paragraph (a)(2)(ii), HUD provides PHAs with 60 days (an additional 30 days) to make an offer of continued housing assistance once a determination has been made that a family is occupying a wrong-size unit, or a unit with accessibility features that the family does not require and the unit is needed by a family that requires the accessibility features. HUD also reorganizes paragraph (b) and adds paragraphs (b)(2) to provide that the PHA must remove the wrong-size or accessible unit from the HAP contract to make voucher assistance available to issue the family a tenant-based voucher if continued housing assistance under paragraph (b)(1) is unavailable. HUD determined this policy change was necessary to ensure the family living in a wrong-size or accessible unit would be able to obtain voucher assistance when no options under paragraph (b)(1) were available.

HUD revises paragraphs (c)(2)(i) and (ii) to clarify the requirements when the PHA's offer of assistance is project-based. HUD also adds paragraph (c)(2)(iii) to address the requirements when the PHA's offer of assistance is other comparable tenant-based rental assistance. In response to requests for additional flexibility, HUD creates under (c)(2)(i) and (c)(2)(iii) an opportunity for a family to request and a PHA to grant one extension not to exceed 90 days in circumstances where a family either declines project-based assistance or accepts or declines other

comparable tenant-based assistance in order to accommodate a family's efforts to locate affordable, safe, and geographically proximate replacement housing.

Finally, HUD adds paragraph (d) to state that if units are removed under this section they can be reinstated later. This final rule also revises paragraph (b)(1)(iv) to align with the revised definition for the term ''comparable tenant-based rental assistance'' in § 983.3.

§ 983.261 Family Right To Move

In response to public comments, HUD at this final rule reorganizes, adds headings to, and revises § 983.261. Paragraph (a) is revised to clarify that the family may terminate its lease at any time after one year of PBV assistance. To ensure PHAs properly manage voucher turnover, paragraph (b) requires that if the search term of a family that requested to move expires, the PHA must first issue a voucher to the next eligible family before issuing another voucher to the family that requested to move. This final rule moves the discussion in paragraphs (c)(1) and (2) of the rights of a family or a member of a family who has been the victim of domestic violence, dating violence, sexual assault, and stalking under the PBV program, to new paragraphs (e) through (g), and expands on these provisions. Paragraph (d) clarifies that if the family terminates its lease before one year of PBV assistance, the family relinquishes the opportunity for continued tenant-based assistance under this right to move section. Lastly, consistent with § 983.10, this final rule requires PHAs to have a policy on the family's right to move in the Administrative Plan in paragraph (b) and (c).

§ 983.262 Occupancy of Units Under the Increased Program Cap and Project Cap Excepted Units

This final rule makes overall changes to § 983.262, to align the PBV rules with the Fostering Stable Housing Opportunities (FSHO) notice,[14] and to specify the occupancy requirements under the 10 percent cap. Additionally, for ease of reading, this final rule moves and revises paragraph (f) to paragraph (b)(4) and distinguishes paragraphs (c) and (d), the requirements for excepted units and units under an increased program cap. This final rule makes clarifying changes to paragraph (b) by explaining the requirements applicable to both excepted units and units under an increased program cap. For clarity, this final rule amends paragraph (b)(4)(ii) to provide PHAs with discretion on whether to reinstate a unit from the PBV HAP contract. The changes in paragraph (c) explain the requirements solely for units under the increased program cap, which includes homeless family, veteran family, supportive housing for persons with disabilities or elderly persons, and units for Family Unification Program (FUP) youth. This final rule requires at paragraph (c)(3)(ii) that PHAs include policies on supportive housing for persons with disabilities or elderly persons in their Administrative Plan requirement in alignment with § 983.10. Revised paragraph (d) outlines the requirements solely for project cap excepted units.

Paragraph (e) of this final rule specifically outlines the requirements for units for FUP youth under the increased program cap and project cap exceptions. This revision is made for better readability and to distinguish FUP youth requirements from other categories of excepted units and units under an increased program cap.

§ 983.301 Determining the Rent to Owner

This final rule revises paragraphs (b)(1) and (c)(2)(i) to align with § 983.10. This final rule changes (f)(3) to align with the changes made to the exception payment standard regulation in § 982.503. Paragraph (f)(3) is also amended to clarify the criteria for whether an exception payment standard applies. Finally, HUD amends paragraph (f)(3) to clarify the purpose for which an exception payment standard applies to PBV projects, which is as a factor for determining rent to owner under paragraph (a)(2) or a factor for determining if the unit is a qualifying tax credit unit for purposes of setting the rent to owner under paragraph (c), as applicable.

HUD revises paragraph (f)(4) to provide HUD with the flexibility to develop a process to approve project-specific utility allowances. This final rule also adds paragraph (f)(5) to state that the PHA must use the applicable utility allowance schedule for the purpose of determining rent to owner and does not use a higher utility allowance from a reasonable accommodation for a person with a disability. This clarifies the existing requirement that a higher utility allowance as a reasonable accommodation is applied only to the particular family's tenant rent (or utility reimbursement) (see 24 CFR 983.353), rather than being used to determine the amount of the rent to owner per 24 CFR 983.301(b)(1) or (c)(2)(i). This final rule removes the proposed rule requirement in paragraph (g) that independent entities determine project-specific utility allowance, with the purpose that HUD will ensure sufficient oversight through the **Federal Register** process to approve project-specific utility allowances.

§ 983.302 Redetermination of Rent to Owner

This final rule revises paragraph (a)(2) to state that the PHA Administrative Plan must specify any advance notice the owner must give the PHA to request a redetermination of rent and the form of such request. This final rule revises paragraph (b)(2) to remove the term ''maximum rent,'' which was undefined, and state specifically how to calculate the maximum adjustment by OCAF. Further, this final rule moves information that was in paragraph (b)(2) in the proposed rule to new paragraphs (b)(3), (b)(4), and (b)(5) with simplified language for readability. HUD amends paragraph (b)(6) to conform to applicable HQS provisions of §§ 983.157 and 983.212.

HUD also clarifies when the rent to owner must be decreased in the case of adjustment by OCAF in revised paragraph (c)(1), to include when there is a decrease in the fair market rent, tax credit rent, or reasonable rent, as applicable, that requires a decrease to the rent to owner. In response to public comments on the proposed changes to rent floors, HUD determined that PHAs should have discretion whether to elect at any time, within the HAP contract, to not reduce rents below the initial rent to owner, as reflected in revised paragraph (c)(2). This revision reflects HUD's opinion that PHAs are in the best position to balance local considerations in making such a determination. To accomplish this change, HUD removed from paragraph (c)(2) the limitation on establishing a rent floor, to account for circumstances where the rent floor may need to be established after rents have fallen beneath the initial rent to owner.

§ 983.303 Reasonable Rent

HUD amends paragraph (b) to add two new situations in which rent reasonableness must be redetermined, which are when a unit is added to the contract and when development activity is completed and accepted for a unit subject to the new option in § 983.157 of this final rule (described in greater detail in the discussion of § 983.157 above). This final rule adds paragraph (c)(3) to explain how to calculate rent reasonableness, which must be based on actual and documentable conditions

[14] *See* 87 FR 3570 (Jan. 24, 2022).

and not prospective information. HUD also deletes in paragraph (f)(2) the phrase ''where the project is located,'' as this language modified ''the HUD field office'' which has been removed.

§ 983.352 Vacancy Payment

This final rule aligns this section with § 983.10 by clarifying that the Administrative Plan must contain the PHA policy on the conditions which it will provide for vacancy payments in a HAP contract, the duration and amount of any vacancy payments it will make to an owner, and the required form and manner of requests for vacancy payments.

§ 983.353 Tenant Rent; Payment to Owner

This final rule revises paragraph (d)(2) to align it with § 983.10, requiring that the PHA describe its policies on paying the utility reimbursement in the Administrative Plan.

§ 985.3 Indicators, HUD Verification Methods and Ratings

This final rule revises paragraphs (i)(1), (i)(3)(i), and (i)(3)(ii) to align them with § 982.503. Further, this final rule clarifies paragraph (l)(1) to state that the initial unit inspection indicator includes both initial and turnover inspections for the PBV program. The purpose of this revision is to capture every time a family moves in and not just capture when a family moves in before the HAP contract. This final rule also revises the citation in paragraph (m)(1) from § 982.405(a) to §§ 982.405 and 983.103(e) to reflect changes made to those sections in this final rule.

This final rule also revises paragraph (c)(3)(i)(A) to reflect changes made to self-certification of assets under 88 FR 9600 (Feb. 14, 2023), which implemented HOTMA sections 102, 103, and 104. A revision has been made to the introductory text of this regulation to reflect that the Federal award expenditure threshold is established by 2 CFR subpart F and has changed from $300,000 to $750,000. The revision reflects the regulatory citation for audit thresholds to ensure that § 985.3 is always aligned with Federal audit requirements.

This final rule revises paragraph (p)(1) and (3)(i)(B) to reflect the renumbering of § 982.503(e) to (f).

General Technical Changes

Throughout parts 5, 50, 92, 93, 982 and 983, HUD moved, corrected, and removed outdated citations and revised headers for clarity purposes. This final rule also revises terminology throughout this final rule, including replacing all references to ''biennial inspection'' with ''periodic inspection;'' ''tenant selection plan'' with ''owner waiting list;'' and ''defects'' with ''deficiencies.'' This final rule also replaces references to ''tenant's rent'' with ''total tenant payment'' and replaces references to ''rent to owner'' with ''gross rent.'' This final rule removes all references to the Project-based certification (PBC) program as it is no longer in existence. HUD also redesignated paragraphs for readability in §§ 982.54, 982.406, 983.53, 983.54, 983.59, 983.153, 983.204, 983.207, 983.211, 983.252 and 983.260. In addition, HUD moved the definition of the term ''Request for Release of Funds and Certification'' from § 983.3 to § 983.56(d)(2). HUD also amended §§ 985.1 and 985.3 to incorporate the PBV program in SEMAP and to align with regulatory changes in § 982.503 which permits additional flexibilities for PHAs inspections and the NSPIRE final rule.

HUD also makes changes throughout this final rule to correspond with the changes described above adding an option to complete rehabilitation after HAP contract execution in § 983.157, moving proposed § 983.157 to § 983.212 of this final rule, and changing the term ''development activity'' to ''substantial improvement'' for a portion of the work described as ''development activity'' in the proposed rule. HUD adds cross-references to § 983.157 in this final rule, and brief descriptions of conforming changes, in appropriate sections of part 983. Also, HUD removes citations to § 983.157 that appeared in the proposed rule or changes them to instead reference § 983.212 throughout this final rule. HUD changes ''development activity'' to ''substantial improvement'' where appropriate throughout this final rule. Finally, HUD removes references to activities that constitute substantial improvements from subpart D of part 983 of this final rule where appropriate and, accordingly, removes references to provisions of subpart D from §§ 983.207 and 983.212 where appropriate.

HUD is also revising the definition of ''household'' at 24 CFR 5.100, consistent with HUD's rule implementing HOTMA at 88 FR 9600 (Feb. 14, 2023), to include foster children and foster adults. This is a technical change consistent with the definitions of ''foster children'' and ''foster adults'' present in 24 CFR 5.100. For more information, see HUD's discussion of foster children and adults at 88 FR 9600, 9602 (Feb. 14, 2023).

Finally, some technical changes throughout the proposed rule were either made by the NSPIRE final rule or rendered moot by the NSPIRE final rule. For example, HUD proposed to amend § 985.1 to update a reference to ''project-based component (PBC).'' This change was made in NSPIRE, and therefore not made here.

IV. Effective and Compliance Dates

Effective Dates

Almost all changes in this final rule are effective thirty days after the publication of this rule. However, HUD is delaying the effective date for §§ 982.451(c), 983.154(h), 983,154(g), 983,157, and 983.204(e) while HUD completes and publishes the PHA-owned certification form and HAP contract rider that are necessary for PHAs to implement these changes. HUD will publish a subsequent publication establishing an effective date for these changes, once the form and rider are ready for use.

Compliance Dates

Compliance with this final rule is required once the rule becomes effective, with some exceptions.

Many changes require updates to PHAs' Administrative Plans. HUD recommends that PHAs update their Administrative Plans at their earliest convenience. However, to aid in providing a smooth transition, PHAs are not required to update their Administrative Plans in response to this rule until 365 days after the effective date of this rule. HUD notes that PHAs wishing to take advantage of many of the changes in this rule are required to update their Administrative Plan to incorporate those changes.

Other sections have delayed compliance dates to provide PHAs with adequate time to update their forms, procedures, and any other written materials that reflect new requirements in accordance with this rule, and to provide HUD with time to provide additional resources advising PHAs. Also of note, §§ 983.57 and 983.155(b) will require some PHAs to either amend their independent entity contracts or select a new independent entity, and HUD is therefore giving PHAs one year from the effective date to make those changes.

V. Public Comments

HUD received 44 public comments from a wide range of commenters: individuals; PHAs; public housing and tenant interest groups; and legal services organizations. The public comments and responses to the substantive comments are found below.

1. Definitions (§ 982.4)

Definition of Request for Tenancy Approval (RFTA)

One commenter stated that the definition of RFTA seems to imply a requirement that the RFTA be submitted by the voucher holder and suggested the definition be amended to clarify that either the family, or the owner on behalf of the family, may submit the form.

HUD Response: In this final rule, HUD has amended the definition of RFTA to clarify that the form can be submitted by the family, or on behalf of the family to the PHA.

Definition of Tenant-Paid Utility

A commenter suggested that HUD include the definition of ''utility'' currently found in guidance to the regulation because the definition is a critical part of the program.

HUD Response: The definition of tenant-paid utility has been added to the definitions section at § 982.4 and this definition is now also referenced in the project-based voucher definition of tenant-paid utility at § 983.3. The new definition in § 982.4 clarifies that tenant-paid utilities are those services and utilities that are not included in the rent. HUD modified the definition from the proposed rule to remove the definition of which utilities may be considered as tenant-paid utilities since this is covered in § 982.517.

Definition of PHA-Owned Units

Commenters supported the proposed definition of a PHA-owned unit, which matches the statutory definition offered by HOTMA. These commenters stated this was clear and did not need expansion and supported tracking the statutory definition and conforming definitions across HCV and PBV regulations, notices, and guidance.

A commenter recommended that for a unit to be PHA-owned that HUD not rely on a bright-line, percentage of ownership test to determine control when a PHA owns more than 50 percent of the managing member or general partner, and HUD should not find a unit to be PHA-owned when a PHA controls less than 50 percent of a managing member or general partner interest. Another commenter supported excluding units in buildings owned by entities in which either a PHA is in the ownership structure, and/or the entity is subject to a ground lease by a PHA. A commenter recommended the definition of ''owned by a public housing agency'' should allow the statutory text to stand on its own, so that only units located in a project ''owned by the PHA, by an entity wholly controlled by the PHA, or by a limited liability company (''LLC'') or limited partnership (''LP'') where the PHA holds a controlling interest'' will be considered ''owned by a public housing agency.'' The same commenter opined that should HUD wish to clarify the control and other factors it will evaluate when determining whether a unit will be considered PHA-owned, HUD can do so through notice or other non-binding guidance. This commenter further stated that the definition of ''controlling interest'' conflates control and ownership contrary to Congressional intent, explaining that percentage of ownership does not guarantee control over the owner entity and that HUD should confirm whether the PHA exercises functional day-to-day control over the owner entity.

HUD Response: HUD appreciates there are many different preferences regarding the level of ownership or control that rises to the level of PHA-owned. In the interest of consistency, HUD agrees with the commenters that supported a definition that follows the statutory definition, and therefore declines to accept the suggestions that HUD avoid a bright-line test or exclude units in buildings owned by entities in which either a PHA is in the ownership structure, and/or the entity is subject to a ground lease by a PHA. Additionally, HUD believes that providing a distinction in the regulation of what constitutes a controlling interest is important to clarify the nuances in the statutory definition of PHA-owned units, and thus does not accept the suggestion that any clarifications beyond the statute should only be made through non-binding guidance. HUD disagrees that its definition of the term controlling interest is contrary to Congressional intent. The common definition of ''controlling interest'' recognizes a majority ownership interest that serves as the basis for control; HUD's definition reflects the most basic and recognized meaning of the term. Therefore, this final rule maintains the proposed rule language without change.

Definition of Independent Entity

A commenter supported the modified definition of independent entity in the proposed rule because it would provide relief to PHAs and maintain a level of scrutiny and prevent the appearance of self-dealing. Another commenter doubted whether there is any circumstance under which a PHA and an independent entity should be connected financially, in the interest of complete fairness and impartiality under which an independent entity should be making decisions.

One commenter suggested that the proposed rule would increase the shortage of vendors for PHAs, especially located in smaller areas, if every vendor were disqualified based on prior contracts with the PHA for services performed on non-PHA-owned units. The commenter viewed HUD's current procedures in tandem with the PHAs' inability to exercise control over the independent entity, as sufficient to ensure independence.

The same commenter recommended that HUD revise the definition of independent entity because it is unclear what it means for an independent entity to ''be connected to'' a PHA, and the definition would prohibit a PHA from using a company it already contracts with as an independent entity. Another commenter stated the phrase ''or in any other manner that could cause the PHA to improperly influence the independent entity'' is vague and subjective, potentially leading to confusion, disputes, and conflict, and should be deleted.

For clarity, a commenter suggested HUD revise the definition as follows: ''HUD-approved independent entities and PHAs cannot have a legal, financial (except regarding compensation for services performed for the PHA), or other connection that could cause either party to be improperly influenced by the other.'' The same commenter suggested that this final rule specify the meaning of ''connected to'' because the current meaning could prohibit a PHA from using an independent entity it currently contracts with, even when these vendor contracts are procured at arm's length.

Another commenter suggested HUD allow PHAs that may have an allowable financial relationship with an independent entity to continue to use that independent entity if there is no chance that the PHA will ''improperly influence'' the independent entity.

HUD Response: HUD appreciates the comments related to the challenges of identifying independent entities in rural areas, as well as the need to ensure impartiality. HUD revises the proposed definition in an attempt to balance these competing interests and ensure that HUD-approved independent entities are impartial and autonomous. HUD believes it is important to provide a regulatory definition of the term independent entity, and thus declines the request that the definition is consistent with current requirements, which provide that the PHA cannot perform any function that would present a clear conflict (*e.g.,* conducting inspections and rent setting) for units it owns. In this final rule, HUD explains when the unit of general local

government meets the definition of an independent entity without requiring HUD approval. HUD believes keeping this option in this final rule will reduce administrative burden and reporting requirements. While HUD disagrees that there are financial connections where there is no chance that the PHA will ''improperly influence'' the independent entity, HUD further clarifies that for HUD-approved independent entities, a financial connection would not include compensation for services performed for PHA-owned units. HUD believes it is necessary to maintain language regarding impartiality of HUD-approved independent entities, which defines the types of relationships (*e.g.,* financial connections) that could interfere with the entity's exercise of independent judgment in carrying out responsibilities with respect to PHA-owned units.

2. Administrative Plan (§ 982.54)

Objections Generally

A commenter stated that HUD should not add items to the Administrative Plan that are not necessary for the daily and core operations of the PHA. Another comment stated that several of the proposed additions would require frequent and burdensome changes for otherwise insignificant policy changes.

HUD Response: HUD disagrees that the requirements should not be added to the regulations. HOTMA offers significant flexibilities and HUD proposes to offer additional flexibilities to PHAs to establish discretionary policies through this rule. Therefore, it is critical that discretionary policies be applied consistently and that such policies are clearly and transparently published for the benefit of participant families, owners, and the general public.

Inclusion of Tenant Selection Plan (TSP)

Another commenter suggested that the requirement that a TSP be included in the Administrative Plan must be mentioned in § 982.54.

HUD Response: In finalizing the rule, HUD replaced all references of the ''tenant selection plan'' with ''owner waiting list policy.''

Question 2: Where could HUD provide greater discretion to PHAs to support their efforts to operate their programs effectively?

A commenter stated that all PHAs should be allowed to be Moving to Work (MTW) agencies to decrease regulatory burdens and provide additional discretion for PHAs to control their local market. This commenter also recommended that PHAs that have Affordable Housing Accreditation Board (AHAB) accreditation and are high performing under SEMAP and PHAS should be rewarded with more discretion because they have shown their ability to properly operate their programs.

HUD Response: HUD appreciates the comments requesting that PHAs should be afforded additional discretion to reduce regulatory burdens and notes that HOTMA and HUD, in its implementation, has made significant modifications and clarifications intended to reduce the burden on PHAs where possible. HUD does not have the statutory authority to allow all PHAs to be MTW agencies as suggested by the commenter.

3. Information When Family Is Selected (§ 982.301)

Disability-Related Obligations in the Oral Briefing

Commenters supported HUD's requirements wherein PHAs must provide families that include an individual with a disability a list of accessible units known to the PHA and assistance in locating an accessible unit. PHAs are already required to provide this information in the information packet, and as required in compliance with HUD's Section 504 requirements. One commenter suggested that PHAs be required to collaborate with local organizations that can provide housing search assistance to tenants with specific accommodation needs. Another commenter suggested that HUD require PHAs to keep track of whether tenants currently in accessible units require the accessible design features and use a lease addendum stating that the family may be required to move if they do not require the accessible design features. The same commenter suggested that HUD provide guidance to PHAs to proactively identify ways to make units accessible, including through new construction or other substantial rehabilitation.

HUD Response: The HCV program allows families to choose any eligible unit in the rental market. In the tenant-based voucher context, an HCV family leaving a rental unit due to not needing its features does not mean that unit is then leased to another HCV family. In other contexts, such as public housing and project-based voucher housing, the owner or manager may require the applicant to agree to move to a non-accessible unit and may incorporate this agreement into the lease, in accordance with HUD's Section 504 regulations. HUD appreciates the comments and recommendations to provide guidance to PHAs on ways to proactively identify units that meet a household's disability-related needs and ways to make units accessible and will consider these ideas in future guidance.

Exception Payment Standards

A commenter stated that HUD should include written and oral briefings on exception payment standards as a reasonable accommodation, and not solely include subsidy standards as required by regulations. The commenter suggested that PHAs be required to inform families of the availability of an exception payment standard, and particularly for when a more expensive new construction unit is needed as an accommodation for a family member's disability. Alternatively, another commenter suggested that the regulation should not detail that there is a reasonable accommodation possible for subsidy standards because reasonable accommodations are available for all PHA policies.

HUD Response: HUD agrees with the commenters that PHAs must make reasonable accommodations in rules, policies, practices, services, and procedures to ensure persons with a disability have equal opportunity to participate fully in all the PHA's programs, privileges, benefits, and services. Therefore, the voucher briefing must include information on the PHA's reasonable accommodation policies and procedures. In addition, the PHA may not know or have reason to know if the family or families attending the oral briefing includes a person with disabilities. Similarly, a family member who is not disabled may subsequently become disabled, so it is important that all families receive information on the reasonable accommodation process. Consequently, HUD is revising § 982.301(a)(3) to require that information on the reasonable accommodation process is provided at all oral briefings and not limited only to briefings where the PHA knows that a family in attendance includes a person with disabilities. While HUD does not require in this final rule that the reasonable accommodation exception payment standards must be covered in the oral briefing, HUD is requiring that an explanation of reasonable accommodation exception payment standards must be included in the briefing packet. HUD believes providing written guidance in the information packet will better address the commenter's concerns as the family will have access to guidance on this subject throughout their housing search.

Briefing Method

A commenter recommended that the regulation for the briefing packet should outline the most critical information for families when they are provided their initial voucher, because excessive amounts of information can be overwhelming for families. The commenter also recommended that PHAs should have the discretion to determine which method of communication, including oral, print, and electronic communications, is proper for the briefing packet, and the regulation should explicitly state that the briefing can be provided in a manner that is not oral, according to the PHA's discretion, while acknowledging that accessibility and interaction between staff and families are required.

Another commenter recommended referencing § 982.301(a), the right to meaningful language access for families whose members are limited English proficient, and how to request and access meaningful language assistance from the PHA. The commenter further stated that in § 982.301(b)(10), HUD should reference how tenants can request language assistance, whether via written translation of documents or oral interpretation, for the PHA; HUD should require that the PHA identify staff members who will coordinate the PHA's language access policies; and the tenant briefing should include translation and oral interpretation for individuals who are limited English proficient in § 982.301(c).

HUD Response: HUD regulations require that the briefing packet contain specific information that is important for families when they are provided with their initial voucher. HUD does not agree that the briefing packet should categorize which pieces of information are more important than others, as all information is required and important for voucher families. HUD does not agree that the regulation should allow for other types of briefings and believes requiring an oral briefing ensures that all families fully understand how the program works and have the opportunity to ask questions and discuss information presented. HUD notes that new paragraph (c) in § 982.310 already addresses providing information for persons with limited English proficiency. HUD has also addressed access to translation in PIH Notice 2020–32 which provides for alternative briefing methods, as well as how to ensure meaningful access for limited English proficient speakers and believes no additional changes to § 982.301 are warranted.

4. Approval of Assisted Tenancy (§ 982.305)

60-Day HAP Contract Execution in § 982.305(c)(4)

A commenter disagreed with HUD's proposal to require a 60-day period to execute a HAP contract and a lease term and noted that requiring PHAs to get permission from HUD to execute a HAP contract in cases exceeding the 60-day period is unnecessary because it is not in the interest of the parties to unnecessarily delay the process. As an alternative, the commenter suggested increasing the contract execution time from 60 days to 90 days to eliminate the need for any additional action from the PHA or HUD and require PHAs to notify HUD when the PHA goes beyond the 60 days, so that HUD can track the prevalence of the extensions requests and re-examine this policy in the future while avoiding administratively burdening PHAs and landlords.

Another commenter did not support a maximum 60-day timeframe between lease effective date and the date of HAP contract execution. The commenter opined that many HCVs are lease-in-place vouchers in rent stabilized units, so PHAs cannot request that the owner sign a new lease at the start of the subsidy without violating local rent laws.

HUD Response: HUD appreciates the comments and clarifies that the requirement to execute a HAP contract no later than 60 days from the beginning of a lease term is already a requirement under current regulations at § 982.305(c)(4) and not newly proposed. HUD also understands the concerns of commenters around extenuating circumstances and believes that the proposed change to allow a PHA to request an extension of HUD sufficiently addresses those concerns. Therefore, HUD will finalize § 982.305(c)(4) as proposed.

5. Eligible Housing (§ 982.352)—Independent Entity Functions and Compensation

Questions 5 and 6: Functions, Other Than Those Identified in the Proposed Rule, That an Independent Entity Should Perform in the Case of PHA-Owned Units

Functions of Independent Entities

Commenters opposed adding duties to independent entities. One commenter stated the functions identified in the proposed rule are the same as the current regulation, and that no other functions should be authorized to an independent entity. Another commenter stated that HUD should not require independent entities to perform other functions beyond those proposed because doing so would increase the costs as well as decrease funding availability for other program functions. One commenter stated that the independent entity requirements should be re-examined so that PHAs are not burdened by the oversight of such entities, and that PHAs should be entrusted to carry out the activities, such as ensuring compliance with selection process, inspections and rent setting—just as PHAs are under the public housing program. The commenter suggested having the PHAs carry out these duties with proper documentation and subject to review through the required annual independent audit.

Another commenter disapproved of HUD requiring an independent entity to conduct duties that the PHA can do itself, such as approve contract renewals, conduct inspections, and conduct rent reasonableness tests. The commenter further emphasized the burden of using independent entities for activities, such as performing inspections because there is a shortage of vendors trained in UPCS–V protocol, and many PHAs conduct rent reasonableness tests through third-party software, making the need for independent entities obsolete. The commenter recommended that HUD require an independent entity to conduct inspections only for special inspections or compliance to lessen the PHA's burden. While another commenter noted that HUD's proposed list of activities to be performed by an independent entity is too long, suggesting HUD reconsider the requirement that an independent entity receive evidence that the PHA is following regulations during the development activity or rehabilitation. This commenter noted that there are already several layers of review at local and Federal levels, and that, in the case of mixed-finance, HUD may have already reviewed the transaction.

A commenter further suggested that independent entities not be required to review awards of Low-Income Housing Tax Credits (LIHTC) or HOME Investment Partnership Program (HOME) funds, as well as PHA-owned project selections and stated that HUD should defer to the PHA to determine when revitalization of a former public housing site is needed. Additionally, the commenter objected to the requirement that independent entities (rather than PHAs) must determine any rent adjustments by an OCAF as part of their rent calculation responsibilities for any PHA-owned units.

HUD Response: HUD agrees that no additional duties need to be added to the independent entity functions but for the addition of one function under § 983.57 requiring the independent entity to approve substantial improvement on units under a HAP contract in accordance with § 983.212 (see the discussion of § 983.57 later in this preamble). HUD has consistently maintained that PHAs cannot appropriately perform any function that would present a clear conflict for units they own. 42 U.S.C. 1437f(o)(11) reflects this view by requiring that the unit of general local government or a HUD-approved independent entity perform inspections and rent determinations. In addition, while the PHA is generally responsible for selecting PBV projects in accordance with § 983.51, including developing the procedures for submission and selection of PBV proposals, HUD believes that, to ensure fairness and impartiality, it is necessary for an independent entity or the HUD field office to review the selection process the PHA undertook and determine that the PHA-owned units were appropriately selected based on the selection procedures specified in the PHA Administrative Plan. Finally, as previously noted, PHAs are statutorily prohibited from determining rents for PHA-owned units; calculating the amount of the reasonable rent and any rent adjustments by an OCAF are integral parts of the process. Accordingly, HUD maintains the requirement that the independent entity must calculate any rent adjustments by an OCAF for PHA-owned units.

Independent Entity Compensation

A commenter suggested that HUD expressly permit a PHA to seek reimbursement of independent entity expenses from project owners as operating costs.

HUD Response: Independent entity functions are not a project owner's responsibility. Tasks performed by the independent entity are administrative functions that the PHA would otherwise be performing if the units did not meet the definition of PHA-owned. PHAs may therefore compensate the independent entity from PHA administrative fees (including fees credited to the administrative fee reserve).

Support for PHAs Keeping Documents

Commenters supported PHAs keeping rent reasonableness and inspection documents and providing copies to the field office only upon request. A commenter noted that this is not required for non-PHA-owned units, and the field offices lack capacity to review these reports.

HUD Response: HUD retains the language proposed at § 982.352(b)(1)(v)(A) requiring rent reasonableness and HQS information be communicated to the family and PHA, but not submitted to HUD unless upon request. HUD agrees that this framework balances HUD's interest in proper oversight and PHAs' administrative burden.

6. Establishment of Life-Threatening Conditions (§ 982.401(o))

Some commenters approved of the list of Life-Threatening Conditions (LTCs). Other commenters suggested that the list should include other items such as mold, due to its harmful impact on individuals with respiratory and immune deficiencies; non-functioning locks; roaches; asbestos; radon; rat infestations; non-functioning heating or hot water systems; properties determined uninhabitable by a city agency; inability of heating system to maintain a minimum of 55 degrees Fahrenheit during cold season; utilities not in service; an absence of a functioning toilet; and missing exterior doors or windows. Another commenter stated that a missing lightbulb should not be an LTC.

One commenter suggested condensing and summarizing the list, as a high level of detail could lead to errors in inspections when multiple criteria must be met to be considered an LTC. Another commenter supported HOTMA's streamlining changes but stated that it is unwarranted to find minor HQS violations as a safety hazard or a reason to terminate HAP assistance. A separate commenter recommended that HUD immediately update the HQS inspector checklists to accurately reflect LTCs. Another commenter recommended that HUD only require the list for initial inspection and not for regularly scheduled annual or biennial inspections.

One commenter stated that HUD should clarify that a unit without a carbon monoxide (CO) detector should not be considered an LTC if there is no CO source in the unit. Another commenter urged HUD not to add CO detectors to HQS through HOTMA and instead ensure consistency across HUD programs by implementing statutory CO requirements through standalone rulemaking. One commenter suggested that voucher applicants and those moving with continued assistance should receive notice of proximity to a Superfund site or contaminated sites on the National Priorities List (NPL) at application, lease signing, and at recertification. This commenter also recommended that HUD expand its Memorandum of Understanding (MOU) with the EPA, which is currently limited to Project-Based Rental Assistance (PBRA) and public housing, to all forms of HUD assistance, and suggested HUD and EPA map all assisted projects and their proximity to sites on the NPL.

Commenters also suggested that PHAs should be allowed to add other conditions into their Administrative Plan. A commenter suggested that HUD allow PHAs to continue using their own pre-existing definitions as a replacement for HUD's NLT definitions. A commenter urged HUD not to require PHAs to adopt the NLT provisions as a prerequisite for adopting alternate inspections. One commenter stated that HUD should only require PHAs to outline deviations from the definition of "life-threatening conditions" in the Administrative Plan instead of repeating HUD's regulations. Another commenter suggested HUD waive the on-site inspection requirement when PHAs use alternative procedures to correct NLT deficiencies.

One commenter suggested that HUD undertake a thorough and public examination with significant stakeholder outreach and participation before changing to the proposed list of LTCs, which is based on UPCS–V and imposes a higher standard than is currently required.

Commenters opposed the expansion and addition of new HQS fail items being categorized as life-threatening because it would limit the PHAs' ability to consider local conditions and hinder applicants from quickly accessing their units.

HUD Response: HUD has decided not to finalize the revisions in the proposed rule to § 982.401 through the HOTMA final rule. All comments made through this HOTMA rulemaking process were taken into consideration in the drafting of the NSPIRE Standards Notice. Commenters had another opportunity to provide feedback through that notice, published to the **Federal Register** (87 FR 36426) on June 17, 2022. All current LTCs are defined in the final NSPIRE Standards Notice (88 FR 40832) published June 22, 2023. All future updates to the LTC list will also be subject to notice and comment in the **Federal Register**.

7. Enforcement of HQS (§§ 982.404, 983.208)

Usage Suggestions for Abated Funds

Commenters suggested various usages for abated funds, such as security

deposits, portion of rent, costs for families moving due to the termination, application fees, and other mandatory expenses.

A commenter suggested relocation assistance for affected tenants should be mandatory, using funds from the abated PBV HAP or TPVs. Commenters also stated that the proposed rule is unclear as to whether the security deposits and moving costs are the only eligible expenses or if the PHA can determine additional expenses and suggested that the PHAs should determine what comprises eligible assistance expenses and refer to the URA cost schedule for moving costs.

HUD Response: HUD appreciates these comments on the use of TPVs and abated funds. With respect to TPVs, these vouchers are not provided in connection with PBV contract terminations or abatement of assistance. In addition, HUD cannot mandate the use of abated funds for relocation assistance to families. The statute does not require the PHA to use abated funds for relocation assistance; instead, it provides the PHA with discretion to use funds for this purpose. Specifically, section 8(G)(vii)(III) of the 1937 Act states: ''The [PHA] may provide assistance to the family in finding a new residence, including use of up to two months of any assistance amounts withheld or abated . . . for costs directly associated with relocation of the family to a new residence, which shall include security deposits as necessary and may include reimbursements for reasonable moving expenses incurred by the household, as established by the Secretary.''

Consistent with the statutory language, and in response to the comments regarding the eligible expenses that may be covered, HUD has provided additional language regarding the permitted uses of abated funds for relocating tenants. Specifically, HUD has added that PHAs may assist families in finding a new unit, including using up to two months of the withheld and abated assistance payments for costs directly associated with relocating to a new unit, including security deposits, temporary housing costs, or other reasonable moving costs as determined by the PHA based on their locality. HUD has further clarified that if the PHA is using withheld or abated assistance payments to assist with the family's relocation costs, the PHA must provide security deposit assistance as necessary, as required by the statute.

Protection of Tenants

Many commenters suggested going further to protect tenants from evictions and subsidy terminations in the event their unit fails an HQS inspection. Commenters warned that the proposed rule would allow PHAs to abate and terminate an entire HAP contract if a single unit fails HQS and tenants may face higher rent under HCV rules or face an owner that evicts them despite the regulatory language.

Commenters stated that withholding HAP during the cure period for HQS violations may create an incentive to evict tenants. Commenters recommended HUD require that tenants cannot be held liable for amounts of HAP withheld or abated, such abatement is not grounds for eviction, and tenants cannot be held liable for their own portion of the rent during abatement. A commenter noted that, in some cases, the PHA withholds HAP for HQS violations that are not an immediate threat to health and safety and do not warrant a tenant to withhold rent under State law and HUD should clearly state that when the PHA is relieved of paying back rent, the tenant is as well, despite any State law discrepancies regardless of State law unless the State law provides stronger tenant protections. A commenter further expressed that when HAP is abated, the tenants should be notified.

Commenters recommended that HUD explicitly state that if a PHA terminates a PBV HAP contract based on a breach of conditions requirements, any of the units that continue to meet or have been brought into compliance with HQS requirements should be allowed to continue under the program. Another commenter recommended that HUD should specify in § 982.404(d)(2)(ii) that the family's assistance may only be terminated in accordance with § 982.555 if a family fails to move within the allotted time. A commenter also suggested that HUD clarify § 982.404(e)(1) to include that a PHA may extend the 90 days for families as needed based on individual circumstances, without HUD approval, and state that for relocation protections, public housing includes properties either pre- or post-conversion under RAD, section 18, or other provision of law, not to include section 9 public housing.

One commenter requested further clarity on whether the requirement for families to be provided at least 90 days to find a new unit after the HAP contract is terminated, refers to 90 calendar days or 90 ''tolled'' days of voucher time, which is required under the Family Move regulations.

A commenter also stated that a PHA must provide a preference to families who relocated due to HQS deficiencies. This commenter sought clarification from HUD on whether the preference for the public housing waiting list would take precedence over other existing public housing preferences. Another commenter stated that HUD's proposed language in § 982.404(e)(2) does not consider that PHAs need to manage limited vacancies to best serve the residents already within the public housing program, or for the many applicants on that program's waiting list. This commenter recommended that HUD modify the proposed language within § 982.404(e)(2) to clarify that HCV family participants transfer into public housing units shall not take preference over the PHA's needs for a Section 504, VAWA, or other emergency need.

One commenter stated that HUD providing a public housing preference for families affected by HCV abatements unable to find a new voucher unit would potentially lead to decreased mobility for HCV participants. The commenter suggested that it would be advantageous to allow payments up to 120 percent of fair market rents for such families, which would enable them to access higher rental markets within the spectrum of ZIP codes served by the PHA. This commenter agreed with the HOTMA language, permitting the PHA to use up to two months of the assistance payments that were withheld or abated under the family's terminated HAP contract for cost directly associated with the relocation of the family because these provisions would provide greater mobility to HCV families.

HUD Response: The language giving PHAs the option to withhold HAP during the cure period is required under HOTMA. In response to the comment regarding procedures under § 982.555, HUD cannot override State and local law regarding enforcement of the lease agreement. HUD has further clarified that tenants relocated due to an HQS deficiency must be given a selection preference by the PHA for public housing, where applicable. HUD has clarified that the PHA must issue the family a voucher to move at least 30 days prior to termination of the HAP contract.

HUD has clarified that the requirement for families to be provided at least 90 days to find a new unit after the HAP contract is terminated, refers to 90 calendar days.

HUD appreciates the suggestion to allow payment standards up to 120 percent of FMR. This change is not necessary as PHAs may currently apply for 120 percent fair market rents and/or SAFMRs under 982.503, which provides for expanded access to rental markets

for all families. FMRs are established for entire geographies, and not on a case-by-case basis, except in the case of a reasonable accommodation exception payment standard (RA EPS) for people with disabilities.

HUD appreciates the recommendation that HCV participant transfers should not take preference over Section 504, VAWA, or other emergency transfers. HUD agrees and finds that 24 CFR 982.404(e)(2) as drafted in this final rule is sufficient and notes that Section 504 transfers must occur under the requirements of 24 CFR part 8, including 8.28, and VAWA emergency transfers must occur in accordance with HUD's VAWA regulations at 24 CFR part 5, subpart L, and program regulations.

Withholding HAP Harms Landlords

A commenter warned that withholding HAP during the 30-day correction period would hurt smaller landlords and potentially discourage them from future participation.

HUD Response: This language cannot be changed because the option for PHAs to withhold HAP during the cure period is required under HOTMA.

Mandatory Termination

A commenter opposed requiring a mandatory termination after 180 days of abatement because it would be an administrative burden and decrease availability of subsidized housing. Another commenter suggested clarification on whether the plural ''HAP contracts'' at § 982.404(a)(2) reflects other contracts for units besides noncompliant contracts would be terminated due to the HQS noncompliance of one unit. Another commenter suggested that the 180-day proposed timeline for termination is a reasonable balance of interests, as required by statute.

HUD Response: HUD has maintained the language around mandatory termination because HUD finds it necessary given the importance of assisted families' housing meeting quality standards. The 180 days maximum is consistent with § 982.455.

HUD has updated § 982.404(a)(2) to read that if the owner fails to maintain the dwelling unit in accordance with HQS, the PHA must take enforcement action in accordance with this section.

Include Renewed Contracts or HAP Contracts Entered Into After the Rule Implementation

A commenter stated that HUD should expand this rule to include renewed HAP contracts or HAP contracts that are entered into after the rule's implementation.

HUD Response: This final rule applies to both new HAP contracts and HAP contracts renewed after this rule is implemented.

90-Day Voucher Terms

One commenter supported the 90-day voucher terms for contracts cancelled due to abatement.

HUD Response: HUD appreciates the supportive comment.

PHA Discretion To Waive and Reimburse

A commenter also recommended clarifying in § 982.404(a)(4) that the PHA has discretion to waive the requirement making the owner responsible for correcting deficiencies where the damage is not from ordinary use, and that the waiver is not just the requirement to be responsible for the deficiency, but the applicability of the entire subparagraph including abatement and withholding provisions. This commenter also urged HUD to clarify that PHAs have the discretionary authority to reimburse the property owner either for a portion or all HAP amounts withheld, which the commenter stated is clearly provided within HOTMA.

HUD Response: HUD has clarified in this final rule that the PHA must identify in its Administrative Plan both the conditions and amounts for withholding HAP. This also includes the conditions and amounts of payments made for the period HAP was withheld.

Monitoring

One commenter suggested that HUD monitor how many PHAs reimburse funds and review their reimbursement policies.

HUD Response: HUD appreciates this suggestion and will consider this outside of this rulemaking.

Tenant-Caused Damage

Commenters addressed whether the tenant or PHA should be responsible for repairs to unit damages. One commenter suggested that HUD provide an exception for § 982.404(a)(4) to address damages that have been caused by domestic abusers and obligate PHAs to require the owner to make the repairs in instances of domestic abuse. This commenter also suggested not using incidents of abuse as a means to terminate a survivor's tenancy and to allow the PHA and owner to take all legal action against the abuser for the damage.

Another commenter found the regulations to be confusing and potentially in conflict with State laws and local practice because in many states tenants are prohibited from carrying out their own repairs. The commenter suggested that for HUD to shift responsibility to the tenant to make the repairs, then HUD should place a higher burden on the landlord. The commenter additionally recommended that, if the landlord charges the tenants for repairs to tenant-caused damage, HUD should require a reasonable repayment plan and that the PHA must continue to pay the HAP during the term of the repayment agreement, so long as the tenant continues to abide by the terms of the lease. This commenter suggested the repayment plan allow landlords to charge an initial fee, which must not exceed 40 percent of the tenant's income, and then impose a reasonable period for the tenant to pay the remainder to the landlord, with longer repayment periods for tenants facing financial hardship. This commenter also recommended PHAs should terminate a HAP contract due to tenant-caused damages only after remedies, consistent with State landlord-tenant laws, have been exhausted and HUD should encourage maintaining units as part of the low-income housing stock.

Another commenter recommended that HUD revise § 982.404(a)(4) and (b)(2) as well as the procedure in the case of tenant-caused damages, consistent with HOTMA section 101(a)(3). Another commenter suggested waiving HQS deficiencies caused by tenants from the landlord's responsibility.

HUD Response: HUD appreciates the comments around tenant-caused damage to the unit. HUD has revised § 982.404(b)(2) and § 983.208(c)(2) to clarify that in cases of tenant-caused deficiencies, the tenant is not necessarily required to physically correct the deficiencies themselves. Rather, the tenant is responsible for ensuring that the deficiencies are corrected by taking all steps permissible under the lease and State and local law, which might include paying the owner for the costs of the necessary repairs. HUD has not gone further to require a PHA to establish a specific repayment plan. HUD has further revised § 982.404 at paragraph (a)(4) and § 983.208 at paragraph (b)(3) to better align with HOTMA section 101(a)(3) in terms of when the PHA may waive the landlord responsibility for HQS deficiencies that have been determined to have been caused by the tenant, any member of the household, or any guest or other person

under the tenant's control, other than damage resulting from ordinary use.

HUD has chosen not to add specific language around tenant damages caused by domestic abusers in this section. However, all VAWA housing protections under 24 CFR part 5, subpart L apply. HUD appreciates the commentor's suggestion but has not added a regulatory requirement for a repayment plan for owner correction of tenant-caused deficiencies. HUD is concerned that imposing additional restrictions on the owner in terms of how and when the owner can recover amounts owed under the lease will discourage owner participation in the HCV program. Nothing in the final rule would prevent the owner from choosing to offer a repayment plan to the family. However, the manner in which the owner may collect amounts owed under the lease for tenant-caused damages should continue to rest with the owner, subject to the terms of the owner's lease.

Remote Visual Inspections

Another commenter stated that Remote Visual Inspections (RVI) should not be used to verify a HQS deficiency correction where there is a life-threatening condition on the property. The commenter suggested HUD should require PHAs to conduct in-person inspections prior to a family moving into a unit that failed HQS for health and safety reasons. This commenter expressed that PHAs should be required to independently check for lead hazards in any Housing Choice Voucher (HCV) home and warned that the proxy to test for lead-based paint after watching a short video is insufficient. This commenter recommended a select use of RVI to reduce administrative burdens for PHAs and increase the speed at which voucher tenants can lease-up, without impacting the family's health.

HUD Response: HUD appreciates this comment but is not addressing the use of RVI in this rule.

8. PHA Initial Unit Inspection (§ 982.405)

Question 4. Are HUD's proposed deadlines by which the PHA must both inspect the unit and notify the owner if the reported deficiency is confirmed reasonable?

Commenters found HUD's proposed deadline reasonable because the adoption of the Non-Life-Threatening (NLT) process is optional. A commenter suggested that HUD include additional time in case a resident does not want to move and requests a ''final appeal,'' or courtesy inspection to remain in the unit if the deficiency is now remedied. Another commenter stated that HUD's proposal to allow flexibility in the rule for inspections and notification of deficiencies is adequate, and that the 30-day extension for inspections will permit adequate time for PHAs and owners to schedule the inspection and discuss deficiencies. One commenter stated that 24 hours for a PHA to notify the owner of any life-threatening deficiency is reasonable, but the commenter also suggested extending the timeline to inspect a unit and notify the landlord for emergency items to two days.

Commenters supported HUD maintaining the current timelines for inspections and repairs due to PHAs' discretion over whether to undertake the LTC/NLT process. One commenter offered 15 days to repair, and another commenter suggested PHAs have absolute discretion to establish their own timelines. Another commenter opposed the 30-day repair requirement because PHAs would be required to define what constitutes ''receipt of written notice'' in their Administrative Plan, which can present a challenge for PHAs that do not use email. A commenter recommended modifying § 983.103(c)(2) to specify that the 30-day inspection period applies if a PHA adopts the NLT exception to inspections.

Another commenter stated that HUD should extend the timeline for emergency inspections from 48 to 72 hours. This commenter further suggested that PHAs should be required to adopt HUD's NLT definition only if they implement the NLT inspection option. One commenter suggested that HUD clarify that the 24-hour correction period for LTCs should only apply when the family is in the unit, and that if the HAP is not being paid while the family is waiting for the landlord to correct a deficiency, the family is also not responsible for making the HAP payment. Another commenter stated that HUD is unnecessarily requiring NLT repairs to be made within 30 days of the owner receiving written notice of the defects, and that it is unclear whether requiring PHAs to proactively waive an owner's responsibility to correct defects will be conducted on a policy level or whether it will be conducted on a case-by-case basis, ultimately requiring notification.

HUD Response: HUD appreciates the multiple comments about the timeframes for unit inspections and believes the timeframes in the proposed rule were reasonable. HUD notes that the requirements under NLT are distinct from other inspection types and HUD believes that it is reasonable for NLT repairs be made within 30 days, given that application of the NLT provision is voluntary, and, under the NLT provision, the unit has never been in compliance with HQS.

HUD has clarified that, in the case of tenant-caused deficiencies, the owner is responsible until such time as it has been determined that the tenant is responsible in a particular case.

9. Housing Assistance Payments Contract (§§ 982.451, 983.204)

PHA-Owned Unit Certification Option

Commenters supported the proposal to not require the creation of a separate legal entity, which commenters stated would add costs and complexity and negatively impact PHAs participating in RAD and section 18 conversions. One commenter stated that HUD should not allow a PHA to permit certifications instead of HAP contracts, explaining that such permission would create ambiguity in other regulations that reference HAP contracts but not certifications, hurting those that rely on those regulations to enforce and protect the rights of tenants.

Another commenter suggested adding a statement that phasing groups of contract units into the HAP contract is acceptable in § 983.204(a). This commenter recommended adding, ''or phases thereof'' after ''HAP contract,'' for § 983.204(c).

HUD Response: HUD appreciates the support to not require the creation of a separate legal entity. Concerning PHA-owned certifications, in order to eliminate ambiguity of cross-references in other regulations, HUD has revised the language of §§ 982.451(c)(2), 983.204(e)(2) to clarify that the PHA-owned certification serves as the equivalent of the HAP contract as it relates to the obligations of the PHA as owner and that, where the PHA has elected to use the PHA-owned certification, all references to the HAP contract throughout parts 982 and 983 shall be interpreted to be references to the PHA-owned certification.

Further, HUD determined the explanation of how to implement staged completion of contract units would be more appropriate in § 983.156. Therefore, HUD has added a paragraph addressing the commenter's concern to § 983.156 and has cross-referenced § 983.156 in § 983.204(c).

PBV HAP Contract Effective Date

Another commenter stated that HUD should not establish a required maximum 60-day timeframe between the lease effective date and the HAP contract execution date, since complex

development and financing timetables may make the timeframe too short. Instead, the commenter recommended a 120-day period before a HAP contract is required to be prospective for PBV projects.

HUD Response: The commenter seems to conflate the rules between the tenant-based and project-based voucher programs, as evidenced by submitting the above comment under the heading of § 982.305. The long-standing requirement in the PBV program is that the effective date of a PBV HAP contract must be on or after the execution date of the PBV HAP contract, and the HAP contract must be effective before the effective date of the first lease covering a contract unit occupied by an assisted family. HUD has clarified this requirement at § 983.204(d).

10.A. Payment Standard Schedules and Basic Range Amounts (§ 982.503(b) and (c))

One commenter suggested that HUD revise § 982.503(c)(3) to refer to 90 days instead of three months for consistency.

HUD Response: This is current regulatory language, and no change was proposed in the rule. HUD, therefore, makes no changes in this final rule.

10.B. Exception Payment Standards (§ 982.503(d))

Greater Flexibility To Reduce Administrative Burden (Question 7)

Several commenters stated that HUD should provide greater flexibility to PHAs to establish exception payment standards without HUD approval to reduce PHAs' administrative burden and allow more rapid responses to changing rental markets. Another commenter stated that HUD should grant PHAs this flexibility if the PHA has the budget authority to support the increased payment standard as demonstrated by HUD's Two-Year Tool, which calculates the PHA leasing potential considering current Voucher Management System (VMS) data, HUD-held reserves (HHR), and Budget Authority (BA). This commenter remarked that HUD's Payment Standard Tool can also be used to establish exception payment standards.

One commenter expressed that HUD should allow exception payment standards for individual projects rather than require PHAs to apply exception payment standards to every project in the same ZIP code.

HUD Response: HUD appreciates the comments about the need for greater flexibility in establishing exception payment standards. In response to these comments, HUD will allow PHAs to go up to 120 percent of the published fair market rent upon notification to HUD so long as the PHA meets the required thresholds as set forth in 24 CFR 982.503(d)(3). HUD disagrees with the comment that PHAs should be allowed to establish different payment standards for individual projects rather than the same payment standard for the applicable geographic area. 42 U.S.C. 1437(f)(o)(13)(H) requires that rents established under PBV HAP contracts must not exceed 110 percent of the applicable FMR, or any exception payment standard approved by the Secretary for the HCV program. Accordingly, there is no statutory authority to establish exception payment standards for individual PBV projects. HUD will continue to require PHAs to adopt one payment standard for an applicable geographic area.

Allow Higher Payment Standards

Commenters generally urged HUD to allow for higher payment standards. Commenters stated that higher standards would allow PHAs to expand geographic choices, allow families to stay in gentrifying neighborhoods, and make the SAFMR exception payment tool more cost-effective to expand housing opportunities in low-poverty areas. A commenter reasoned that in cases where the PHA chooses not to seek HUD approval, families would benefit from a higher SAFMR, which would ensure the prudence of policy because rents would remain subject to reasonableness.

Another commenter suggested that increased payment standards up to 120 percent of the SAFMR should apply for ZIP codes with SAFMRs that exceed the regional FMR. One commenter stated that PHAs should have discretion to set exception payment standards up to 150 percent of SAFMR. Commenters also supported HUD's proposed policy at § 982.503(d)(4) and (e)(1) allowing PHAs to choose to set payment standards up to 110 percent of the SAFMR without HUD approval, and asked HUD to clarify this allowance by explicitly stating it in § 982.503(d)(2). The commenters stated many PHAs are unaware of the flexibility the policy described in § 982.503(d)(2) provides them.

Commenters stated that HUD's proposal in § 982.503(d)(2) to require the lowest SAFMR in an area with more than one FMR constrains PHA authority and HUD should instead allow PHAs to utilize the highest FMR. As an alternative, a commenter recommended that HUD implement a threshold that is not dependent on the FMR and instead use a threshold that is reflective of the risk of excessively high payment standards. Another commenter stated that HUD should rely on its own ZIP code grouping guidance, which allows PHAs to set payment standards for a group of ZIP codes as long as the payment standard is 90 to 110 percent of the SAFMR of each ZIP code in the group. This commenter also stated that SAFMRs are burdensome and undesirable for PHAs to determine payment standards, and as an alternative, PHAs should be allowed to provide data to HUD and have the local field office approve the payment standards based on actual current market data. The commenter noted that there is no reason to change the ability of owners to request increases below 110 percent of the FMR or the reasonable rent.

A commenter supported payment standard increases as providing stability to families and landlords but urged HUD to ensure that rent increases occur at a reasonable rate and not forced with an abrupt increase.

HUD Response: HUD agrees with the numerous public comments in support of allowing higher payment standards. This final rule allows PHAs to set payment standards up to 120 percent of the FMR upon notification to HUD that the PHA meets certain criteria. Since the publishing of the proposed rule, HUD has also seen the success of PIH Notice 2022–09, and successor notices, which provided a streamlined regulatory waiver process for PHAs to establish payment standards from 111 to 120 percent of the FMR. Given this, HUD decided that added flexibility to set payment standards up to 120 percent of FMR is sufficient and notes that there are other avenues for PHAs to request to establish payment standards at higher levels.

HUD notes that § 982.503(d)(2) does explicitly allow PHAs that are not in designated SAFMR areas or have not opted voluntarily to adopt SAFMRs to establish exception payment standards up to 110 percent of SAFMR without HUD approval. Additionally, HUD will allow PHAs to opt-in to the SAFMR by notification to HUD, rather than requiring HUD approval by modifying § 888.113(c)(3).

HUD does not agree that requiring the lowest SAFMR in an exception area that crosses one or more FMR boundaries constrains PHA authority. Each ZIP code, regardless of whether it crosses one or more FMR boundaries has one established SAFMR amount. Therefore, a PHA adopting ZIP code-based SAFMRs will only have one SAFMR to choose from, which is how many PHAs establish exception payment standards

using the SAFMR under this provision. However, in some cases, PHAs group ZIP code-based SAFMRs into one FMR area to reduce administrative burden. In the case of grouping, the basic range of all of the selected ZIP codes is still applicable. Therefore, in lieu of establishing a unique payment standard for each ZIP code area, a PHA may use this flexibility to establish payment standards for ''grouped'' ZIP code areas, provided the payment standard in effect for each grouped ZIP code area is within the basic range of the SAFMR for each ZIP code area in the group. As a result, HUD finds that the policy is reasonable and will continue with this final rule as proposed. HUD also notes that § 982.503(d)(4) allows PHAs the opportunity to provide rental market data to HUD to support their request for exception payment standards.

Consolidation of Exception Payment Standard Requirements

A commenter supported consolidating exceptions to payment standards in a single location.

HUD Response: HUD appreciates this comment and in this final rule HUD consolidates exception payment standard regulations in § 982.503(d).

Rental Market Data

Several commenters opposed HUD requiring PHAs to submit rent comparability studies or require certification of the rental market data in exchange for higher payment standards. A commenter stated that HUD does not indicate that PHAs are providing insufficient rental data in requests for an exception payment standard. Commenters also noted that HUD requiring data for exception payment standards to be prepared through a market study or by a certified appraiser is administratively and financially burdensome for PHAs. One commenter proposed that HUD establish a procedure to extend payment standards in rapidly changing, low-vacancy, and high-cost rental markets, seeing as there are existing mechanisms to request exception payment standards within the HCV program. Other commenters proposed that HUD accept data from various sources including local market studies from the PHA or other local entities that use data from a reputable or verifiable source, online surveys of the local renter community, PHAs that use a third-party vendor to conduct rent reasonableness for rental market data, rental market studies prepared by institutions of higher education, industry data, or the rent reasonableness evaluations.

A commenter proposed that HUD expand access to data on low-vacancy areas by unit size and exclude public housing developments from calculating FMR/SAFMR because a concentration of low rent units in large public housing developments are in exception payment standard areas. The commenter further stated that when there are differentials with the ACS data, HUD should allow PHAs to provide local data if the data is available.

Another commenter encouraged HUD to establish clear rental data standards for the exception payment standards that require HUD's approval to decrease the administrative burden so that PHAs can obtain justified exceptions, while simultaneously providing reasonable assurance that the higher standard is needed to cover market rents in the area.

Another commenter stated that the exception payment standard assessment HUD requires for a PHA should be easily accessible to under-resourced PHAs and that HUD should provide funding grants to PHAs that will conduct a study for purposes of applying for an EPS. The commenter also stated that HUD should require PHAs to make their assessments of rental market data and rent comparability data publicly available, because this would improve advocates' and residents' understanding of the PHA's assessment of the rental market, as well as create transparency and an opportunity to challenge FMR policies that do not further fair housing goals. One commenter recommended that HUD set the data requirements by notice for easier adjustment based on lessons learned and when new types of data become available.

HUD Response: HUD appreciates the comments and intends to issue a PIH notice with further clarification regarding data that must be submitted in support of an exception payment standard request. However, under this final rule at § 982.503, PHAs no longer must submit supporting data for exception payment standard requests between 110 and 120 percent of the FMR if they notify HUD that they meet certain criteria. Additionally, data submitted for exception payment standards greater than 120 percent usually relies on American Community Survey and Census data, and therefore is available to the public already.

Responses to Question 8 (Maximum Cap)

Several commenters objected to HUD's maximum cap on exception payment standard amounts due to differences in high-cost markets and requested PHA flexibility. A commenter stated that limits on exception payment standards should be data driven. Another commenter recommended that HUD ensure that PHAs are setting payment standards to affirmatively further fair housing and reduce voucher concentration in high poverty communities, considering that some studies have shown that most SAFMR PHAs set higher payment standards in low-opportunity communities and lower payment standards in higher-opportunity communities. The commenter further suggested that HUD require PHAs to submit rent comparability studies and payment standard schedules to HUD, so that HUD can easily review them and compile them in a national database. According to the commenter, the database would easily allow voucher holders to explore their options regarding portability moves and would help HUD and advocates ensure that payment standards comply with the applicable requirements.

A commenter stated an additional level of scrutiny is reasonable for PBVs, because requiring approval for an exception payment standard above 120 percent of FMR for project-basing vouchers could prevent abuse and make development deals financially acceptable and profitable for developers. A commenter stated that HUD should allow exception payment standards, even if they are high, if there is data showing that the higher standard is needed to cover typical market rents in an exception area. The commenter expressed that instituting a cap preventing PHAs from establishing exception payment standards would risk excluding voucher holders from areas of the metropolitan area, therefore reinforcing economic and racial segregation. In the alternative, the commenter suggested that if HUD establishes a cap, it should be set high enough to ensure that voucher holders have access to a substantial variety of low-poverty and high-opportunity areas, including areas where their own racial or ethnic group does not predominate. This commenter also recommended that HUD adjust the proposed rule to accommodate the use of SAFMRs for non-metropolitan ZIP codes and publish SAFMRs for those ZIP codes whenever sufficient data is available. The commenter stated that HUD should apply the same standard to SAFMRs in non-metro areas as it does in metro areas as well as establish SAFMRs in ZIP codes where there are sufficient data and defaulting to a county-based FMR in ZIP codes where there are not. The commenter added that HUD should

explicitly state in § 982.503(d)(4) that PHAs may not require families to pay more than 30 percent of their income for rent as a condition for receiving an exception payment standard for a reasonable accommodation. The commenter further noted that the need for exception payment standards could be reduced by ensuring that FMRs reflect actual market rents, particularly in areas where rents are rapidly rising.

A commenter encouraged HUD to implement methods for PHAs to increase payment standards where appropriate, such as requiring payment standards in areas with significant disparity between voucher concentration in impoverished neighborhoods and affordable unit distribution or financial incentives. The commenter found upper limits on exception payment standards as unnecessary and stated that PHAs should have maximum flexibility to seek higher standards, as there are already natural ''limits'' on requesting excessive rents. In conclusion, the commenter objected to using the success rate payment standards for metro areas with very low vacancy rates, while requiring other metro areas to use the SAFMR flexibilities.

HUD Response: After considering these comments on HUD's questions about instituting a maximum cap on exception payment standard amounts, HUD will not institute a maximum cap. HUD recognizes the need to set payment standards that are responsive to the rent conditions in multiple areas. This final rule also allows voluntary use of SAFMRs in non-metropolitan ZIP codes for which HUD publishes SAFMRs, in order to provide PHA serving those area greater flexibility to set payment standards that reflect local market conditions. While HUD appreciates the comments on additional flexibilities, HUD is not making broader changes to exception payment standards in this final rule, other than those discussed above.

Reasonable Accommodation (§ 982.503(d)(4))

A commenter recommended that HUD clarify that ''FMR boundaries'' refers to the ZIP code boundary and not the metropolitan boundary. This commenter further emphasized that HUD must revise the payment standard regulations as well as revise or rescind inconsistent PIH notices, to clearly state that tenants who request a reasonable accommodation for an increase in the payment standard are not required to pay 40 percent of their income in rent to see the benefits of the accommodation. The commenter mentioned that the fair housing laws allow individuals with disabilities to request higher payment standards as a reasonable accommodation if there is a disability-related need for a particular unit (for example, it has accessibility features or is located in proximity to services/supports which will be lost if the client has to relocate); however, the commenter noted that HUD should add to § 982.503(d)(4) because HUD has not fully implemented the third sentence of the HOTMA-revised section 8(o)(1)(D), which prohibits HUD from establishing additional requirements regarding the amount of adjusted income paid by a family receiving a reasonable accommodation.

HUD Response: Tenants who request exception payment standards as reasonable accommodations are not required to pay 40 percent of their income in order to benefit from the accommodation, so no change to this rule is needed in order to achieve that result. HUD will issue guidance clarifying this point.

10.C. Payment Standard Below the Basic Range (§ 982.503(e))

A commenter suggested proactive requirements, such as HUD establishing limits for when PHAs can set payment standards below the basic range (below 90 percent of the applicable FMR) because PHAs have financial incentives to set lower payment standards, regardless of adverse effects on families. The commenter also recommended that HUD require PHAs seeking approval for payment standards below the basic range to provide rent data showing that the requested standard would be adequate to cover rents and utilities for at least 40 percent of units in each ZIP code and show that no more than 40 percent of current voucher holders would be required to pay more than 30 percent of their income for rent. The commenter stated that HUD should eliminate the success rate payment standard option because the SAFMR-based payment standard flexibility could effectively accomplish more.

A commenter opposed HUD's changes to how it will assess requests for payment standards below the basic range. The commenter expressed that the proposed language threatens the affordability characteristic of the voucher program because the proposed language sets low assessment standards, does not require PHAs to meet rent burden or market rents criteria, and removes the current prohibition on payment standards below the basic range at agencies where more than 40 percent of voucher families pay gross rents above 30 percent of their adjusted income. The commenter encouraged HUD to require PHAs seeking approval for a payment standard below the basic range to implement a policy that holds families harmless where the reduction in payment standard causes an increase in the family's rent. The commenter stated that requiring PHAs to hold families harmless would allow PHAs to incentivize new or moving voucher families to consider lower poverty communities, while not penalizing families who decide to remain in their current home.

Another commenter objected to HUD's proposal to provide PHAs with discretion to determine lower payment standards without HUD approval because PHAs cut corners or costs which end up falling on the participant. The commenter remarked that lower payment standards tend to cause tenants to pay higher rents they cannot afford, and to prevent this HUD should ensure tenants will be held harmless should the family remain in the unit for a reasonable period until the family can relocate to a new affordable unit.

HUD Response: HUD appreciates the comments and will continue to require the PHA to request approval to establish a payment standard lower than the basic range. This final rule states that unless necessary to prevent terminations, HUD will not approve payment standards below the basic range if the payment standard would cause the family share to exceed 30 percent of adjusted income for more that 40 percent of families with tenant-based vouchers.

Responses to Question 9 (§ 982.503(h))

a. Is 40 percent a reasonable ''significant percentage of families,'' or should the trigger be raised to a higher percentage of families (for example, the HUD review would be triggered if 50 percent of families pay more than 30 percent of AMI as the family share)?

Commenters stated that 40 percent is a reasonable ''significant percentage of families.'' Some commenters stated that a higher percentage would create a burden on families before an assessment is completed. One commenter stated that HUD should not increase the threshold for the share of families paying more than 30 percent of their income, as there are already more than 40 percent of voucher families paying more than 30 percent, and that HUD should lower the threshold below 40 percent. Another commenter stated that available data shows that HUD's monitoring has not lowered the cost-burden on households below 40 percent, which the commenter stated is a high definition of ''significant.'' This

commenter proposed that HUD require PHAs to raise their payment standard and reduce minimum rents when more than 40 percent of families pay more than 30 percent of their adjusted income or when success rates fall below a certain percentage, so that they must set payment standards that avoid rent burdens and allow voucher families to lease-up.

HUD Response: HUD appreciates the comments and maintains the current regulation measurement of 40 percent being a ''significant percentage of families'' as reasonable.

Make Data Public

Commenters recommended that HUD make the data and evaluations used to determine rent burdened percentages public with the opportunity for public comment, which would allow voucher holders and other public members to know how the PHA is doing.

HUD Response: Data on rent burden is already public in HUD's two-year tool and the payment standard tool, which can be accessed at HUD's HCV Utilization page at *https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/Tools.*

Include Rent Burdens in SEMAP

Commenters suggested that HUD incorporate rent burdens into SEMAP. A commenter recommended doing this by adding an indicator measuring compliance with the 40 percent standard. Another commenter recommended adding two new indicators measuring the portion of assisted families that are rent burdened and the percentage of voucher families who are not able to lease up within search periods.

HUD Response: HUD appreciates the comments, but changes to SEMAP are beyond of the scope of this rulemaking.

b. If HUD were to replace 40 percent with a higher percentage of families, as described above, should HUD also establish an additional threshold that would trigger a review even though the number of families paying more than 30 percent of AMI had not reached the significant percentage?

Commenters objected to HUD's proposal to establish an additional threshold that would trigger a review, even though the number of families paying more than 30 percent of AMI had not reached the significant percentage. One commenter stated that HUD's proposed standards are arbitrary because PHAs sufficiently conduct internal tracking to monitor rent burden and suggested that if HUD implements a rent burden standard, then PHAs should be exempt if they show that they are trying to address the rent burden issue by using SAFMRs or high opportunity payment standards or if they have an adequate success rate for voucher holders. Another commenter noted that it is unnecessary for HUD to add additional metrics for determining whether HUD should review a PHA's payment standards. One commenter suggested that the trigger for HUD's review should be when 50 percent of the families pay more than 30 percent AMI as the family share of the rent. The commenter explained that families may stay in a unit and pay more than 30 percent of income in tight rental markets where locating a new unit may be financially and administratively burdensome. This commenter suggested consistently defining ''significant percentage'' in all section 8 programs, defining ''significant percentage'' in regulation to prohibit PHAs from altering the definition, and providing additional information on what a PHA must do if the threshold is met.

HUD Response: As explained above, HUD appreciates the comments and maintains the current regulation measurement of 40 percent being a ''significant percentage of families'' as reasonable. HUD received multiple comments in opposition to changing the threshold of families paying more than 30 percent of their income as a trigger for review of a PHA's payment standard schedule. Therefore, HUD will continue its current practice of reviewing a PHA's payment standard schedule when HUD finds that 40 percent or more of families occupying units of a particular size pay more than 30 percent of their adjusted monthly income as the family share.

Responses to Question 10 Regarding Success Rate Payment Standards (§ 982.503(f))

Many commenters supported retaining success rate payment standards. One commenter objected to HUD tying additional payment standard functions to SAFMRs due to the lack of adoption of SAFMRs. Another commenter explained that the utility of the success rate payment standard is essentially eliminated if PHAs are given the option of setting exception payment standards at up to 120 percent of FMR without HUD approval, and stated that moving to and from the 40th to 50th percentile of rent has an almost identical impact on the resulting payment standard. This commenter supported retaining the success rate payment standard if HUD approval will still be required for exception payment standards above 110 percent of FMR. One commenter opposed retaining success rate payment standards. The commenter stated that the standards, set at the 50th percentile of the metro FMR, were ineffective at the stated goal of increasing housing opportunity for voucher families. Additionally, the commenter noted that the SAFMR final rule eliminated the regulations that governed the establishment of FMRs using 50th percentile rents, and HUD is currently phasing out its use of success rate payment standards. Another commenter stated that HUD should eliminate the success rate payment standard option because the SAFMR-based payment standard flexibility could effectively accomplish more.

HUD Response: Because this final rule increases flexibility for PHAs to set exception payment standards up to 120 percent of the FMR, HUD has determined that it is unnecessary to also retain success rate payment standards. This final rule eliminates the ability for PHAs to receive new success rate payment standards but allows them to continue to use previously approved success rate payment standard amounts.

11. How To Calculate Housing Assistance Payment (§ 982.505)

A commenter stated that HUD must ensure that participants are provided due process and a reasonable opportunity to decide whether the family can afford to remain in the subsidized unit if HUD increases payment standards after the initial HAP contract. The commenter offered the following suggestions if HUD increases payment standards: (1) allow the tenant 60 days after the increase request to decide or request moving papers; (2) phase in the rent increase over time or require that the PHA make up the difference to the higher standard; or (3) mirror the timeframe in § 505(c)(3) for increases and decreases. The commenter stated the proposed rule fails to adequately address arising problems when PHAs create payment standards that trap residents in low-opportunity, high poverty, and high crime areas, when families may need higher exception rents to access better schools, employment, or other resources for self-sufficiency. As a remedy, the commenter recommended that HUD map where families can live within the PHA's payment standards. One commenter recommended that HUD remove § 982.505(c)(4)(iii) to streamline the rent change process and prevent confusion among families that expect changes during the recertification process and not outside of the recertification process.

HUD Response: HUD appreciates the comments received on when to apply

increases in the payment standards to the family. This final rule, at § 982.505, requires PHAs to apply increases in payment standards no later than the earliest of (1) the effective date of an increase in the gross rent will result in an increase in the family's share, (2) the family's first regular or interim reexamination, or (3) one year following the effective date of the increase in the payment standard amount. This approach provides participating families the benefit of these increases more consistently and helps ensure that their portion of the rent remains affordable. This final rule also allows PHAs to adopt a policy, at their option, to apply an increase in the payment standard before these events occur. HUD will not remove paragraph (c)(4)(iii) because this provision eliminates the potential lag time between an increase in the rent to owner brought about by an increase in the payment standard and the increase in the assistance payment made on behalf of the family as a result of the increase in the payment standard.

Timeline

One commenter supported HUD's revisions on when to apply a reduction in the payment standard because the changes will promote fairness and consistency in the voucher program. Another commenter opposed the two-year adjustment timeline as an administrative burden for PHAs and believed it would provide no tangible benefit for families over a shorter timeline. This commenter stated that the current timeline of the second recertification already ensures adequate preparation for families and is when all contact with the family is planned from the PHA's perspective.

HUD Response: HUD appreciates the range of comments. HUD in this final rule will continue with requiring PHAs to give families two full years from the date of the application of the payment standard decrease to ensure all families have the same period of time to adjust to the decrease in the payment standard.

Payment Standard Timeline

A commenter supported requiring application of payment standard increases on the effective date of a gross rent increase instead of waiting until the next annual recertification or one year after the increase. The commenter recommended that HUD add a requirement to § 982.505(c)(4) that PHAs immediately address payment standard increases during the HAP contract term and before the effective date of the new payment standard, to protect tenants in rapidly rising rent markets.

HUD Response: HUD appreciates the comments and this final rule creates additional required times for when a payment standard must be increased in § 982.505(c)(4). HUD finds that these additional requirements sufficiently balance ensuring participants receive the benefit of payment standards and PHA administrative burden in applying increases in the payment standards.

Payment Standard Update Burden

A commenter opposed HUD's proposal at paragraph (c)(4) of § 982.505 (How to calculate HAP), adding two new points at which the family's payment standard may be increased, as unnecessarily burdensome and expressed concern regarding whether the number of transactions that would trigger the payment standard calculation to determine if an "increase in the family share" occurred will greatly outnumber the times the higher payment standard would be applied under the rule and expressed an appreciation for data supporting the proposed rule.

HUD Response: HUD appreciates these concerns. When paragraphs (c)(4) and new paragraph (c)(5) are read in conjunction, HUD believes the burden on PHAs of this change is relatively small and outweighed by the benefit to the family.

Specifically, the requirement that this commenter is concerned about, is as follows: when there is an increase in the payment standard, and when there is an increase in the gross rent, and the increase in gross rent would increase the family share, then the PHA must apply the increased payment standard, to reduce the burden on the family.

This requirement is limited to situations where the gross rent increase would increase the family share is intended to decrease the burden on the PHA, not increase it. If a PHA would prefer not to make this calculation, the PHA may apply the new payment standard every time there is a gross rent increase, or indeed as soon as they want to, regardless of whether the gross rent increase changes the family share calculation, per paragraph (c)(5).

12.A. Utility Allowance (UA) Schedule (§ 982.517)

Commenters suggested HUD allow PHAs to provide a UA for wireless internet to expand opportunity. A commenter noted that there is no statutory or regulatory prohibition on it and PHAs can use their own budgetary judgement to decide if they can afford to provide a UA for internet. Another commenter proposed that HUD consider broad ways to support assisted households during and after the pandemic. One commenter suggested that HCV UAs should include fees charged, as well as reflect the actual rates charged by the major utilities serving the units and the rate plans used by most tenants. This commenter also recommended that HUD not consider low-income discounts, unless there is universal access and verified tenant participation. To ensure transparency, the commenter also stated that supporting documentation for the calculation for the PHA's UA schedules for both HCV and PBV programs should be available to tenants' rights advocates, without resorting to cumbersome and vague FOIA and State public records acts. The commenter recommended that HUD's review should be retained and strengthened, to ensure compliance with the regulatory standards and consistency among UAs in similar climatic regions and markets, rather than ending the requirement for PHA submission of the schedule. Another commenter suggested that HUD continue to require PHAs to submit their UA schedules to HUD, which would provide a system of checks and balances and much needed oversight.

HUD Response: HUD is currently reviewing ways to support internet access for the families it serves in all assisted housing programs and how to best complement subsidies provided through the Affordable Connectivity Program (ACP) and Lifeline administered by the Federal Communications Commission (FCC). HUD is working to raise awareness among PHAs so they can help families enroll in the ACP and Lifeline programs. In addition to supporting the FCC programs, HUD is reviewing its assisted housing program policies across the department to align policies and support broadband. At this time, HUD is not providing in this final rule that PHAs may use UA schedules for internet; however, HUD has removed the language that explicitly prohibits wireless internet. In place of language prohibiting wireless internet, HUD added language providing that HUD may add utilities required to pass HQS by **Federal Register** notice allowing for public comment.

The language in § 982.517(b)(1) states that "the utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality." The typical cost of utilities and services includes surcharges charged by the utility company. Many PHAs separate the surcharge out on the UA schedule. For

example, a family may have natural gas for their heating, cooking, and water heating and the natural gas company charges a monthly surcharge for this utility. A rate-based utility allowance is provided on the schedule for each of these utilities and the PHA also provides the family with an allowance for the surcharge if they have one or more natural gas-powered utilities in their home. While this is not a change in policy and HUD believes this is already the common practice at PHAs, HUD recognizes that it would be helpful for the regulation to be clearer. HUD is adding ''applicable surcharges'' to the list of utilities and services on the utility allowance schedule in § 982.517(b)(2)(ii).

PHAs develop their area-wide utility allowance schedules, both the regular schedule described in § 982.517(b)(v)(2)(i) and the new option for an energy-efficient schedule provided in § 982.517(b)(v)(2)(ii), based on the cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. Household income or discounts provided to certain households are not a factor in the development of the utility allowance schedule.

HUD understands the concerns expressed by commenters encouraging HUD to continue collecting utility allowance schedules from PHAs. While the proposed language would have allowed submission to HUD only upon request for utility allowance schedules from PHAs, HUD agrees with commenters that proactive submission of utility allowance schedules will help with oversight. HUD has reverted § 982.517(a)(2) in this final rule to the existing codified language which requires submission of these schedules to HUD.

12.B. Area-Wide Energy-Efficient Utility Allowance Schedule (§ 982.517(b)(2)(ii))

Commenters stated that HUD should authorize PHAs to use energy-efficient utility allowance (EEUA) schedules. Another commenter stated that PHAs should have the option to implement alternative utility allowance schedules though they may be burdensome to implement. One commenter suggested that HUD should not require entire buildings to achieve energy saving design certifications for an individual unit to qualify for an EEUA. Further, the commenter stated that due to the time and cost, many property owners may elect to only install energy-efficient appliances and other design standard upgrades, and if so, property owners should not be penalized for their inability to achieve energy savings design certifications for entire buildings especially where the property owners can demonstrate that the EEUA schedule would best encourage conservation and the efficient use of HAP funds based on historic utility consumption data.

Other commenters stated that EEUA schedules should be voluntary because they require annual updates and are costly, and, as a result, they are better suited to PBV where the owner can be required to commission an annual update to keep using the schedule, or PHAs could make their decision based on their market areas and funding. Another commenter stated that utility allowance options would present a high possibility for error and could open PHAs up to charges of discrimination because it would be hard to identify units where alternate utility allowances could be used. A commenter suggested that HUD use the HUD Utility Schedule Model (HUSM) for all project types to minimize project-specific utility's administrative burden as well as permit PHAs the ability to decide their HUSM approach to determine UAs and be required to publish this in their Administrative Plan.

HUD Response: HUD appreciates the many comments supporting the option for PHAs to establish an EEUA. HUD believes that permitting EEUA for units that are located in buildings that do not have a full-scale energy savings design is premature. While HUD agrees that allowing PHAs to use an EEUA on substantially retrofitted units in an older building could encourage owners to make units more energy efficient, more guidance is needed to ensure the EEUA is not applied too liberally leaving many tenants with UAs that are too low. This final rule allows PHAs to implement an EEUA for units in Energy Star or LEED certified buildings; however, HUD will release more guidance before allowing additional units to use the EEUA schedule. PHAs must be careful to ensure that their EEUAs will work for most energy efficient properties. It would not be appropriate to use LEED estimates for UA costs if Energy Star certified units make up the majority of energy efficient units in the area. In that case, a PHA may decide to only apply the EEUA to LEED certified units or base the EEUA on Energy Star estimates. The establishment of an EEUA schedule is voluntary. PHAs in areas that have a large percentage of units that are energy efficient may wish to have a separate schedule to ensure the utility allowances for these units are not unnecessarily high. This may also reduce requests for project-specific allowances in the PBV program that are often needed due to energy efficient requirements, since the area-wide EEUA schedule will also apply to PBV projects that meet energy efficient requirements.

12.C. Utility Allowance Based on Flat Fees (§ 982.517(b)(2)(iii))

Several commenters offered suggestions for HUD's proposal to provide PHAs the discretion to substitute flat fees charged for certain utilities. One commenter recommended that HUD modify § 982.517(b)(2)(iii)'s current language of ''only if the flat fee charged by the owner is less than,'' to ''only if the flat fee charged by the owner [is] no greater than,'' to account for the possibility that the flat fee is equal. One commenter objected to HUD's flat fee proposal by stating that flat fee UAs do not ensure that a tenant is exceeding their maximum share of the rent, stating that UA should be based on actual use.

HUD Response: HUD will adopt in § 982.517(b)(2)(iii) the suggested language changing ''less than'' to ''no greater than'' to make flat fees easier for PHAs to administer. HUD would like to clarify that flat fees are meant to be used only when the landlord charges a set fee for certain utilities and the fee does not change based on consumption or other criteria. If the landlord charges a variable fee for a utility, then the PHA would not have the option of using the flat fee to calculate the utility allowance. Instead, the PHA would use the appropriate area-wide utility allowance based on the size and type of unit. Applied correctly, tenants will not pay more than the flat fee used to calculate the utility allowance.

13. Manufactured Home Space Rental (§§ 982.620–982.623)

Commenters recommended that HUD amend § 982.620 to require that PHAs must provide the option for tenants to use voucher funds for the costs of purchasing a manufactured home because without the requirement, the HOTMA amendments will be undermined. A commenter also noted that section 112 of HOTMA eliminated the option for a PHA to offer only assistance under a voucher for the cost of leasing land on which a manufactured home is sited (but not for the annual cost of purchasing a home) and therefore recommended HUD amend § 982.620(b)(2) to delete the phrase ''to a manufactured homeowner to lease a manufactured home space'' and add in its place, the words ''under paragraph (a)(3) of this section.''

A commenter suggested the following modification for § 982.620(a)(3): ''The

PHA may provide assistance for a family that owns a manufactured home (including a family that has recurring expenses to amortize the cost of purchasing a manufactured home) and leases only the space. The PHA shall make this option available upon a bona fide request from any party in the PHA's jurisdiction.'' The commenter also recommended deleting the clause, ''to a manufactured homeowner to lease a manufactured home space'' from § 982.620(b)(2), since that type of assistance is no longer authorized. The commenter requested clarification behind why HUD proposed to require PHAs to make separate payments to the landowner and to the family for debt costs, rather than only making a single payment to the family. The commenter opposed HUD's requirement that space owners sign a HAP contract with the PHA, if the owner waives receiving a direct PHA payment. The commenter also proposed that HUD delete the first sentence under § 982.623(d)(2) regarding the HAP contract and revise the second sentence to state that the owner's acceptance of the family's rent payment is a certification that the space complies with HQS as specified in § 982.621(a) and (b). Some commenters stated it is unnecessary to require the tenant pay for the landowner's HAP contract of manufactured home space, because regardless of the tenant timely paying rent, the landowners must go to the PHA for payment, which has the contract. A commenter claimed that incidental protections that a HAP contract with the landowner might provide are not commensurate with the creation of an additional barrier to using the voucher option.

HUD Response: HUD does not have the authority under the statute to require that PHAs provide manufactured home space rental assistance. 42 U.S.C. 1437f(o)(12) states, ''A public housing agency *may* make assistance payments in accordance with this subsection on behalf of a family that utilizes a manufactured home as a principal place of residence and rents the real property on which the manufactured home owned by any such family is located'' (emphasis added). The use of the word ''may'' in the statute unambiguously means provision of this assistance is at the PHA's discretion. To be eligible for manufactured home space rental assistance, the family must own the manufactured home. The ownership does not need to be outright, and they may still be making monthly payments to amortize the purchase of the manufactured home. Both scenarios are considered ownership similar to how a person who owns a home with a mortgage is still considered the homeowner. For this reason, HUD is finalizing the language in the proposed rule for adoption in this final rule. Owners of manufactured space rental will still be required to sign a HAP contract even if the PHA does not pay them rent directly. The HAP contract is more than a vehicle for conveyance of rent payments. The HAP contract is essential to ensuring compliance with HQS, including the appropriate utility hookups, and the owner's agreement to comply with rent reasonableness, among other requirements.

14. Homeownership Counseling (§ 982.630(e))

A commenter stated that homeownership counseling services should only be provided by HUD-certified counselors working with a HUD-approved housing counseling agency. Another commenter approved of HUD requiring certified counseling for the homeownership program as well as supported HUD excluding home equity as an asset and not decreasing the payment standard of the homeownership program.

HUD Response: HUD appreciates the comments and will be moving forward with requiring any homeownership counseling to be conducted by a HUD-certified housing counselor working for a HUD-approved housing counseling agency. This requirement conforms with current Housing Counseling requirements.

15. Amount and Distribution of HAP (§ 982.641(f))

A commenter supported maintaining utility amounts for homeownership families based on housing size, instead of family size.

HUD Response: HUD appreciates the supportive comment and will continue with the proposed language at § 982.641(f)(3) stating that the use of a utility allowance schedule under § 982.517(d) does not apply to the homeownership option because the utility allowance is always based on the size of the home bought by the family receiving homeownership assistance.

16. PBV: When the Tenant-Based Voucher Rule Applies (§ 983.2)

A commenter supported HUD's policy to not require new verification at briefing for the PBV program and making the 60-day timeframe inapplicable under the PBV program because this approach improves PHAs' ability to administer PBVs.

HUD Response: HUD appreciates the support and agrees that the standard at § 982.201(e) is inapplicable to the PBV program, as families are not issued vouchers in the PBV program, but notes that the applicable timeframe for PBV is codified in § 983.251(a)(2).

17. PBV Definitions (§ 983.3)

Definition of ''Development Activity''

A commenter expressed concern with HUD's definition of ''development activity,'' due to its potential harmful impact given its lack of previous implementation for other HUD programs. Another commenter stated that the definition is adequate because minor renovations are not included in the definition of development work. A commenter stated that the definition of ''development activity,'' was unclear and broad and should be limited to new construction, adaptive reuse, or substantial rehabilitation of existing housing in compliance with HQS. Another commenter suggested that including replacement of equipment and materials with items that are of improved quality in the definition of ''development activity'' would deter project owners from modernizing and completing other updates to properties, which neither HUD's regulations nor form of HAP contract require a project owner to report to a PHA. This commenter also recommended that the development activity should be limited to instances of new construction or substantive rehabilitation of housing that fails to substantially comply with HQS. This commenter further expressed that development requirements, such as subsidy layering review, should not continue to apply to units once they are placed under HAP contract or when units are being added to an existing HAP contract. A commenter warned that HUD is exceeding its statutory authority by having a broad definition of development activity, because HUD does not have the Congressional authority to regulate a project owner's ability to engage in development work following execution of a HAP contract, and HUD has not historically regulated this type of development activity. This commenter stated that the 1937 Act provides PHAs with discretion on when to allow owners to engage in development work.

HUD Response: Upon review of comments regarding this definition and other sections of the proposed rule, HUD determined using a single term to refer to both rehabilitation and new construction done in order for the project to receive PBV assistance and for other work occurring later during the

term of the PBV HAP contract produced significant confusion. Similarly, the corresponding regulatory structure resulting from the dual-purpose definition, such as using the development requirements of subpart D (Requirements for Rehabilitated and Newly Constructed Units) of part 983 to address certain requirements applicable to work occurring later during the term of the PBV HAP contract, produced significant confusion. As a result, HUD has removed work occurring later during the term of the HAP contract from the proposed definition of ''development activity,'' and instead covers this work under the new definition of ''substantial improvement.'' The regulatory structure also is revised in this final rule to eliminate this confusion, as described throughout this preamble. The public comments on the proposed definition regarded the portion of the proposed rule definition of ''development activity'' that is instead covered in this final rule by the definition of ''substantial improvement.''

HUD disagrees with the commenter's characterization of previous implementation, given HUD's prior use of a similar definition, as provided in the former 24 CFR 983.210(j) (which is removed in this final rule) and described in 80 FR 52511 (Mar. 9, 2015), which drew from requirements of other programs. HUD appreciates the positive comment. HUD does not adopt the proposal to define substantial improvement as new construction, adaptive reuse, or substantial rehabilitation, as HUD believes those terms are less clear than the proposed definition. HUD does not believe that including in the definition a substantial improvement in the quality or kind of equipment and materials will deter owners from modernizing projects, since this final rule implements a reasonable process for such activity to occur. HUD does not adopt the proposal to define substantial improvement as new construction or substantive rehabilitation of existing housing that fails to substantially comply with HQS, as HUD finds there is a compelling need to encompass additional activities that may greatly impact occupants in the rules governing substantial improvement. HUD also notes that it has a clear mandate under law to ensure housing occupied by assisted families is decent, safe, and sanitary, which includes establishing rules governing substantial improvement that occurs following contract execution, as such activity necessarily impacts occupants.

Definitions of ''Newly Constructed Housing'' and ''Rehabilitated Housing''

Another commenter proposed that the definitions of ''newly constructed housing'' and ''rehabilitated housing'' should incorporate the concept of housing ''under construction'' that HOTMA inserted in new section 8(o)(13)(F)(iii). This commenter suggested that HUD's proposed rule failed to account for this provision's direction that HUD allow PHAs to enter a HAP contract for ''any unit that does not qualify as existing housing and is under construction[.]'' This commenter suggested HUD make clear that projects which are under construction qualify as newly constructed.

HUD Response: HUD disagrees that the wording of the definition of newly constructed housing forecloses selection of a project that is under construction. For example, projects for which development activity occurred prior to PBV selection would nevertheless meet the definition of newly constructed housing if any of the units in the project ''do not exist on the proposal or project selection date and are developed after the date of selection for use under the PBV program.'' Likewise, projects may qualify as rehabilitated housing despite any development activity that occurred prior to PBV selection where the project will be developed for use under the PBV program and meets the other components of the definition of ''rehabilitated housing.'' Further, as previously provided in the regulations, contracts for newly constructed and rehabilitated projects may be executed in stages, even though the construction has not been completed, which is not in conflict with the definitions. Neither definition contains language barring projects for which some of the development occurred earlier from being considered newly constructed or rehabilitated; rather, the definitions affirm that there will be development that occurs after the proposal or project selection date for purposes of using the projects as PBV units. HUD recognizes that in many cases projects may engage in development activity for legitimate reasons unrelated to the plans to project-base a project prior to the PHA selection of the project for PBVs. In order to effectuate the applicable development requirements at § 983.153 without foreclosing selection of projects under construction, the regulation at § 983.154 requires that, in cases in which the PHA and owner use an Agreement prior to development activity, development activity does not commence from the date of proposal submission or board resolution, as applicable, until the effective date of the Agreement, and that, in cases of development without an Agreement or use of an Agreement after construction or rehabilitation has commenced, all development occurring after the date of proposal submission or board resolution, as applicable, complies with § 983.153. Further, while HUD does not change the definitions for the purpose the commenter proposed, HUD has provided an additional mechanism for execution of a HAP contract for a rehabilitated housing project while it is under construction in this final rule, as further explained in the summary of changes to § 983.157 above. Taken together, HUD believes §§ 983.3, 983.154, and 983.157 provide an appropriate balance between effectuating the development requirements and providing a mechanism to allow a PHA to project-base projects under construction. HUD therefore declines to expand the definition of newly constructed housing to provide an explicit reference to housing under construction, as doing so would change the definition from a statement of the meaning of the term to a provision that could appear to conflict with the development requirements in subpart D of part 983.

Definition of ''Project''

Commenters approved of HUD's proposal to keep its current definition of ''project,'' which is statutory, and which a commenter preferred for administrative consistency and clarity purposes. Another commenter recommended that HUD delineate the definitions for each program. Commenters suggested that HUD create a definition that allows for buildings in scattered sites (*i.e.,* non-contiguous sites), and establish conditions for the scattered sites, such as requiring buildings to have the same owner and containing a certain number of subsidized units in each building. A commenter noted that this would be consistent with HUD's position in the PBV, RAD, and ''Mod'' programs. Another commenter noted that buildings that span multiple blocks in a city grid and have historically been operated as part of one project are classified as individual projects for purposes of PBV, which creates an incongruous result. This commenter further expressed that the statute appears to support limiting the definition of ''project'' to only assessing whether a project complies with the income-mixing requirement.

HUD Response: HUD agrees that retaining the prior definition of ''project,'' consistent with the statutory

definition of ''project'' for purposes of the income-mixing requirement (project cap), supports the goals of administrative consistency and clarity. However, HUD found that the proposed rule as written appeared to inadvertently remove the discretion PHAs previously had, through the Administrative Plan, to further define ''project'' within the statutory parameters. HUD finds that PHAs may need such discretion for optimal program operation in certain cases. Given these considerations and positive comments received, HUD restores and codifies in this final rule the meaning of the term ''project'' as it was previously understood. For programs other than the PBV program, the definition of ''project'' applicable to such programs can be found in those programs' governing rules.

HUD declines to further define ''project'' to allow scattered sites to constitute one project. Doing so would increase the complexity of determining what constitutes a project, for purposes of the income-mixing requirement and for other purposes, to a level unwarranted by a relatively small administrative advantage in a small number of cases. However, HUD will continue to allow multiple projects, each consisting of a single-family building (defined in this § 983.3(b) as no more than four total dwelling units), to be under one HAP contract. HUD has taken this opportunity to update the language in § 983.202(a) to more clearly state that placing multiple projects, each consisting of a single-family building, under one HAP contract is allowable. HUD has also updated § 983.154(a) to clarify that it is allowable to place under one Agreement multiple projects that each consist of a single-family building and § 983.51(a) to clarify that PBV proposals may cover multiple projects where each consists of a single-family building. HUD agrees that whenever a HAP contract covers multiple projects all such projects must be owned by a single owner because, as a general principle, an owner can only execute a HAP contract for units the owner has authority to commit in a HAP contract (or a certification, in the case of a PHA-owned project exercising the option in § 983.204(e)(2)). The number of subsidized units in each project will continue to be governed by existing PBV requirements, particularly the income-mixing requirement (see § 983.54(a)).

Regarding the concern about buildings that span multiple blocks being classified as individual projects for purposes of PBV, HUD clarifies that the definition of ''project'' can include parcels separated by a public way, so long as such parcels can reasonably be considered contiguous (defined in this § 983.3(b) for this purpose to include ''adjacent to'' or ''touching along a boundary or a point''). For simplicity, the definition describes in general terms the buildings and parcels of land that qualify as ''projects'' in the vast majority of cases. Where natural or engineered features make up a boundary between buildings or parcels, PHAs are expected to reasonably determine if the buildings or parcels make up a project. Considerations include the extent and difficulty of access from one building to another, public regard of the buildings as interrelated, and whether the classification proposed would serve the statutory purpose of the income-mixing requirement. HUD intends to publish further guidance on this matter.

Definition of Request for Release of Funds and Certification

A commenter suggested HUD delete the definition of ''request for release of funds and certification,'' which is not used in the regulations and creates an unintended parallel process to the environmental review and replace it with the definition of ''letter to proceed,'' which is used in the regulations. This commenter suggested in the alternative to change ''PHAs'' to ''responsible entities,'' because the responsible entity signs the request for release of funds under 24 CFR part 58 for environmental reviews, and reorder the current language under 24 CFR part 58 because it suggests that Authority to Use Grant Funds (AUGF) would authorize a HAP, which is inaccurate.

HUD Response: HUD has considered this comment and determined that, while ''request for release of funds and certification'' is in fact used in § 983.56 of the regulation and is not the same as a ''letter to proceed,'' which is issued by HUD, the lack of clarity the commenter points out is best addressed by moving the content of the definition of ''request for release of funds and certification'' from § 983.2 to the appropriate section of § 983.56.

Definition of Comparable Rental Assistance

A commenter stated that the definition of comparable rental assistance does not explicitly include the statutory requirement that assistance must be tenant-based. This commenter suggested HUD specify that comparable assistance cannot be time-limited or subject to requirements that do not apply under section 8(o).

HUD Response: HUD agrees that the definition of comparable rental assistance should include the statutory requirement that assistance must be tenant-based. HUD therefore amends the definition, in this final rule termed ''comparable tenant-based rental assistance'' at § 983.3(b) to be consistent with the statute. HUD notes that the terminology used in § 983.261(b)–(c) before publication of this final rule was consistent with section 8(o)(13)(E) of the 1937 Act. HUD therefore views this change only as a clarifying change to the definition. HUD additionally specifies the essential elements of comparable tenant-based rental assistance in this final rule. That is, comparable tenant-based rental assistance enables a family to obtain decent, safe, and sanitary housing in which: (1) a family's monthly payment is not more than 40 percent of adjusted income; (2) the rental assistance is not time-limited; (3) the rental assistance is not conditioned on a work or supportive service requirement; and (4) the rental assistance affords the family a portability option. HUD does not in this final definition prohibit the assistance being subject to requirements that do not apply under 8(o) because doing so would reduce options available to PHAs and families, as many tenant-based rental assistance programs across the country likely do not meet every HCV program requirement. Such a requirement could increase wait times for families wishing to move from PBV units with tenant-based assistance.

HUD in this final rule also takes this opportunity to clarify that the ''gross rent'' calculation refers to the family's share of the gross rent, and not the total gross rent. This is a clarifying change consistent with how HUD already applies this definition. Additionally, to consolidate definitional language, this final rule removes language explaining the meaning of ''comparable tenant-based rental assistance'' at § 983.260(b)(4) such that the complete definition is in this final rule at § 983.3(b).

Existing Housing

Support and Disagreement

A commenter supported the proposed definition of ''existing housing'' in relation to how long it would take to make any repairs needed to comply with applicable quality standards and stated that it is a significant improvement over the use of a fixed and arbitrary cost of repairs as HUD proposed previously.

Other commenters found the current existing housing definition more flexible for PHAs. The commenters stated that the proposed definition did not clarify the existing requirement and

could create different implementation across the country. One commenter stated that PHAs should retain discretion to determine whether a project constitutes existing housing and to define substantial compliance with HQS in their Administrative Plans.

HUD Response: HUD appreciates the supportive comment and proceeds with a standard that does not include cost, as further discussed below. HUD finds that including a definition of ''substantially comply'' in this final rule will improve consistency and predictability in implementation of the PBV program across the country.

Potential Regulatory Burdens

One commenter urged HUD to reconsider the definition change due to the potential regulatory burden of narrowly defining ''existing housing'' while simultaneously expanding the definition of ''development activity,'' which could have chilling implications on PBV programs. Another commenter stated that treating some of the units as ''existing'' and some as ''rehabilitation'' would be confusing and regulatory burdensome for PBV purposes.

HUD Response: HUD concludes that, given the strong use of rehabilitated housing in the PBV program, clarification that a project is rehabilitated housing when an owner is undertaking extensive or lengthy work will not chill participation. However, HUD believes that the new option at § 983.157 for rehabilitated housing to complete development activity after HAP contract execution will provide additional flexibility needed to attract more PBV owners. In response to comments, HUD has revised the definitions of existing housing, newly constructed housing, and rehabilitated housing to clarify that the classification of project type is on a project basis.

Potential Rent Cost Burdens

A commenter opposed shifting from building condition (*e.g.,* current HQS status) to building correction plan (*e.g.,* ability to make repairs) as too high a burden, especially as the standard correction period is 30 days. This commenter warned that the proposed definition would likely result in additional rent burdens for tenants in units that cannot qualify as existing housing and encouraged HUD to define existing housing based on the percentage of units that pass HQS.

HUD Response: HUD agrees with the commenter that it is appropriate to incorporate into the definition of ''substantially comply with HQS'' the standard deficiency cure period applicable to the program, since that period best represents an overall correction timeline that remains compliant with HQS enforcement standards. This change is reflected in this final rule's definition of ''existing housing'' at § 983.3. HUD considered the suggestion to use, instead of the proposed definition, percentage of units passing HQS but determined such a standard would inappropriately allow classification of units with rehabilitation needs as existing housing. HUD appreciates the concern for the rent burden of tenants while awaiting assistance but determines that it is better addressed by adding the new option at § 983.157 for rehabilitated housing to complete development activity after HAP contract execution and maintaining the options at § 983.103(c) for initial execution before HQS compliance is determined via inspection. In other words, amending the definition of existing housing to include units immediately undergoing extensive work would have been an inappropriate mechanism to address the concern.

General Comments About Existing Housing Restriction

One commenter supported HUD's putting restrictions on the applicability of the definition of existing housing and noted it had experience with projects seeking to circumvent executing an Agreement for rehabilitation by requesting the project be defined as existing housing based on the units being already occupied, even though the owner was planning some level of rehabilitation.

Another commenter disagreed with the framing of the question because it suggests that PHAs and project owners are ''circumventing'' rehabilitation program requirements when selecting existing housing projects that comply with HUD's definition of existing housing.

HUD Response: HUD appreciates commenters' perspectives regarding circumventing rehabilitation requirements and believes that PHAs and owners will be better able to determine when rehabilitation rules apply using this final rule's definitions.

Question 13. Is the 48-hour standard reasonable, particularly for larger projects?

One commenter supported HUD's proposed definition of ''substantially complies with Housing Quality Standards (HQS).'' Other commenters stated that the 48-hour timeframe is unreasonable, especially for large projects with multiple units requiring minor repairs or in housing markets where contractors are scarce because some units require renovations that are impossible to complete in a 48-hour timeframe.

HUD Response: Commenters' explanations of when a 48-hour standard may be infeasible were persuasive, and HUD has changed the standard in this final rule.

Alternative Timeframes

One commenter suggested that the 48-hour timeframe only apply to individual units and not the entire building. Commenters also suggested alternative timeframes to cure HQS deficiencies including 72 hours for projects with more than 20 failed inspections, and a maximum of 5 or 10 business days to cure deficiencies.

A commenter expressed that the HOTMA alternatives to initial inspections are unusable if HUD requires a PHA to conduct and a project to pass an HQS inspection before making an existing housing determination.

One commenter proposed allowing PHAs to integrate in their policies a specific timeline for completion of the repairs based on local conditions.

Another commenter recommended defining the timeframe based on the time it takes to complete a repair, rather than the time it takes to begin a repair.

HUD Response: In this final rule, HUD adopts a timeframe based upon the standard deficiency cure period as part of a reasonable representation of substantial compliance with HQS. Under this final rule, PHAs must determine whether, taking into consideration the totality of the deficiencies in the project, the owner will be able to correct the deficiencies in a 30-day period. HUD does not impose through this definition a requirement that correction occur at a specific time; the standards at § 983.103(c) dictate when the corrections must occur, depending in large part on whether the PHA has adopted the discretionary options for initial inspection. HUD believes that this definition provides sufficient flexibility to account for local conditions and differences in unit repair times while still adequately distinguishing existing housing from housing properly characterized as rehabilitated.

HUD's Previous Proposed Definition of Existing Housing ($1,000) [15]

One commenter supported the prior proposed definition because it was clear

[15] *See The Housing and Economic Recovery Act of 2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs,* 77 FR 28741 (May 15, 2012).

and unambiguous. However, other commenters disagreed with the prior proposed rule and suggested that existing housing projects should not be permitted to make over $1,000 of improvements per unit within the first year of their HAP contract or to make significant improvements within the first 5 years, unless there are extenuating circumstances as determined by the PHA.

Commenters suggested that the definition should include units where planned rehab exceeds $1,000 over the next year per unit, as this amount is too low in many high-cost areas. Another commenter stated that the $1,000 limit previously proposed by HUD was not required by HOTMA. A commenter suggested that HUD permit PHA discretion to create alternative standards based on a reasonable cost for each unit, considering that 48 hours for deficiency correction may be impractical for large projects or in national emergency situations.

HUD Response: HUD appreciates the benefit mentioned by commenters of a clear dollar threshold or PHA discretionary amount but determines not to adopt the suggestion because the differing impact of a dollar threshold across markets with different local conditions will result in an inconsistent meaning of ''existing housing'' nationwide. HUD considered the suggestion to define ''existing housing'' based on cost or extent of work occurring shortly after contract execution. In this final rule, HUD adopts that suggestion in part. HUD defines ''existing housing'' based on the condition of the units at the proposal or project selection date and incorporates a requirement that the PHA determine, and the owner certify, the units will not need or undergo substantial improvement from the date of proposal submission or board resolution, as applicable, to two years after the HAP contract. In conjunction with this change, HUD codifies in this final rule complete standards for correction of deficiencies (see discussion of § 983.103 below) and substantial improvement (see discussion of § 983.212 below) following contract execution.

Alternative Definitions of Existing Housing

Commenters suggested that the standard should be a percentage of local rehabilitation or development costs or whether the apartment is occupied or available for occupancy. Another commenter supported the proposed definition of ''existing housing,'' but found the reliance on proposal selection date as impractical compared to using the HAP execution date because there can be a significant gap between selection and HAP execution. One commenter opposed the imposition of a bright line threshold that fails to account for PHA discretion and local circumstances as well as thresholds based on time or money because the test will affect project owners differently based on availability and costs of materials and labor associated with routine maintenance. Another commenter suggested that the standard for existing housing should be ''housing that does not need to be rehabilitated,'' which would require HUD to chart the cost threshold and number of PBV units in a development, and developments that must spend above the threshold to make PBV units HQS-compliant would not be considered ''existing housing.''

HUD Response: HUD does not adopt the suggestion to use a percentage of local costs in the definition out of concern that the approach may make housing type classification unpredictable over time and may require significant administrative burden to estimate costs in advance of work. HUD declines to adopt a standard that defines ''existing housing'' based on whether the unit is occupied or available for occupancy; HUD finds the former does not afford sufficient protection against assistance being provided to units that do not meet HQS and the latter is not sufficiently clear to be applied uniformly. In addition, HUD does not adopt the suggestion to use the contract execution date rather than the proposal or project selection date, as the PHA must establish the housing type well before the contract execution date to follow the appropriate pre-contract program requirements.

HUD believes the linkage in this final rule to a standard cure period addresses the concern regarding a bright line threshold. HUD generally agrees that the nature of existing housing should be ''housing that does not need to be rehabilitated,'' but has implemented this principle in a manner different from what the commenter suggests. HUD has in this final rule defined ''substantially comply'' based on the nature of the correction of HQS deficiencies—whether they require only repairs to the unit's current components or replacement of equipment and/or materials by items of substantially the same kind to correct—in addition to the likelihood of compliance with HQS within the standard cure period.

PHA Determination Whether a Project Will be Ready To Be Placed Under a HAP Contract

Commenters stated that PHAs should have discretion to determine whether a project is ready to be placed under a HAP contract with ''minimal delay'' because the PHA is best positioned to judge whether the owner will quickly complete repairs and make the determination consistent with PHAs' own policies regarding the time that may elapse between the initial inspection and the HAP contract's execution.

HUD Response: Upon consideration of comments, HUD finds that the timing of execution of the HAP contract is difficult to estimate based on condition of units alone, given the many factors impacting execution, and will not provide sufficient clarity to use the definition consistently. Therefore, HUD removes the proposed ''minimal delay'' element from the definition of ''existing housing'' in this final rule at § 983.3.

Definition of ''Building''

One commenter suggested that HUD define the word ''building'' under § 983.103(d), and specifically as it relates to conducting an inspection of 20 percent of a building's units. The commenter stated that while the definition of ''building'' may be obvious, the definition is obscure, and the commenter suggested changing ''building'' to ''project.''

HUD Response: HUD agrees with the commenter that the term ''building'' may not always be clear. Therefore, HUD adopts in § 982.4 the following definition: ''a structure with a roof and walls that contains one or more dwelling units.'' Where the term ''building'' is used regarding periodic inspection of a sample of units (now located in § 983.103(e)), HUD intends that the requirement apply to buildings, not projects. HUD believes that the sample should be drawn on a building basis to get a good cross-section of the condition of the units in a project. Further discussion of this matter is at 70 FR 59892, 59905 (Oct. 13, 2005).

Definition of ''Areas Where Vouchers Are Difficult To Use''

Give PHAs Discretion

Several commenters suggested HUD should allow PHAs to define areas where vouchers are ''difficult to use'' because PHAs can consider local and recent conditions and handle complex calculations.

HUD Response: HUD declines to give PHAs discretion to define areas where vouchers are ''difficult to use'' because

such an approach could lead to highly inconsistent application of the program and project caps across the country.

Opposition to Proposed Definition

A commenter warned that the proposed definition of ''difficult to use'' may inaccurately reflect the current status of rental markets at either end of the income spectrum and may insufficiently adjust if rapid market changes occur.

HUD Response: HUD determined that the proposed measure is appropriate given the targeted incomes that the voucher program is intended to serve. HUD agrees that FMRs may take time to adjust to market changes but determines the benefit of using FMR data, which is held to a high standard of accuracy, outweighs this concern. HUD continues its commitment to continually improving FMR calculations in order capture the most current market conditions.

Base on Vacancy Rates

Commenters supported HUD's proposal to define areas where vouchers are ''difficult to use'' based on vacancy rates. Some commenters stated that HUD should use a three or four percent or lower target vacancy percentage for metropolitan Fair Market Rent areas and use ZIP code areas to analyze vacancy rates and allow exceptions in areas with accurate data at lower levels, such as census tracts. A commenter noted that it would be beneficial to examine vacancy rates separated by bedroom size, since bedroom size may impact vacancy rates. One commenter opposed HUD defining ''difficult to use'' based on vacancy rates because of the challenges and inaccuracies behind identifying vacancy rates based on ZIP code.

HUD Response: HUD appreciates the commenters' support of HUD's proposal to define areas where vouchers are ''difficult to use'' based on vacancy rates. HUD considered a more restrictive target vacancy percentage as some commenters proposed but determined the proposed four percent threshold provides PHAs an appropriate level of discretion to respond to local conditions and is consistent with other uses of a vacancy threshold in HUD programs. HUD does not provide for additional definition on the basis of areas smaller than ZIP code or of bedroom size because such data are not consistently available. Determining vacancy rates based on ZIP code is currently possible using reliable and available data, so HUD maintains this change in this final rule.

Other Suggestions

A commenter suggested that HUD add three additional criteria to define areas where it is ''difficult to use'' vouchers: (1) in areas experiencing rapid rent appreciation as shown by increases in fair market rent, (2) areas with low vacancy rates, and (3) areas undergoing revitalization. The commenter pointed out that these additional criteria would allow PHAs to preserve affordability in rapidly changing areas as well as present residents with the ability to choose whether to move or remain in areas of opportunity when they may otherwise be priced out. Moreover, this commenter stated that HUD should consider areas with defined exception payment standards as ''difficult to use,'' and ''difficult to develop,'' because it consolidates efforts to improve fair housing opportunities. Another commenter recommended that HUD identify areas where costs are high relative to metropolitan area FMRs based on a median salary comparison to SAFMR because it would identify areas where rent dramatically increases, but salaries remain stagnant.

One commenter suggested that defining areas where vouchers are ''difficult to use'' should include a poverty threshold to avoid voucher concentrations in high-poverty areas. This commenter also stated that the Small Area FMR (SAFMR) standard is a good proxy for areas of opportunity. Another commenter expressed that another means to identify areas where vouchers are difficult to use is by comparing actual costs to the area's FMR, since using other parameters may be complex to calculate and labor-intensive.

HUD Response: This final rule incorporates into the definition of ''area where vouchers are difficult to use'' the proposed rule's measure of low vacancy rates. HUD reviewed the suggestion to add areas experiencing rapid rent appreciation and areas undergoing revitalization but determined that data on such measures are not available or updated frequently enough to be meaningful. HUD appreciates the benefit of preserving affordability in rapidly changing areas and allowing residents to remain in areas of opportunity but determined that the data limitation will require that PHAs explore use of the 20 percent program cap and other exceptions to the cap to meet these objectives. HUD disagrees that areas with exception payment standards in place should be incorporated into the definition, as exception payment standard use can reflect conditions beyond the sole criterion this definition is intended to reflect (whether vouchers are difficult to use) and their use in the definition would result in broad and inconsistent application of the program and project cap exceptions.

HUD appreciates the commenter's recommendation to incorporate high-cost areas but retains the proposed rule's definition because the criteria therein appear to provide adequate coverage of areas where vouchers are difficult to use. HUD intends to monitor the impact of this definition over time and consider this additional criterion for future rulemaking if the definition proves insufficient. HUD also declines to add a poverty threshold to this definition because the standards regarding deconcentration of poverty when siting PBV projects are adequately covered by existing requirements at § 983.55. HUD reviewed other methods to determine actual costs as recommended by commenters but determined none are available and verifiable in a manner adequate to be relied upon consistently on a national scale.

18. Description of PBV Program (§ 983.5)

Operating Without an Agreement

A commenter supported HUD's proposal to allow development without an Agreement to increase flexibility and reduce burdens on PBV developments. Other commenters suggested that HUD clearly state, potentially in the definition of ''newly constructed,'' that a PHA may enter an Agreement contract with prospective units of a property under construction.

HUD Response: HUD appreciates the positive comment and discusses further comments on the topic of development without an Agreement in the discussion of § 983.154 later in this preamble. The comments concerning the definition of ''newly constructed'' have been addressed in the discussion of § 983.3 earlier in this preamble.

19. Maximum Amount of PBV Assistance (§ 983.6)

Outline Calculation Situations

One commenter requested that HUD outline in the preamble the situations in which a PHA would have to conduct a calculation.

HUD Response: In this final rule at § 983.58, HUD clarifies that the PHA must calculate the number of authorized voucher units that it is permitted to project-base in accordance with § 983.6. The calculation must include a determination of the amount of budget authority that it has available for

project-basing in accordance with § 983.5(b). The PHA's calculations must occur before it issues a request for proposal in accordance with § 983.51(b)(1), makes a selection based on a previous competition in accordance with § 983.51(b)(2), amends an existing HAP contract to add units in accordance with § 983.207(b), or noncompetitively selects a project in accordance with § 983.51(c). Further, PHAs must perform an analysis of the impact if project-basing 50 percent or more of the units under the Consolidated Annual Contributions Contract (ACC). The analysis should consider the ability of the PHA to meet the needs of the community across its tenant-based and project-based voucher portfolio, including the impact on, among others, families on the waiting list and eligible PBV families that wish to move under § 983.261.

Reducing Units

A commenter recommended that a PHA should never be required to reduce units under an Agreement or HAP contract but should only be unable to enter new commitments, Agreements, or HAP contracts until they are back below the cap. This commenter stated that owners and PHAs need stability in the PBV program and should not be subject to reduction after Agreements or HAP contracts are entered. Therefore, this commenter recommended that HUD strike the first clause of § 983.6(a)(3), limiting the paragraph to paragraphs (a)(1) and (2) of the same section.

HUD Response: HUD has reviewed the comment and determined that this final rule already affords relief when a PHA would otherwise be out of compliance with the statutory program cap simply because of a change in the number of authorized voucher units. In such cases, this final rule maintains the proposed rule provision that states the PHA is not required to reduce the number of units to which it has committed PBV assistance under an Agreement or HAP contract. Notwithstanding, this final rule prohibits the PHA from adding units to PBV HAP contracts or entering into new Agreements or HAP contracts (except for HAP contracts resulting from Agreements entered into before the reduction of authorized units or April 18, 2017, as applicable). Further, the PHA could add units if the unit meets one of the increased cap exceptions and adding the unit does not place the PHA outside of the program cap or increased program cap. The same principle applies where the noncompliance is simply the result of the change in statute (from budget authority to authorized units). Conversely, HUD has an obligation to ensure that statutory requirements are met, and, therefore, has no discretion to allow for the same policy where the noncompliance with the statutory requirement is based on PHA error and under this final rule, HUD will not strike the first clause of § 983.6(a)(3). HUD takes this opportunity, however, to clarify that the PHA may also add units in the instances described above, if the unit does not count toward the program cap under the requirements of § 983.59.

Technical Edit

A commenter recommended using ''authorized units'' instead of ''budget authority'' in § 983.6(c).

HUD Response: HUD reviewed the comment and determined that the reference is accurate and the PHA is responsible for determining the amount of budget authority that is available for project-based vouchers and for ensuring that the amount of assistance that is attached to units is within the amounts available.

The Census Tract Data

A commenter stated that the use of census tract data ''as determined by HUD'' in §§ 983.6(d)(2)(iv) and 983.54(b)(1) is unclear whether it is determined by census data or other metrics, as the commenter believed it would be determined by census data, but the text suggests HUD may seek to use other metrics.

HUD Response: This final rule maintains HUD discretion to determine the most appropriate data source and metric to use in making this determination. HUD will ensure that stakeholders are notified and fully informed once such determinations are made. HUD notes that these provisions have now moved to the definition of ''area where vouchers are difficult to use'' in § 983.3.

Definition of Veterans

Commenters objected to HUD excluding dishonorably discharged veterans in its proposed definition of ''veterans'' and find it is counter to both other HUD programs and Congressional intent, because the proposed definition undermines local efforts to end veteran homelessness by denying assistance to dishonorably discharged veterans, who are likely to face barriers to stable housing. A commenter suggested that HUD should allow PHAs to define ''families with veterans.''

HUD Response: Under this final rule, HUD makes the change commenters suggested in defining veteran, solely for purposes of applying the additional 10 percent veteran exception to the PBV program cap, to ''a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom.'' HUD determines that the change from the proposed rule definition is likely to better prevent and address homelessness and unstable housing among those who served and their families by providing PHAs an option to attach more PBV assistance to projects serving this population. HUD does not make the change suggested by a commenter to give PHAs discretion to establish the definition of ''veteran'' for this purpose. HUD is concerned about the different treatment of applicants that would result from divergent definitions around the country.

Supportive Services Limitation

One commenter disagreed with HUD's proposal to continue its existing policy that allows PHAs to exceed the 20 percent limitation on project-basing of authorized voucher units for ''units that provide supportive housing to persons with disabilities or elderly persons'' only when ''the project makes supportive services available for all the assisted families in the project.'' The commenter recommended that the statutory requirement to offer services to ''all the assisted families in the project'' be removed from this final rule.

HUD Response: HUD appreciates the commenter's suggestion; however, HUD is unable to implement such a change through regulation because it would be in conflict with the current statutory language under section 106(a)(2) of HOTMA, which amends section 8(o)(13)(B) of the 1937 Act. Under HOTMA, a PHA may project-base an additional 10 percent of its ACC authorized units above the 20 percent program limit, provided the additional units fall into one of the eligible exception categories, one of which is providing supportive housing to persons with disabilities or elderly persons. The use of the term ''supportive housing'' in section 8(o)(13)(B) of the 1937 Act means that the project must be making the supportive services available for all the assisted families in the project, not just individual families.

Survivors of Domestic Violence

A commenter suggested including survivors of domestic violence, sexual assault, and stalking to the list of circumstances under which PBV units may exceed the cap.

HUD Response: HUD appreciates the commenter's suggestion; however, HUD is unable to implement such a change through regulation because it would be

in conflict with the current statutory language.

20. PBV Provisions in the Administrative Plan (§ 983.10)

A commenter stated that § 983.10(a) is unclear in its requirements and recommended this paragraph be guidance instead of a requirement. This commenter also suggested HUD clarify in § 983.10(b)(7)(ii) that PHAs can use a combination of general, site-based, and owner-maintained waiting lists, as determined by the PHA's discretion. Finally, this commenter suggested that HUD create a section similar to § 983.10 for PHA Plan requirements or, if already identified in part 903, create a cross-reference, because combining requirements makes monitoring and compliance easier.

HUD Response: HUD's longstanding requirement has been that the Administrative Plan must state PHA policy on matters for which the PHA has discretion to establish local policies. As provided in § 983.2, the HCV program regulation governing Administrative Plans (§ 982.54) applies to the PBV program. Section 983.10, as amended in this final rule, provides a list of additional Administrative Plan policies that a PHA must also adopt, to the extent applicable, if it has implemented or plans to implement a PBV program. HUD has reviewed the language of § 983.10(a) in response to this comment and edited it to better explain these requirements.

HUD's position is that § 983.251(c) is the appropriate location to explain PHAs' options to use a combination of general, site-based, and owner-maintained waiting lists. Section 983.10(b)(7) merely requires the PHA to include in the Administrative Plan a description of the waiting list policies the PHA has chosen to adopt; it does not impose a limitation different from § 983.251(c). To prevent any potential confusion, HUD revised this section to limit the discussion of each PHA policy in § 983.10 to a short description only. PHAs must look to the cross-referenced section for complete information about the contents of and requirements for each PHA policy.

As provided in § 983.2, the HCV program regulation explaining the relationship between the Administrative Plan and PHA Plan (§ 982.54(b)) applies to the PBV program. PHA Plan requirements themselves are contained in 24 CFR part 903 and HUD finds that repeating them in part 983 would be duplicative. However, HUD has clarified in § 983.3(b) that the definition of PHA Plan in § 982.4(b), which cross-references part 903, applies to the PBV program, to address the commenter's concern.

21. Prohibition of Excess Public Assistance (§ 983.11)

Subsidy Layering, Standards, and Review

Several commenters opposed HUD's proposal to permit subsidy layering review upon rehabilitation or development activity. Commenters found the change administratively burdensome and recommended that subsidy layering reviews be limited to additional Federal resources for operating assistance or recommended that SLR only be applied at the time of signing an Agreement. Another commenter objected to the language in § 983.12(d)(1) (§ 983.11(d)(1) in this final rule) as harmfully broadening subsidy layering requirements, which is not done in other programs and, historically in PBV and Project Based Rental Assistance, has only been required when the PBVs are awarded, not for any subsequent rehabilitation or assistance. The commenter stated that this will be administratively burdensome for owners and PHAs, especially given the ninety-day plus review periods.

A commenter suggested that HUD clarify that rehabilitation projects which may be done without any additional funding, and which are unlikely to result in a rent increase, are exempt from the subsidy layering requirements. A commenter questioned whether HUD has the capacity and expertise to conduct the additional subsidy layering reviews that would be required by the proposed regulations. Another commenter stated that HUD's Regulatory Impact Analysis (RIA) is silent with respect to subsidy layering reviews.

HUD Response: HUD has considered the comments and agrees that it would be unnecessarily administratively burdensome for a new SLR to be performed every time any amount of additional related assistance is added to a newly constructed or rehabilitated project after the HAP contract is effective. As such, HUD has revised the rule to clarify that the criteria for whether the addition of assistance requires a new SLR will continue to be located in the PBV SLR Administrative Guidelines published in the **Federal Register**. With regard to the concern that § 983.11(d)(1) broadens subsidy layering requirements, HUD clarifies that it is and has long been a requirement in the PBV HAP contract for newly constructed and rehabilitated housing that the owner must disclose public assistance that is made available during the term of the HAP contract. This requirement was reinforced and further explained in 75 FR 39561 (Jul. 9, 2010), 79 FR 57955 (Sep. 26, 2014), 85 FR 12001 (Feb. 28, 2020), and the most recently applicable notice at 88 FR 15443 (Mar. 13, 2023).

Section 983.153(b)(1) clarifies that an SLR is required for rehabilitated housing projects only when housing assistance payment subsidy under the PBV program is combined with other governmental housing assistance from Federal, State, or local agencies. HUD confirms it has the capacity and expertise to conduct the required SLRs. HUD's statement in the RIA was that changes that are merely codifications of current HUD practice would not be analyzed. As discussed above, this final rule aligns with the policy in effect in the most recently applicable SLR Guidelines.

22. Proposal and Project Selection Procedures (§ 983.51)

Responses to Question 15 Regarding Additional Exemptions

Several commenters supported HUD exempting the placement of PBVs that are used to replace previously federally assisted or rent-restricted property from the competitive selection requirements.

One commenter stated that PHAs and project owners of affordable housing units should not have to compete with private owners to preserve existing units through on-site or off-site development. This commenter expressed that PHAs and owners can use the voucher commitment to obtain additional financing to rehabilitate and preserve the affordable housing units, many of which have struggled due to insufficient appropriations, below-market rents, and unfunded capital needs. Another commenter stated that HUD should allow exceptions to the competitive selection process in housing-emergency situations, such as when the PHA is part of a local partnership to save Naturally Occurring Affordable Housing (NOAH) or to relieve homeless encampments.

Other commenters suggested that HUD exempt tax credit properties where the compliance period has come to an end to help protect the affordability of the units. One commenter stated that HUD should add Project-based Veterans Affairs Supportive Housing (VASH) vouchers on the condition that the local Veteran Affairs Office supports doing so. One commenter stated that HUD should remove the competitive selection requirements when PBVs are submitted with an application for a LIHTC credit, to ease the ability of entities to submit

LIHTC proposals. Another commenter stated that PBVs in income-restricted developments create a mix of incomes while providing financial stability for affordable developments.

HUD Response: HUD considered the comments and determined an additional exemption category should be added at § 983.51(c)(3) to include PHA-owned units as defined under § 982.4. The exemption from the proposed rule requires for a PHA to be ''engaged in an initiative to improve, develop, or replace a public housing property or site,'' but in all cases HUD means housing assisted under section 9 of the 1937 Act when referring to public housing. Adding PHA-owned units to the exemption will streamline and support a PHA's ability to develop long term affordable units in its community.

If a PHA has identified preserving affordable housing or serving veterans and the homeless as a local priority, the PHA can incorporate that goal into their RFP or strategically utilize other funding competitions to select such projects. As a limited resource, PBV should be used to address local needs and priorities using a method that is intended to identify the best project.

Previous Competition Requirement

A commenter encouraged HUD to remove the requirement that projects be selected solely based on previous competition, if the previous competition did not involve consideration of the PBVs, because most tax credit and other funding selections will require a provisional commitment of PBV assistance. The commenter warned that this puts PHAs and project owners in an untenable position, since they cannot compete for vouchers without tax credits, and PHAs cannot compete for tax credits without PBV assistance.

HUD Response: HUD understands the limitations presented by the commentor because of the provision that prohibits a PHA from selecting a housing assistance proposal that included any consideration that the project would receive PBV assistance; however, this provision maintains the integrity of a competitive selection method and will not be revised in this final rule.

Language was added to § 983.51(b)(1) clarifying that a PHA may establish selection procedures that combine or are in conjunction with other Federal, State, or local government housing assistance, community development, or supportive services competitive selection processes, and HUD intends to provide future guidance to support PHAs in using these methods in combination with other funding sources.

Clarification Request

A commenter suggested removing ''regard to,'' from § 983.51(c)(1) and (2) and modifying the statement, ''newly developed or replacement housing,'' in § 983.51(c)(1) to ''newly developed, rehabilitated, or replacement housing.''

HUD Response: HUD agrees with the commenter and has removed the language ''regard to'' and revised the language ''newly developed or replacement housing.'' Additional language revisions were made to § 983.51(c) for better readability.

23. Prohibition of Assistance for Ineligible Units (§ 983.52)

One commenter recommended deleting § 983.52(d). In the alternative, the commenter urged HUD to revise the requirement from applying upon ''proposal submission'' to only be triggered following ''proposal selection.'' According to the commenter, if the owner submits a proposal and that proposal is not successful (perhaps because there are not enough PBVs at that time or it is simply not awarded), this language will foreclose the owner's future participation in the PBV program.

HUD Response: HUD has retained proposed § 983.52(d) in this final rule. The provision has not changed from the requirement in place under the prior regulation, except with respect to units developed without the use of an Agreement and rehabilitated projects developed after HAP contract execution, and it continues to be necessary to ensure critical development requirements are followed. HUD declines to amend the language to require applicability only after proposal selection, because doing so could result in development occurring prior to completion of critical development requirements. HUD clarifies, however, that if the PHA does not select the project for PBVs, the project is not subject to program requirements and the provision does not apply.

HUD also takes this opportunity to amend the prohibition on using PBVs in manufactured homes. Under this final rule, PHAs may use PBVs in manufactured homes so long as they are permanently affixed to a permanent foundation and the owner owns the land on which the manufactured home is located, as these are necessary preconditions for compliance with the PBV program rules (all standard PBV rules continue to apply). Using PBVs in manufactured homes also means that the manufactured home can be made accessible in accordance with HUD's accessibility requirements, including requirements under HUD's Section 504 requirements at 24 CFR part 8. HUD finds this change necessary given the changes in industry practice since the rule was written.

24. Cap on Number of PBV Units in Each Project (§ 983.54)

Question 16: Whether the proposed rule sufficiently addressed the project cap requirements in relation to a unit losing its excepted status?

One commenter supported HUD's changes as beneficial for families and PHAs. Other commenters suggested that HUD permit a continued excepted status for families that lose their excepted status, whether due to the death of an elderly family member or other reasons. Commenters warned that removing the unit could have negative financial implications especially when the project has been underwritten against the number of subsidized units. A commenter stated that this would align HUD with PIH Notice 2017–21, because this would allow units to remain excepted until turnover if the family no longer qualifies for the exception through no fault of its own.

One commenter proposed that HUD adopt a ''next available unit'' rule, which would allow a PHA and project owner to continue counting units as excepted so long as the next available unit is subsequently leased to an eligible family at turnover. In the alternative, this commenter suggested a cure period of 90 days, in which the project owner and PHA could avoid default under the HAP contract while assessing options, ensuring compliance, amending the HAP contract, and engaging in other related tasks. Another commenter suggested that PHAs should enforce families' excepted status without HUD intervention and that a de minimis standard should be set so a minimal number of units can be out of excepted status without changes needed to the PBV contract.

HUD Response: HUD reviewed the comment and determined that § 983.262 of this final rule already affords discretion to PHAs to allow the elderly exception to continue to apply to the unit where, through circumstances beyond control of the family (*e.g.,* death of the elderly family member, long term or permanent hospitalization, or nursing care), the elderly family member no longer resides in the unit. Further, should HUD adopt a ''next available unit'' policy, such a policy would be at odds with statutory requirements, as would be the ''de minimis'' standard suggested by another commenter.

Question 17: Whether other options not considered by the proposed rule should be available to the PHA when a unit loses its excepted status?

Alternative Options

A commenter noted that no other options need to be considered. Another commenter suggested unit substitution as an option to PHAs when a unit loses its excepted status.

HUD Response: HUD has reviewed the comment and has determined that § 983.262 of the proposed rule already offers unit substitution as an option.

HCV Conversion

A commenter suggested PHAs have discretion, but not the obligation, to provide families with an HCV because requiring PHAs to provide all families in formerly excepted units with an HCV could create a loophole where families who are initially eligible for the excepted unit move in and promptly remove a household member from the lease to prematurely access an HCV. One commenter expressed that the option to temporarily convert to HCV seems burdensome to PHAs. Another commenter suggested that for § 983.262(f) (now moved to § 983.262(b)(4) in this final rule), HUD should require the owner to accept the tenant-based voucher issued to the family if the family chooses to remain or is unable to locate another suitable unit.

HUD Response: HUD appreciates the perspective provided by commenters concerning the option to temporarily remove the unit from the PBV HAP contract and provide the family with a tenant-based voucher when a unit loses its excepted status; however, under the proposed rule, this was meant to be one of several options that a PHA could use to manage the loss of the exception. Additionally, given the discretion provided at § 983.262(c)(3) and (d)(1)–(2), HUD expects a unit losing its excepted status not to be a frequent occurrence. Additionally, there is no reason to assume that families will start removing members from the lease just to receive a tenant-based voucher.

Combining Exception Categories

One commenter encouraged HUD to retain references to combining exception categories in a project and to permit the designation of units as elderly or eligible for supportive services in projects that are exempt from the income-mixing requirement. This commenter stated that HUD is not statutorily required to prohibit PHAs from designating units under the HAP contract once the income-mixing requirement does not apply, due to reasons beyond income-mixing, such as complying with various set asides and pointing allocations in LIHTC applications or seeking to convert existing elderly designated public housing to PBV.

HUD Response: HUD agrees with commenters that reinstating § 983.56(b)(3) in this final rule would be helpful. While the provision was initially removed because the supportive services exception requires that supportive services are made available to all PBV families in the project, HUD agrees that this ‘‘combining exception categories’’ provision is not at odds with that requirement and re-inserting it makes clear that PHAs may designate units in the HAP contract for specific exceptions. This final rule restores the provision at § 983.54(c)(1) with textual changes to clarify that the provision allows that some units may be under different exception or exclusion categories than others in a single project. HUD disagrees with the comment that a unit may be excepted when it is already excluded. Where a unit is excluded, the statute provides no basis for an additional exception.

Supportive Services

One commenter supported HUD's emphasis that the use of supportive services is voluntary. Another commenter thought that families receiving drug and alcohol treatment as a condition of living in an excepted unit should agree to supportive services, if needed, and to comply with PBV regulations including following their supportive service plan and timely paying their rent.

HUD Response: HUD does not make participation in supportive services mandatory and the statute conveys that participation in such supportive services is voluntary.

Question 18: Does the regulation clearly convey how the Family Self-Sufficiency (FSS) program may be used in meeting the supportive services exception?

Many commenters stated that the proposed rule is clear on how FSS can be used in meeting supportive services. A commenter supported the change that prohibits owners from terminating a family's lease for failure to complete an FSS contract without good cause. In response to question 18, one commenter found the proposed rule unclear on whether ‘‘supportive services used in connection to the FSS program’’ could be the sole services offered to families to meet the exception. Another commenter suggested putting the proposed rule on hold until HUD finalizes the FSS proposed rule [16] to avoid any potential conflict between both rules.

HUD Response: While HUD appreciates the comments received concerning the clarity of the FSS provisions, upon reflection, HUD has determined that a PHA that administers an FSS program can choose to solely use FSS in meeting the supportive services exception. This is because PBV families are eligible to enroll in FSS (and, therefore, eligible for the supportive services that are made available through the FSS program) and enrollment in FSS is voluntary. However, if the family fails to comply, without good cause, with the requirements of the FSS contract of participation, the family may be terminated from FSS. If the family's FSS contract of participation is terminated, the PBV unit would lose its excepted status if the PHA solely uses FSS in meeting the supportive services exception and the PHA policy in the FSS Action Plan prohibits the re-enrollment of all members of a household that enrolled in FSS but did not complete the program successfully (were terminated from FSS or left the program voluntarily); as provided in § 983.262(d)(3)(iii) of this final rule, the unit loses its excepted status only if the entire family becomes ineligible for all supportive services for a reason other than that the family successfully completed the services.

PHAs that choose to rely solely on FSS to meet the supportive services exception must, therefore, plan carefully for such an eventuality. The PHA may consider the following in making a determination on whether to rely solely on FSS: (a) FSS graduation rates, because if the PHA has low FSS graduation rates and a policy prohibiting the re-enrollment of previous FSS participants, this could potentially result in a high number of PBV units losing their excepted status; and (b) availability of an FSS slot at the time of the PBV family's request for enrollment since the supportive services must be made available to the family within a reasonable time, as defined by the PHA but not to exceed 120 calendar days from the family's request, for the exception to apply. Further, the PHA could avoid the potential loss of the PBV unit's excepted status by making the supportive services used in connection with the FSS program available to non-FSS PBV families at the project. Notwithstanding, PHAs cannot use the FSS grant-funded coordinators to serve non-FSS PBV families but non-

[16] 85 FR 59234 (Sep. 21, 2020).

FSS services can serve non-FSS PBV families.

With respect to the commenter's suggestion to put this proposed rule on hold, the FSS rule was published on May 17, 2022, with an effective date of June 16, 2022 (compliance with the FSS rule was required no later than November 14, 2022). As a result, HUD can ensure all HOTMA final rule provisions are aligned with the FSS rule to avoid any potential conflict between both rules. HUD has also taken this opportunity to clarify that, to meet the exception, the supportive services must be made available to the family within a reasonable time, as defined by the PHA but not to exceed 120 calendar days from the family's request.

25. Site Selection Standards (§ 983.55)

Another commenter supported permitting PHAs to use project-based vouchers in new construction developments in areas with poverty rates greater than 20 percent, but suggested HUD does not require the PHA to have gathered five years of information regarding poverty rates first.

HUD Response: HUD appreciates the commenter's support pertaining to permitting PHAs to use project-based vouchers in new construction developments in areas with poverty rates greater than 20 percent. In this final rule, HUD continues to require the PHA to have gathered five years of information regarding poverty rates first, which must be consistent with the PHA Plan under 24 CFR part 903 and the PHA Administrative Plan, because HUD believes doing so will improve compliance with the requirement at section 8(o)(13)(c)(ii) of the 1937 Act that the PBV HAP contract be consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities.

26. Environmental Review (§ 983.56)

Support for the Proposed Rule

One commenter supported an environmental review exception for existing housing that is formerly federally assisted property. Another agreed with the proposed rule but suggested broadening the definition of existing housing to encompass more properties.

HUD Response: HUD has not adopted this aspect of the proposed rule, as further explained below in this discussion of comments regarding § 983.56.

Responses to Questions 19 and 20 Regarding Evidence of Past Environmental Reviews

Commenters warned that requiring owners to demonstrate that an environmental review was previously conducted would be an administrative burden. A commenter stated that it is unreasonable to require that new owners of older buildings provide environmental review documentation. Commenters stated that an exemption should be allowed even if documentation of prior review is unavailable. Commenters also stated that HUD should infer that those previous federally assisted projects must have conducted an environmental review and HUD should assume that the review was properly conducted and met environmental review requirements especially if the owner is in good standing with HUD. A commenter suggested an owner should be allowed to self-certify that the property was formerly federally assisted. Another commenter expressed that Congress set a bright line standard to exempt all existing housing from demonstrating that an environmental review was previously conducted, and, as such, there should be a rebuttable presumption that the existing housing received a proper environmental review, unless HUD can show otherwise. A commenter stated that if the PHA's environmental review records are unavailable, then a new review should be conducted.

HUD Response: HUD agrees that requiring owners to demonstrate that an environmental review was previously conducted would have presented some administrative burden and has removed this requirement.

HUD Should Exempt All Existing Housing

Commenters expressed that HUD should exempt all existing housing that only receives HAP Federal assistance. A commenter suggested this exemption should not expire. Commenters stated that the statute clearly provides an exemption broader than HUD's proposal and noted legislative history shows that Congress intended such an exemption. A commenter stated that HUD's citation of Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), as support for the proposed rule's environmental review position is inapplicable because there is no evidence that a plain reading of the text would be in contravention of Congress's intent that site-based housing comply with environmental review requirements. This commenter expressed that the HUD's Regulatory Impact Assessment concedes that the Housing and Economic Recovery Act (HERA) and HOTMA requirements contradict Congressional support for environmental review.

One commenter stated that HUD should exempt existing housing to prioritize environmental review for new construction and rehabilitation projects because they pose the greatest environmental risk. Another commenter stated that this requirement would do nothing to protect tenants from adverse environmental conditions. Another commenter found HUD's proposal legally questionable and unnecessary to protect subsidized tenants from living in areas with adverse environmental conditions. Commenters suggested that HUD allow exemption of existing housing from environmental review if it meets the criteria for environmental acceptability under § 982.401(l)(2). Another commenter also questioned HUD's statutory authority to impose an environmental review requirement on project owners of existing structures and suggested that HUD eliminate this requirement because it is significantly burdensome on responsible entities, PHAs, and project owners as the document retention policies adopted by responsible entities are not uniform.

HUD Response: HUD agrees that requiring owners to submit past reports of environmental reviews may result in a burden to the owner without reducing the risk of unhealthy environmental conditions. Upon consideration of this and other comments, HUD determines that revising the rule to provide that environmental review is not required to be undertaken before entering into a HAP contract for existing housing, except where the review is required by law or regulation relating to funding other than PBV housing assistance payments, best balances HOTMA's textual change with Congress's continuing emphasis on the importance of Federal assistance being used in an environmentally sound manner. HUD agrees that existing housing projects pose lesser environmental risk than newly constructed and rehabilitated projects given that the existing housing structures at issue are not altered, though HUD recognizes existing housing is not without risk. HUD agrees with commenters that compliance with standards for environmental acceptability as part of the review of site selection standards in § 983.55 (formerly under § 982.401(l)(2)) can contribute to the mitigation of environmental harm to and the risk of exposure to adverse environmental conditions in existing housing.

Requirements Following Contract Effective Date

A commenter stated that adding units generally does not create an environmental impact. The commenter encouraged HUD to provide technical and financial assistance to responsible entities and PHAs if HUD requires an environmental review for a project that seeks to add units to an existing HAP contract that has already undergone review, to ensure sufficient capacity and expertise. Another commenter suggested that HUD should not require review at the five-year review period if environmental conditions have not changed in the intervening years.

HUD Response: HUD agrees that adding units generally does not have an environmental impact. PBV regulations do not require review every five years nor was such a requirement proposed. HUD appreciates the comment encouraging technical and financial assistance to responsible entities and PHAs. HUD intends to provide additional technical assistance regarding changes to the PBV program following publication of this final rule. HUD will consider the need for financial assistance in existing HUD programs and any relevant new funding opportunities that become available.

Allow Alternatives

Commenters supported the current environmental review requirements, and requested HUD allow acceptable alternatives, such as an abbreviated review or other local environmental review reports.

HUD Response: HUD considered whether the regulation previously in effect should be amended to allow for alternatives, but determined that such an approach would not be appropriate for newly constructed or rehabilitated housing, which are subject to environmental review under law, and that requiring no environmental review before entering into a HAP contract for existing housing is a better approach, given that the housing remains as it was prior to receiving PBV assistance and assisted families remain protected by HQS.

Require Environmental Review Near Documented Hazard Sites

One commenter recommended that existing housing projects be required to undergo environmental review if the site is located near a documented hazard site and suggested that HUD require PHAs to notify tenants and update HQS inspection lists when a housing project is close to a Superfund site or on the National Priorities List.

HUD Response: HUD finds that it would be impractical to require environmental review when environmental issues are near the housing because, in many cases, the issue would become known only through environmental review and in the remaining cases, the PHA would be prohibited from selecting any such site if it presented a hazard in accordance with site selection standards.

Use HEROS To Track Environmental Reviews

One commenter encouraged HUD to continue tracking environmental reviews via HUD's Environmental Review Online System (HEROS).

HUD Response: HUD intends to continue use of HEROS.

Technical Edit Suggestions

A commenter stated that § 983.56 should refer to parts 50 and 58 instead of summarizing the requirements to prevent inconsistencies. This commenter also stated that if there are differences between parts 50 and 58, the regulations should identify the deviations. This commenter further suggested that HUD revise § 983.56(d)(2) to read, ''The responsible entity has completed the environmental review procedures required by 24 CFR part 58, and HUD has either issued authority to use grant funds or Letter to Proceed.'' The commenter recommended revising § 983.56(e) to ensure consistent use of terminology with part 58. The commenter additionally expressed that § 983.56(f) is inapplicable to HUD, because PHAs cannot direct HUD's compliance with its own requirements. Another commenter suggested HUD clarify that a transfer of ownership of a property should not impact the definition of existing housing for environmental review purposes.

HUD Response: In this final rule, HUD amended some of the language of proposed § 983.56 to ensure there were no inconsistencies with parts 50 and 58. HUD amends paragraph (f) to better reflect part 50 and 58 requirements and paragraph (d)(2) to clarify the applicability of the Letter to Proceed. HUD does not find clarification regarding transfer of ownership to be necessary, as the definition of existing housing is clear that the condition of the units, rather than the ownership of the units, is the relevant criterion, and the environmental review regulation clearly provides that no environmental review is required before entering into a HAP contract for existing housing.

Expand Definition To Match PIH Notice

A commenter suggested expanding the definition of existing housing to include the entirety of the PIH Notice 2016–22 definition, which ''clarifies the applicability of environmental reviews under 24 CFR parts 50 and 58 to all PHA activities at project site(s) assisted or to be assisted by HUD.''

HUD Response: HUD has determined to change the requirements for environmental review for the reasons explained above in this discussion of comments regarding § 983.56; upon the effective date of this final rule, portions of PIH Notice 2016–22 relating to PBV will become obsolete. HUD intends to issue guidance replacing PIH Notice 2016–22.

Change the Deadline for Submitting an Environmental Review

A commenter suggested that HUD allow two years to write an environmental review.

HUD Response: HUD determined that procedural changes to the manner in which HUD or a responsible entity conducts environmental reviews are beyond the scope of this rulemaking.

Question 21: Time Limit for Accepting Previously Assisted Properties' Environmental Reviews

Some commenters stated that there should be no time limit for when prior environmental reviews must have been conducted to be accepted for purposes of the exemption if no changes occurred during the intervening years. Other commenters suggested time ranges. One commenter suggested an environmental review for federally assisted property that has undergone significant work or rehabilitation in the past ten years. Another commenter objected to HUD establishing a time limit but suggested a review if the property has changed use. A commenter suggested every thirty years to remain coterminous with early PBV HAP contracts. Another commenter recommended every five years consistent with HUD's general recommendation. One commenter expressed that there should be a ten-year limit for the exemption since neighborhoods often change on a decadal scale, and another commenter stated that time limits should be tied to past evolution of the rule, rather than an arbitrary period.

HUD Response: HUD does not proceed with the proposed reliance on prior environmental reviews in this final rule for the reasons explained above in this discussion of comments regarding § 983.56, and therefore does not adopt any time limit for prior environmental reviews.

Question 22: Alternative Approaches To Conducting NEPA Reviews

Commenters stated that no national standard would be an adequate substitute for the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) review. One commenter expressed that most lending institutions will require an American Society for Testing and Materials (ASTM) Phase I site assessment but believed this would not be adequate because most will not include review of historic building elements, endangered species, noise, airport waste storage and groundwater flow. Some commenters suggested that HUD allow projects to use local requirements to conduct environmental reviews because most local jurisdictions have rigorous environmental review requirements.

HUD Response: HUD appreciates the examples of environmental standards other than Federal environmental review provided by commenters and the discussion of the limitations of those standards. HUD finds that none of the examples provided are easily determined to address the same criteria as Federal environmental review nor are they uniformly applicable on a national basis. HUD appreciates that many projects will be subject to these alternative standards and expects PHAs will thoroughly consider the results of reviews undertaken in response to lender or local requirements, including whether the results impact the PHA's site selection determination.

27. PHA-Owned Units (§ 983.57)

A commenter stated that it is unclear the conflict HUD is attempting to avoid by requiring independent entity oversight of development activity. Another commenter suggested that the PHA plan should contain details about the rights and obligations of the independent entity with respect to both the PHA and the tenants, and that HUD should require that applicants and tenants receive a written disclosure explaining: (1) the relationship between the PHA and independent entity; (2) contact information for the independent entity; (3) what rights the tenants may have; and (4) what to do in the case of a complaint. That same commenter stated that special care is needed to achieve the intended quality results from PBV investments, suggesting that HUD should ensure that PHA affiliate-owned PBV units receive adequate independent oversight—including compliance with HQS and civil rights obligations—by another public entity or HUD.

HUD Response: HUD maintains the position that the PHA cannot perform any function that would present a clear conflict (ensuring compliance with selection process, inspections and rent setting) for units they own. 42 U.S.C. 1437f(o)(11) requires that the unit of general local government or a HUD-approved independent entity perform inspections and rent determinations for any PHA-owned units. When the owner carries out development activity under § 983.152 or substantial improvement under §§ 983.207(d) or 983.212, the independent entity is required to review the evidence and work completion certification submitted by the owner in accordance with § 983.155(b) and determine if the units are in complete accordance with § 983.156. This is an inspection function. To assist independent entities in carrying out these inspection responsibilities and avoid further conflicts, one function was added to § 983.57, requiring the independent entity to approve substantial improvement on units under a HAP contract in accordance with § 983.212 (which was § 983.157 in the proposed rule).

HUD does not believe it is necessary to add additional disclosures. When a family is accepted into the PBV program, § 983.252 requires the PHA to conduct an oral briefing and provide a written information packet. Although the topics listed in the comments are not explicitly covered in the rule, HUD believes that many of these items would be covered in meeting the requirements at § 983.252, such as how the program works and family and owner responsibilities. Additionally, § 982.352(b) sets conditions on assisted units that are PHA-owned, including that the PHA must inform the family, both orally and in writing, that the family has the right to select any eligible unit available for lease; the PHA-owned unit must be freely selected by the family, without PHA pressure or steering; and the PHA must obtain the services of an independent entity.

28. Units Excepted From Program Cap and Project Cap (§ 983.59)

Question 23: Should PHAs that wish to PBV over a certain number threshold be required to analyze the impact on the availability of vouchers and demonstrate that they will still have sufficient tenant-based vouchers available within a reasonable period of time for eligible PBV families that wish to move?

Some commenters disagreed with a cap on the number of PBVs a PHA can use based on the number of available HCVs. Commenters supported PHAs allocating PBVs and tenant-based vouchers (TBVs) based on local conditions, which some noted as Congressional intent for PHAs. One commenter expressed that HUD lacks the statutory authority to restrict a PHA's ability to project-base vouchers. This commenter stated that HUD's concerns about unintended consequences of cap exceptions are unfounded, given studies finding that Moving to Work (MTW) agencies usually fall within statutory program caps, and PHAs already consider the availability of vouchers due to families' right to move. The commenter further criticized HUD's analysis requirement of available vouchers for eligible PBV families as an unfunded mandate and duplicative of existing efforts. This commenter also recommended that the list of formerly assisted housing excluded from the portfolio cap should include HOME, and that replacement units excluded from the portfolio cap should include off-site replacement units, to enable owners and PHAs to site replacement housing in high opportunity areas, low vacancy areas, and areas outside of minority concentrations, which are locations that HUD has prioritized as important fair housing goals and has recognized as being better for the residents. The commenter further suggested that, in the case of newly constructed units developed to replace units that meet the criteria of § 983.59(b), units should be excluded even if the replacement units are built on a different site and the requirement at proposed § 983.59(d)(2) should require that the identification of the housing as replacement housing occur prior to PBV award rather than prior to demolition.

Commenters recommended that HUD establish an overall hard cap of 50 percent of vouchers, with exceptions to allow PHAs to project-base vouchers if local conditions warrant. Another commenter preferred PBV assistance over tenant-based assistance because it eliminates the barriers to lease from a private landlord in the open rental market. A commenter suggested the threshold at which the PHA or HUD should focus on the impact of providing PBV families with a meaningful opportunity should be when the waiting list is five years long.

HUD Response: HUD appreciates all the comments received regarding this question. With respect to the comments that HUD establish a hard cap of 50 percent of the number of vouchers the PHA may project-base (with exceptions based on local services) or remove the limitation cap entirely, the cap and the

exceptions to the cap are statutory requirements and consequently HUD cannot alter or remove the cap through rulemaking. HUD further agrees with the comments that the determination to choose to project-base vouchers rests with the PHA, including the decision to project-base vouchers in units that, as a result of the HOTMA amendments to 42 U.S.C. 1437f(o)(13)(B), do not count against the percentage limitation on PBV units. However, nothing in the HOTMA provision that excludes units previously subject to federally required rent restrictions or that were receiving another type of long-term housing subsidy provided by HUD from the percentage limitation relieves the PHA of its responsibility to administer its PBV program in accordance with all other program requirements. In cases where the percentage of units the PHA is contemplating project-basing is over 50 percent of ACC units, HUD is concerned about the potential impact on the PHA's ability to fulfill its obligations under 42 U.S.C. 1437f(o)(13)(E). Section 1437f(o)(13)(E) provides that families may move from the PBV unit at any time after the family occupied the unit for 12 months, and that upon such a move, the PHA shall provide the family with HCV tenant-based assistance or other comparable tenant-based assistance, and further provides that if such assistance is not immediately available, this requirement may be met by providing the family priority to receive the next voucher or comparable tenant-based rental assistance.

The use of PBV assistance can be an effective preservation tool and HUD is supportive of the use of PBV to prevent the loss of affordable housing units in their communities. However, in cases where a PHA is selecting a project for PBV assistance that would result in a situation where the PHA would be project-basing 50 percent or more of the PHA's authorized units, HUD believes that it is critical that the PHA has first fully considered the ramifications of that decision for its program, including if and how the PHA will be able to fulfill its statutory obligation to provide priority for tenant-based rental assistance to PBV families that wish to move consistent with 42 U.S.C. 1437f(o)(13)(E). Furthermore, since available vouchers would need to be prioritized for PBV families exercising their statutory right to move with tenant-based assistance, PHAs should also want to take the potential impact on families on the PHA's tenant-based waiting list into consideration. Consequently, this final rule provides that PHAs must perform an analysis of the impact prior to selecting a project for PBV assistance if project-basing 50 percent or more of the PHA's authorized voucher units, and the analysis should consider the PHA's ability to fulfill its responsibilities to provide tenant-based assistance to PBV families that wish to move and the impact on the tenant-based waiting list in such cases.

Replacement Housing and Units

One commenter proposed that HUD exempt off-site public housing replacement from caps to help deconcentrate poverty. Another commenter recommended that HUD allow off-site public housing replacement to maximize flexibility to use PBVs to replace public housing. Another commenter expressed concern over § 983.59, because replacement units should reflect the number and size of units required by the original residents to maximize their preference to return, reduce displacement, and maximize the preservation of site-based units in the community, according to the commenter. The commenter requested a civil rights review if there is any loss of units or change in unit size. As part of the redevelopment process, the commenter suggested that developers be required to survey residents about their housing size needs and only alter unit sizes if the survey demonstrates that the original residents require fewer or different sized units. The commenter further recommended the following: (1) that a reduction in the total assisted replacement units should be prohibited, unless the civil rights review makes no adverse finding; (2) the developer must demonstrate that the unit is in a voucher friendly area as well as located in a census tract where the poverty rate is greater than 20 percent; and (3) the resident notice and consultation reflect a desire not to return to PBV units. Commenters additionally opposed HUD's limitations that replacement units be on the same physical site as improper on fair housing grounds and overly restrictive, which the commenters stated was an unnecessary restriction and reinforced racial segregation.

HUD Response: First, HUD clarifies that nothing in the proposed rule prohibited off-site replacement. The provision at § 983.59(d) of the proposed rule served only to clarify which units are excluded, by statute (section 106(a)(2) of HOTMA), from the percentage limitation and income-mixing requirement. Under both the proposed rule and this final rule, PHAs may project-base units to replace formerly assisted or rent-restricted units off-site. However, a PHA's choice to replace units off-site does not result in those units being excluded from the percentage limitation or income-mixing requirement. Because the exclusion in section 106(a)(2) of HOTMA provided only that ''units of project-based assistance that are attached to units previously subject to federally required rent restrictions or receiving another type of long-term housing subsidy provided by the Secretary shall not count toward the percentage limitation,'' units located on an entirely different site from those replaced do not qualify for the statutory exclusion from the percentage limitation. Similarly, such units do not qualify for the statutory exclusion from the income-mixing requirement at section 106(a)(3) of HOTMA, which excluded only ''units previously subject to federally required rent restrictions or receiving other project-based assistance provided by the Secretary.''

HUD recognizes Congress's intent to preserve public and other affordable housing under the PBV program by (1) providing that on-site replacement units do not count toward the PBV percentage limitation and (2) giving HUD the authority to create additional exception categories. HUD acknowledges that sometimes attaching PBVs at an off-site location may better advance fair housing goals, including to racially integrate communities and to provide replacement housing of adequate bedroom size, which commenters cited as concerns. In many cases, the off-site project would be eligible for the increased cap at § 983.6(d)(1)(iv) (projects in areas where vouchers are difficult to use). In addition, to more directly facilitate opportunities to replace housing off-site, HUD is adding at § 983.6(d)(v) of this final rule an exception category specifically for off-site PBV replacement housing under the PHA's increased cap authority (under which the PHA may project-base an additional 10 percent of authorized voucher units). HUD believes this additional category will address the concerns raised and further notes that PHAs have other options beyond this new exception authority to develop off-site replacement housing with PBV assistance. Under the RAD PBV program, HUD waived section 8(o)(13)(B) of the 1937 Act so that covered projects, including those RAD PBV projects developed at a new location, do not count against the PBV percentage at all. Finally, PHAs can and should be making efforts to improve their tenant-based voucher programs to better address the aforementioned fair housing concerns.

Exclusion for LIHTC and 515 Loans

Commenters supported HUD's proposal to include units that previously received LIHTC allocations or 515 loans as excepted units. However, commenters stated HUD lacks statutory authority to limit this exclusion to properties that have been subject to rent limitations or received specified types of assistance within five years prior to PHA commitment of PBVs. Commenters recommended removing this limitation or incorporating an exception for replacement of old public housing properties.

HUD Response: HUD has reviewed the comments and has determined that HUD has the statutory authority to limit this exclusion to properties that have been subject to rent limitations or received specified types of assistance within five years prior to PHA commitment of PBVs.

General Opposition

A commenter stated that requiring PHAs to analyze the impact on the availability of vouchers and demonstrate that they will still have sufficient tenant-based vouchers available within a reasonable period of time for eligible PBV families that wish to move is costly and burdensome to PHAs. One commenter opposed HUD requiring an analysis as a pre-requisite for project-basing additional vouchers, due to a concern that an analysis will remove the PHA's discretion to decide to project-base, which would impact PHAs' broader plans to serve their communities.

HUD Response: In this final rule, an analysis of impact in § 983.58 appropriately addresses the risk of unintended or unanticipated consequences that over-use of PHAs' broad and unlimited exception authority to project-base formerly restricted or assisted units may have without creating undue burden.

Opposition to Setting a Specific Threshold

A commenter opposed HUD setting additional thresholds based on the percentage of vouchers and found the current turnover method for PBV assistance sufficient. This commenter stated that high rates of turnover at a property indicate the need for improvement and retention of tenants. Another commenter recommended that HUD provide PHAs with additional discretion in allowing PBV tenants to leave with their voucher or extending the occupancy requirement in PBV to two years, which is consistent with RAD, due to PBVs' higher turnover rate than other developments, which increases HCV waitlists. Commenters also recommended alternating the turnover voucher issuance between households on the HCV list or other waiting list.

HUD Response: HUD is unable to modify families' option to move with tenant-based assistance because it is required by statute.

Recommended Threshold Percentage of Vouchers

A commenter stated that the increase in a PBV household's eligibility to request vouchers leads to a waitlist backlog and an impact on occupancy in some locations, increased vacancy rates, and higher turnover costs. This commenter recommended that PHAs have the flexibility to administer a 25 percent cap on tenant-based attrition vouchers to eligible requesting PBV households, so that 75 percent of attrition vouchers go to HCV waitlist families. The commenter suggested this approach as equitable to house unsubsidized families faster while preserving PBV residents' rights to continued HCV assistance.

HUD Response: HUD reviewed the comment and has determined that HUD is unable to modify PBV families' option to move with tenant-based assistance because it is required by statute.

Alternative Suggestions

A commenter stated that the uncertain availability of tenant-based vouchers due to attrition, being over-leased or under-leased, and spending shortfalls, makes it difficult to set a threshold that would ensure that PBV participants can be issued a tenant-based voucher within a certain timeframe. This commenter stated that the PBV cap as a percentage of a PHA's total allocation is a better predictor that tenant-based vouchers will be anticipated to be available for program transfers. The commenter also stated that PBV assistance is preferable over tenant-based assistance because PBV property owners target certain special needs population, eliminating the barriers experienced to lease from a private landlord in the open rental market.

HUD Response: HUD has reviewed the comment and determined that this final rule will require an analysis of impact in § 983.58, which is required if project-basing 50 percent or more of units under the ACC.

Congressional Authority

Commenters stated that HUD does not have the statutory authority to control a PHA's authority to project-base vouchers. One commenter stated that if HUD decides to place more restrictions on PHAs, then it should be Congressionally authorized. Another commenter recommended that HUD increase the number of housing vouchers in general.

HUD Response: With regard to the comment that if HUD decides to place more restrictions on PHAs in terms of the number of vouchers that may be project-based, the restrictions should be Congressionally authorized, HUD agrees that the determination to choose to project-base vouchers rests with the PHA, including the decision to project-base vouchers in units that do not count against the percentage limitation on PBV units. The final rule does not place additional restriction on the number or percentage of vouchers that the PHA may project-base. However, nothing in the HOTMA provision that excludes units previously subject to federally required rent restrictions or that were receiving another type of long-term housing subsidy from the percentage limitation relieves the PHA from its responsibility to administer its PBV program in accordance with all other program requirements. HUD is concerned about the PHA's ability to fulfill its obligations under 42 U.S.C. 1437f(o)(13)(E) in cases where most or all of the PHA's vouchers are project-based. Section 1437f(o)(13)(E) provides that families may move from the PBV unit at any time after the family occupied the unit for 12 months, and that upon such a move, the PHA shall provide the family with HCV tenant-based assistance or other comparable tenant-based assistance, and further provides that if such assistance is not immediately available, this requirement may be met by providing the family priority to receive the next voucher or comparable tenant-based rental assistance. The use of PBV assistance can be an effective preservation tool and HUD is supportive of the use of PBV to prevent the loss of affordable housing units in their communities. However, when a PHA is considering project-basing a high percentage of its authorized units, HUD believes that it is critical that the PHA should take into account if and how the PHA will be able to fulfill its statutory obligation to provide tenant-based rental assistance to PBV families that wish to move. Further, since available vouchers would need to be prioritized for PBV families exercising their statutory right to move with tenant-based assistance, PHAs would also want to take the potential ramifications for reaching families on the PHA's tenant-based waiting list into

consideration. Consequently, this final rule provides that in cases where a PHA is selecting a project for PBV assistance that would result in a situation where the PHA would be project-basing 50 percent or more of the PHA's authorized units, the PHA must perform an analysis of the impact of its program.

With regard to the commenter recommendation that HUD increase the number of housing vouchers in general, HUD cannot increase the number of authorized vouchers through this final rule. New vouchers and the funds to support them are provided by Congress through HUD's appropriations acts.

HUD Report/Study

A commenter stated that families should not be forced to wait in potentially unsafe housing while they wait for the PHA to process the PBV-to-HCV transfer. Therefore, commenters suggested that HUD and PHAs monitor and report from the next three to five years increases in wait times for HCV assistance from PBV families where PHAs have increased the availability of PBV assistance, due to HOTMA.

HUD Response: HUD's position has always been that families should not be forced to wait in potentially unsafe housing while they wait for the PHA to process a family's right to move.

29. Inspecting Units (§ 983.103)

Question 24: Non-Life-Threatening (NLT) Conditions for New Construction and Rehabilitation Housing

One commenter stated that NLTs could effectively be used when newly constructed developments have units ready for occupancy, but the public space areas are still not fully developed, and the development can obtain a temporary certificate of occupancy. A commenter proposed that HUD continue to use the current definition for NLT conditions for new construction and rehabilitation housing because it streamlines standards and provides owners with the opportunity to address minor issues that arise from construction or rehabilitation work.

A commenter stated that there is no reason for new construction or rehabilitation to fail HQS when they have the final certificate of occupancy, especially where new construction is built under strict county and local requirements. Another commenter urged that new construction or rehabilitated units should be subject to regular HQS inspections, and not NLT or alternative inspections. However, this commenter suggested that PHAs should have discretion in applying NLT or alternative inspection options.

Another commenter expressed that while NLT conditions may occur in new construction or rehabilitated properties, other units, including PBVs, can use NLT/alternative inspections as well. A commenter stated that NLT provisions could be helpful on rehabilitation or new construction when minor defects fail HQS and NLT conditions are found. This commenter expressed that for rehabilitation or new construction, the NLT option could be helpful in expediting assistance approvals. This commenter also recommended changing the allowable timeframe, rather than eliminating the alternative inspection option, would be a better solution to the problem of the alternative inspection occurring prior to rehabilitation.

One commenter recommended that under § 983.103(b), inspection timing and procedures of new construction and rehabilitation projects be consistent with the NLT option, and that under § 983.103(f) additional time should be permitted for inspections of units in which the owner or family refuse access to the PHA, unless the regulation states otherwise. This commenter also supported HUD revising the repair time under § 983.103(f) to 30 days after the PHA provides owner notification of the deficiency.

One commenter supported HUD's proposal of alternative inspections, by stating that alternative inspections can fulfill the obligation for initial HQS inspection in unsafe circumstances for tenants and inspectors to enter units that are occupied. Another commenter noted the administrative burdens of alternative inspections such as tracking the units, notifying the landlords and tenants, scheduling the inspections, and obtaining results from the owner, or the agency doing the inspection. This commenter stated that this may create delays in assisting tenants, especially for units that must pass a PHA inspection. This commenter recommended that HUD use alternative verification methods of corrections to failed inspection items, which will help administratively and with producing positive relationships with landlords as well as assisting families quickly. This commenter also noted that PHA-owned housing should not have a problem passing HQS.

A commenter stated that PHAs should have the ability to utilize alternative inspection and NLT options with respect to PBV new construction and rehabilitation projects, because these projects must meet local code standards to receive a certificate of occupancy, and, therefore, they are unlikely to be uninhabitable. The commenter stated that, while minor items may remain, these items do not threaten the lives of renters, and they should not prevent a PHA from placing the unit under a HAP contract.

Commenters expressed that PHAs should have discretion deciding whether to implement NLT inspections for units because requiring NLT inspections for certain units makes implementation overly complex. Other commenters noted confusion and requested HUD clarify that PHAs can decide whether to apply initial inspection flexibilities project-by-project. Another commenter stated that another form of acceptable alternative inspections could include a city inspection or a certificate of occupancy. One commenter suggested that HUD incorporate alternative requirements from PIH Notice 2020–33.

HUD Response: HUD appreciates the comments both in favor of and against extending the NLT provision to new construction and rehabilitation PBV. HUD has chosen not to extend the NLT option to new construction or rehabilitation at this time. Additionally, HUD is not extending the alternative inspection option to new construction or rehabilitation to ensure the PHA inspects the newly completed work. HUD agrees with the comments stating that the NLT provision may be applied to existing housing at the discretion of the PHA and this is reflected in this final rule.

30. Nature of Development Activity (§ 983.152)

Previously Unassisted Units

A commenter stated that adding previously unassisted units to a HAP contract should not be considered development activity, as it is often due to availability of funding and/or eligibility of in-place families, and, as such, no additional regulatory approvals should be necessary.

HUD Response: Section 983.152(b)(2) of the proposed rule did not operate to include in the definition of ''development activity'' the act of adding previously unassisted units to a HAP contract. Rather, ''development activity'' was defined in § 983.3(b) and § 983.152(b)(2) of the proposed rule addressed cases in which development activity occurred to add previously unassisted units in the project to the HAP contract. However, HUD determined that including such activity under the definition of ''development activity'' and in subpart D of part 983 led to significant confusion among commenters in interpreting the rule as a whole. As a result, in this final rule HUD amends the definition of

''development activity'' as described above in discussion of comments pertaining to § 983.3, such that ''substantial improvements'' undertaken in order to add units to a contract are clearly distinct. Accordingly, HUD removes discussion of substantial improvements from § 983.152 of this final rule. Section 983.207 of this final rule contains provisions applicable to adding units, including when substantial improvement will occur in order to add the units.

Broadband

A commenter suggested that the broadband requirements referenced in § 983.152(b)(2) should not apply when adding previously unassisted units to a HAP contract because the installation of broadband infrastructure requires construction work and should be triggered only if work is being done.

HUD Response: The proposed § 983.152(b)(2), as restructured and moved in this final rule to § 983.207(d), applies only when substantial improvement is undertaken to add previously unassisted units in the project to the HAP contract, and the requirement to install broadband infrastructure is further limited as provided therein. As a result, this final rule does align with the commenter's proposed limitation that the broadband infrastructure requirement applies only when work is being done.

31. Development Requirements (§ 983.153)

Subsequent Rehabilitation or Development Activity

A commenter recommended that HUD continue to only require subsidy layering review for initial awards of PBV assistance and not upon subsequent rehabilitation or development activity because it will be administratively burdensome for project owners and PHAs.

HUD Response: This comment is addressed in the discussion of § 983.11 above.

Section 3 Compliance

This commenter also stated that HUD's section 3 compliance proposal is neither authorized by statute nor consistent with regulations in part 135, and, therefore, the commenter proposed that HUD delete section 3 compliance as a development requirement, because section 3 does not apply to monthly rental assistance payments.

HUD Response: Pursuant to the section 3 final rule published at 85 FR 61524 (Sep. 29, 2020) and codified at 24 CFR 75.3, which eliminated the applicability of section 3 to assistance under section 8 of the 1937 Act, HUD does not retain section 3 compliance as a development requirement in this final rule. The section 3 rule does make clear that residents of housing receiving section 8 assistance and who are employed by a section 3 business concern are included in the definition of *section 3 worker.* The PHA must report the number of hours worked by section 3 workers.

Applicability of Davis-Bacon Requirements

Commenters stated that it would be unreasonable for HUD to require a PHA to enforce owner compliance with labor standards, specifically Davis-Bacon, in circumstances where there was no Agreement. A commenter further added that where a project's development does not depend on the provision of PBVs, as few obstacles as possible should be provided to permit affordability, because these developments do not need PBV assistance to be built and they are often the most desirable, best located, and most advantageous developments. Another commenter expressed that it is unclear how to reconcile the exemption of non-Agreement projects from Davis-Bacon (§ 983.153(c)(1) of the proposed rule) and the proposal that projects that do not enter Agreements must comply with the development requirements of § 983.153 (§ 983.154(e)(2) of the proposed rule, which has been moved to § 983.154(f)(2) of this final rule). Some commenters opposed excluding rehabilitated and newly constructed projects from the Davis-Bacon wage rate requirements. A commenter stated that PHAs do not have flexibility under the statute to exclude rehabilitation or new construction of PBV projects from Davis-Bacon coverage. A commenter suggested giving PHAs discretion to exclude rehabilitation or new construction from Davis-Bacon wage requirements.

HUD Response: HUD appreciates the comments in support of the exclusion of units developed without an Agreement from the labor standards at § 983.153(c)(1) of the proposed rule, but does not adopt the proposed language in this final rule. While the impact of paying prevailing wages on a project's development cost could be viewed as an obstacle to development, HUD agrees with commenters who pointed out that this cost must be balanced against the historical reasons for the labor standards, including ensuring that federally assisted projects do not depress local wage standards. HUD appreciates the commenter's support of PHA discretion regarding use of Davis-Bacon wage requirements, but has determined upon further reflection that the PHAs' new option to decline to use an Agreement does not impact the applicability of Davis-Bacon wage requirements. In the case of a newly constructed or rehabilitated project, the owner is seeking a commitment of PBVs in advance of development of the project, regardless of whether the PHA and owner enter into an Agreement, and the PHA's pre-construction offer and owner's acceptance of the PBV offer constitutes the agreement triggering Davis-Bacon requirements in accordance with section 12 of the 1937 Act. Therefore, HUD provides in this final rule that a PHA decision to use no Agreement or to execute an Agreement after construction or rehabilitation has commenced will not relieve an owner's responsibility to pay Davis-Bacon prevailing wages, consistent with the statutory intent of section 106(a)(4) of HOTMA and section 12 of the 1937 Act.

HUD appreciates the comment regarding the relationship between § 983.153(c) and § 983.154(e) (now § 983.154(f) in this final rule). In response, HUD amends § 983.154(f) to better clarify that the owner need only comply with development requirements of § 983.153 that are applicable to the particular project when the development occurs without Agreement. For example, the Davis-Bacon compliance requirement is applicable only if the HAP contract will assist nine or more units.

Use of an Alternative Document

A commenter stated that HUD should not require Davis-Bacon coverage through an alternate document. Another commenter suggested using an alternate document or a document created by a PHA. One commenter urged HUD to provide a clear and consistent policy regarding how to execute alternate documents to avoid confusion.

HUD Response: HUD determines that, where the PHA will not use an Agreement, the PHA's notice of selection of the project and the owner's acceptance is the mechanism by which the owner agrees to compliance with Davis-Bacon requirements. This final rule adds explanatory text regarding the notice of selection in §§ 983.51(f) and 983.153(c), in response to comment.

32. Development Agreement (§ 983.154)

Begin After Environmental Abatement

A commenter suggested that development activity for new construction should exclude environmental abatement.

HUD Response: Environmental abatement may constitute a significant or inseparable portion of work involved in new construction. Therefore, in cases in which the nature of environmental abatement itself constitutes commencement of development activity or in which environmental abatement involves work that occurs following the commencement of development activity, HUD determines it is appropriate for such abatement to be subject to the standard rules governing development activity in this part 983.

Consult With Interested Parties

A commenter recommended that HUD consult with industry groups and interested parties and utilize nonbinding notice documents to define and develop additional guidance on the term, ''rehabilitation activity'' noted in § 983.154(c)(2).

HUD Response: HUD appreciates this comment and will consider it when developing guidance on the PBV program.

33. Term of HAP Contract (§ 983.205)

Question 27: Contract Extensions

Commenters urged HUD to allow HAP contract extensions beyond 40 years to permit sufficient time to secure recapitalization and facilitate preservation. A commenter explained that HAP contracts do not always align with other regulatory agreements and projects may need to secure long-term financing during their regulatory agreement. Another commenter suggested that HUD allow for extensions 60 months prior to the contract expiration instead of the existing contract extension beyond 40 years until 24 months prior to the HAP contract expiration. Other commenters proposed that HUD allow PHAs to commit PBV contract extensions where re-syndication extends the affordable term tied to financing beyond the term of the PBVs and allow PHAs to establish the terms of the PBV HAP contracts as provided by PIH Notice 2017–21.

A commenter stated that HUD should modify § 983.205(b)(4) to allow the PHA and the owner to agree in advance to additional conditions applying to continuation, termination, or expiration of the contracts; instead of keeping the existing language, which the commenter stated requires that PHAs only use the contracts provided by HUD. One commenter stated that independent entities are unsuitable to determine the appropriateness of contract renewals, and that PHAs should make this determination because PHAs can assess resources and the local housing market demand to determine the best interests of the PHA's portfolio and residents.

HUD Response: In review of comments received, it became apparent that the language of § 983.205(b) in the proposed rule was not sufficiently clear that HUD does allow a HAP contract to be extended beyond 40 years. Therefore, HUD has revised § 983.205(b) in this final rule to clarify this point.

In consideration of public comments, HUD also revises § 983.205(b) in this final rule to provide that, at any given time before a PBV HAP contract expires, the PHA may execute any number of extensions (with terms up to 20 years each) such that there are up to 40 remaining years on the contract. HUD believes this will provide PHAs sufficient flexibility to extend the HAP contract term as needed to meet the needs of the local community and align with common preservation efforts as described by commenters, while striking a reasonable balance with the PHA's obligation to make its statutorily required determination prior to extension. As such, the rule continues to require the PHA to determine that each extension is appropriate to continue providing affordable housing for low-income families or to expand housing opportunities but recognizes PHAs are in the best position to determine the appropriate time to consider an extension. Additionally, this change streamlines and simplifies PBV processes.

With respect to comments that propose that HUD allow the PHA and the owner to agree in advance to additional conditions applying to continuation, termination, or expiration of the contracts, the statute authorizes HUD (not the PHA) to impose such conditions. HUD has chosen not to do so. Lastly, with respect to the comment concerning the role of the independent entity in making determinations on HAP contract extensions, HUD finds the commenter's explanation persuasive and, further, determines that PHAs are best positioned to set the initial term of the contract. Therefore, HUD removes the independent entity function in agreeing to the initial term and extensions in this final rule.

34. Contract Termination or Expiration and Statutory Notice Requirements (§ 983.206)

Commenters suggested adding to § 983.206(d) a requirement that an owner's termination of the PBV contract because the PHA has lowered the rent below the initial rent cannot be effective until the PHA has (1) notified tenants of the upcoming change to HCVs; (2) executed the required tenant-based voucher HAP contract between the owner and PHA; and (3) provided tenant-based vouchers to the tenants. This commenter recommended requiring PHAs to complete these tasks within a specified timeframe (and PHAs can avoid this by agreeing in the initial contract or extension not to reduce rents below the initial rent to the owner).

Some commenters supported prohibiting owners from terminating the family's housing assistance due to the termination or expiration of a PBV HAP contract. Another commenter supported HUD not requiring that families be allowed to stay in their same units, and instead, allowing a PHA and owner to make decisions about handling terminations locally. This commenter claimed that HUD lacks the statutory authority to mandate that families be allowed to stay in their own units, since the statute explicitly mentions remaining in the same project.

Another commenter suggested modifying § 983.206, to state that tenants whose PBV units are re-developed should not be treated as contract terminations. One commenter supported families remaining in the same unit and not just the same project. In § 983.206(b) and (b)(6), regarding tenants' right to remain, a commenter recommended that the ''other good cause'' reference to the HCV rule at § 982.310 be limited to tenant misconduct; there should also include conforming language inserted into the HUD PBV tenancy addendum. This commenter also suggested that section 106 of the HOTMA statute extends the tenant's right to remain to the project, and not just the unit, as a guarantee for tenant housing stability upon subsidy expiration or termination in circumstances where family size has changed, or the current unit may need rehabilitation that requires extended absence. Another commenter supported families with disabled individuals or children remaining in the same unit due to hardships caused by moving and recommended letting the extension expire when they voluntarily leave or become ineligible for PBV.

A commenter recommended stating in § 983.206(d) that under situations of PBV HAP contract termination, that the PHA may not re-screen for eligibility beyond income when providing HCVs to former PBV tenants. The commenter suggested clearly stating tenants' right to replacement assistance and housing stability, despite PHA or HUD administrative delays in providing the required assistance. The commenter also stated that under § 983.206(d), the proposed exception to the one-year notice requirement for an owner who

terminates a PBV HAP contract after the PHA reduces the contract rent below the initial rent to owner is statutorily unauthorized. A commenter suggested revising § 983.206(a)(4) to clarify that the tenant has the right to remain at prior rent until the owner has provided legally required notice and that notice period has elapsed, not just for the one-year period.

HUD Response: HUD has adopted commenters' recommendations in part. Section 983.206 in this final rule provides a timeframe by which a PHA must issue families a tenant-based voucher before planned contract termination, except in limited circumstances specified by HUD, and requires sufficient notice by the owner to the PHA to allow such voucher issuance. HUD declines to adopt the recommendation that the PBV HAP contract not be terminated until execution of a tenant-based voucher HAP contract. The provision implemented in this final rule, at § 983.206(b), requires the PHA to issue families tenant-based vouchers, not to assure that families locate units to lease with the vouchers. The tenant-based voucher HAP contracts for tenants who stay in place must not be effective prior to the date of termination (end date) of the PBV HAP contract, and circumstances may arise in which the actual end date must change from the planned end date. In this final rule, § 982.305 provides PHAs sufficient flexibility to execute the tenant-based HAP contracts retroactively if all contracts cannot be executed timely in relation to termination of the PBV HAP contract. In cases in which families choose to use their tenant-based assistance elsewhere, using target dates for execution of each tenant-based HAP contract to determine the end date of the PBV HAP contract would be unworkable.

HUD has considered the comments regarding whether a family should have the ability to remain in the same unit and has determined to retain the proposed rule language allowing a family instead to remain in the same project. While HUD recognizes that moves may cause hardship for families, HUD determines that PHAs are in the best position to consider conditions and limitations surrounding specific contract terminations and expirations and assist families to secure the best possible housing for them given those considerations. Notwithstanding, retaining the proposed language on allowing a family to remain in the same project does not exempt a PHA from receiving, processing, or granting a reasonable accommodation to remain in the unit. Regarding the comments concerning redevelopment, HUD is not adopting the proposed change. Section 983.212 in this final rule allows PHAs and owners to engage in substantial improvement on units under HAP contract without terminating the HAP contract, and where PHAs and owners agree to do so they must follow the rules set forth in § 983.212. Section 983.206, by contrast, has the requirements in cases of contract termination.

With regard to good cause for termination, HUD adopts the commenter's suggestion in part. HUD in this final rule allows for lease terminations on the basis of certain grounds in § 982.310, to include family duties, which the family has failed to fulfill and other family misconduct, as well as when the owner will use the unit for a non-residential purpose or to renovate the unit. Nothing in this final § 983.206 is intended to preempt operation of State and local laws that provide additional limitations regarding allowable causes for lease termination. HUD intends to issue a tenancy addendum specific to families who were residing in a PBV project at contract termination who elected to remain in the project with tenant-based assistance, which will also reflect the specific grounds on which the family's lease may be terminated. HUD determines this final rule allows for meaningful election by families to remain in the project while also providing exceptions for situations under which the owner cannot reasonably be expected to allow a family to remain.

HUD does not make changes in this final rule in response to the comment on re-screening when families get tenant-based vouchers, as the proposed § 983.206(b)(4), retained in this final rule, adequately explains that such families are not new admissions; rather, they are and remain section 8 voucher participants, subject to the rules relating to participants (as further explained in the definition of ''admission'' in § 983.3). As discussed above, HUD has clarified some of the provisions in § 983.206 to better explain the timeframes involved in provision of tenant-based assistance. Finally, section 8(c)(8) of the U.S. Housing Act of 1937 defines the term ''termination'' for purposes of the owner notice requirement as ''the expiration of the assistance contract or an owner's refusal to renew the assistance contract. . . .'' HUD declines to further extend the one-year notification requirement to an owner's termination of the contract during its term due to a reduction below initial rent, to preserve the existing authority of the owner to terminate timely, given the owner's substantial interest in maintaining sufficient project income. However, HUD has added a 90-day notice requirement, so as to provide the PHA sufficient time for voucher issuance per § 983.206(b). HUD has also taken this opportunity to clarify when mutual termination of a PBV HAP contract during its term would be allowable and to specify that in those cases the full notice period is required.

With regard to the comment on § 983.206(a)(4), HUD does not believe a change is necessary as the text is already clear that the family may remain ''for the required notice period,'' which aligns with the comment.

Insufficient Funding

A commenter stated that HUD's implementation of the insufficient funding requirement (HOTMA section 106(a)(4), to be codified at 42 U.S.C. 1437f(o)(13)(F)(i)(I)), is critical to developers' ability to finance PBVs with minimal transition reserves. Commenters also recommended modifying language in § 983.206(c)(1) to clarify that sufficient funding is not necessary for a PHA to make PBV contract payments for a full year, despite unpredictable timing of full-year appropriations bills and the frequency of continuing resolutions.

A commenter stated that the legislative history indicates that Congress intended PHAs to prioritize project-based HAP contracts and provided neither HUD nor PHAs with the discretion contemplated by the proposed regulations.

HUD Response: HUD appreciates the comments regarding the nature of sufficient funding and agrees that PHAs need not consider sufficient funding as requiring a full year's PBV contract payments to be on hand. HUD has amended § 983.206(c)(1) accordingly.

Regarding the comment on prioritizing project-based HAP contracts, HOTMA section 106(a)(4), to be codified at 42 U.S.C. 1437f(o)(13)(F)(i)(I), provides ''that in the event of insufficient appropriated funds, payments due under contracts under this paragraph shall take priority if other cost-saving measures *that do not require the termination of an existing contract* are available to the agency . . .'' (emphasis added). Per this language, PHAs retain discretion to establish an Administrative Plan policy, as described in § 983.206(c)(1), for actions it will take if no cost-saving measures other than HCV or PBV contract termination are available.

35. HAP Contract Amendments (To Add or Substitute Contract Units) (§ 983.207)

Cost of Reinstating Units

A commenter suggested that HUD should revise § 983.207(b)(3) to reinstate units under a HAP contract without being subject to development requirements at § 983.152(b) because without it, PHAs would be subject to subsidy layering reviews and other burdens and it would place a significant burden and cost upon project owners. This commenter also urged that HUD does not apply the set of ''development activity'' requirements to projects that undertake modifications to PBV units which result in adjustments to pre-existing contracts because PHAs may need to add units or substitute units after HAP signing, and this would make that process very burdensome.

HUD Response: In all cases in which units are added to a PBV HAP contract per § 983.207(b), including where a unit is being reinstated after having previously been removed, HUD determines it is appropriate for certain requirements at § 983.207(d) to apply when the unit is undergoing substantial improvement. As discussed earlier in this preamble, this final rule separately defines ''substantial improvement'' and ''development activity,'' and applies appropriate requirements to each. Substantial improvement undertaken during the term of the HAP contract, as defined in § 983.3(b), is significant work and, as such, application of the specific requirements listed in § 983.207(d) represents a reasonable balance of the costs to project owners and the interests of HUD in maintaining housing quality and program integrity. As for the comment about ''development activity'' requirements, HUD determined that the limited requirements applicable to substantial improvement undertaken to add units to a contract, including when the added unit is a substitution for a contract unit, represent the minimum necessary requirements for such relatively intensive activity. Therefore, HUD retains both requirements in this final rule.

36. Owner Certification (§ 983.210)—Davis Bacon, Other Conforming Changes

Commenters supported the proposed Davis-Bacon changes that would remove the current owner certification under the HAP contract at § 983.210(j) that repair work on a project selected as an existing project may constitute development activity and, if determined to be development activity, the repair work shall be in compliance with Davis-Bacon requirements. One commenter supported HUD's Davis-Bacon wage rate requirement proposal due to its potential reduction in development costs; permittance of State independence to apply their own wage requirements; and the reduction of administrative burden on projects that have multiple funding sources. Another commenter expressed that the Davis-Bacon changes would encourage owners and operators of existing housing to incorporate PBVs while maintaining and improving living conditions for residents.

Commenters supported the removal of ''existing housing'' from the Davis-Bacon wage rate requirement. One commenter stated that excluding existing housing provides clarity, because it aligns with the language and spirit of the 1937 Act. Another commenter stated that applying the wage requirement to existing housing significantly increases the cost of developing affordable housing and reducing the number of households that could be served by the PBV program. One commenter stated that eliminating existing housing from the Davis-Bacon wage rate requirements would allow owners to utilize more PBVs and potentially erase operating deficits, reach more ELI and VLI residents, and reduce reliance on gap financing when seeking to refinance.

HUD Response: HUD appreciates the comments in support of removing § 983.210(j), and in this final rule proceeds with the removal as proposed. As previously discussed in the preamble of the proposed rule, HUD acknowledges that the broad, open-ended definition of ''existing housing'' in place prior to this final rule has proven insufficient to ensure that PHAs properly classify PBV housing types and contributed to the Davis-Bacon issues that HUD attempted to address through the addition of the owner certification in § 983.210(j) in 79 FR 36146 (Jun. 25, 2014). In order to remedy this problem and other related issues with respect to other Federal requirements such as subsidy layering reviews, this final rule provides a much more specific and tighter definition of ''existing housing,'' which is described in detail elsewhere in this preamble.

37. Substantial Improvement to Units Under a HAP Contract (§ 983.212)

Support

Several commenters supported HUD's proposal to establish a five-year timeframe, within which development work would not be permitted except in extraordinary circumstances. A commenter stated that permitting development work within the first five years is only reasonable to prevent the circumvention of certain requirements that would normally be stipulated in an Agreement.

HUD Response: HUD appreciates the supportive comments, but reduces the general five-year limitation proposed to two years in this final rule (both the proposed and final rule contain exceptions to the general limitation). HUD believes doing so continues to ensure housing intended for immediate rehabilitation is subject to appropriate requirements governing rehabilitation. However, HUD believes a two-year period in which work will not occur is more reasonable to foresee.

Opposition

Other commenters opposed HUD's proposal to establish a five-year timeframe because it is overly restrictive. Commenters stated that requiring a burdensome permitting process would disincentivize owners of older housing from making periodic substantial repairs and renovations to maintain the housing in good condition. A commenter expressed that it is challenging to anticipate all physical needs in a five-year period. Another commenter stated that HUD's proposal would have a significant impact on residents by discouraging owners from conducting voluntary repairs and replacements that would improve the quality of life for residents and may stall or prevent the start of a HAP contract for units that would otherwise be eligible to receive PBVs.

A commenter warned that the five-year period would impact projects that may need work within five years of being built due to flawed work by the original builder. A commenter stated that the HUD-prescribed process to request development activity (called ''substantial improvement'' in this final rule, per discussion of changes to § 983.3 above) would create an additional administrative burden for PHAs without the process and expertise to assess development requests and determinations. A commenter warned that HUD's proposal would require non-MTW PHAs to obtain a waiver or to adopt a MTW demonstration activity to complete the unit rehabilitation and would require non-MTW agencies attempting to pursue public housing repositioning to need regulatory waivers. Another commenter stated that HUD's proposal may present challenges to create affordable housing through the PBV program because of the disincentive to perform capital work within five years of HAP contract signing and would force owners to

conduct a heavier workload upfront, which may be unsupported through existing financing tools.

HUD Response: HUD agrees that it would have been difficult for PHAs and owners to anticipate all physical needs requiring a significant improvement over a five-year period, and therefore changes the period to two years in this final rule.

HUD disagrees that the rule discourages repairs, replacements, and renovations. The owner is required to meet HQS and continues to be able to replace equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind (this is not substantial improvement as defined in § 983.3(b)), which should enable the owner to maintain the housing in good condition. An owner that instead has an immediate desire to undertake development activity remains able to do so through the process of project-basing rehabilitated housing, and HUD provides further flexibility at § 983.157 of this final rule to better accommodate these situations. An owner faced with an urgent, unanticipated need to engage in substantial improvement during the first two years of the contract may be able to receive PHA approval to do so under the exception for extraordinary circumstances. Taken as a whole, HUD determines that this final rule provides the greatest latitude possible to owners while still ensuring appropriate projects are subject to pre-development requirements such as subsidy layering review, Federal funds are used only in quality housing, and PBV-assisted families are housed stably.

The PHA (or independent entity, in the case of PHA-owned units) approval process codified in this final rule reflects minimum oversight necessary to ensure compliance with PBV requirements and protection of families. HUD incorporates into this final rule additional clarity for PHAs regarding the basis upon which to approve or disapprove owner requests. HUD does not anticipate that this final rule increases the potential need for waiver, as the prior rule also contained divergent processes to project-base rehabilitated housing versus existing housing, including limitations on development activity that could occur after HAP contract execution. This final rule improves the clarity and safeguards of existing limitations.

HUD is aware that project-basing rehabilitated housing entails a heavier workload upfront. Completing the development activity upfront typically has the intended result that the housing is in good condition longer and therefore is better positioned to serve as long-term housing for families. HUD expects that PHAs select existing housing for PBVs when the housing is in good enough condition to serve families for the contract period, without immediate housing instability due to substantial improvement. PBV funding supports rents to house assisted families, which may cover a project's ongoing operating expenses; it is not development funding.

Suggestions and Alternatives

Some commenters suggested HUD allow for exceptions in instances where improvement or upgrading is needed for the substantial improvement, such as energy efficiency efforts, security precautions, and previously scheduled projects that are part of effective long-term property maintenance plans. A commenter also stated that HUD should include a catch-all provision to allow improvements to protect the housing quality for assisted families or protect the viability of the project. Another commenter suggested that HUD create a ''pass-through'' of rental assistance where construction improvements are to be made in a property, similar to what is allowed in other project-based rental assistance. Commenters also recommended that PHAs have the discretion over permissibility, oversight, and monitoring of substantial improvement that commences after the beginning of the HAP contract as a means for PHAs to remain accountable to HUD for monitoring compliance and development requirements. Another commenter suggested that HUD adopt a three-year timeframe instead of a five-year timeframe.

HUD Response: HUD reviewed the examples commenters provided and determines they are adequately addressed by this final rule. HUD does not anticipate that projects that met HQS applicable to qualify for PBV assistance will then require non-emergency substantial improvement soon after contract execution to remain viable and compliant with HQS; usual maintenance should suffice. HUD does not add a pass-through option because doing so is not consistent with PBV program requirements. For example, section 8(o)(13)(K)(i) of the 1937 Act allows payment for vacant units only when vacancies are not the fault of the owner, section 8(o)(10)(A) requires that rent for a unit receiving HAP be reasonable at all times, and section 8(o)(8)(G) prescribes the required PHA actions with respect to HAP for units that do not comply with HQS and is incompatible with providing HAP for the purpose of housing a family who is leasing a noncompliant unit and living elsewhere. This final rule provides significant discretion to PHAs, balanced against adequate safeguards for assisted families and reasonable limitations to ensure the PBV program operates as intended. HUD adopts a two-year timeframe in this final rule rather than the three-year timeframe suggested by the commenter, because HUD believes the owner and PHA are better able to anticipate the need for substantial improvement over a two-year period.

Proposal Would Have No Effect

A commenter expressed that because project owners are often required to utilize several funding sources to fund substantial rehabilitation, it is likely that other funding sources used to finance the substantial improvement may independently trigger many of the cross-cutting requirements that HUD cites in question 25. Another commenter further stated that PHAs have mechanisms in place to ensure that projects comply with development requirements; adding an additional mechanism to substantial improvement after HAP contract signing would be burdensome.

HUD Response: HUD supports the additional oversight that other funding sources and PHAs independently require but finds it necessary to retain and clarify this section in this final rule to ensure PHAs can easily reference and comply with the PBV-specific requirements relevant to post-contract substantial improvement.

Rehousing During Rehabilitation

Commenters suggested that HUD add clarifying language stating that owners are permitted to continue receiving HAP for the family's re-housing during a fixed period of rehabilitation.

HUD Response: Housing assistance payments provide rental assistance for participant families, and therefore must not be paid to owners for units not occupied by participants. Under this final rule, the PHA may pay HAP for occupied contract units that meet HQS, except when the unit is temporarily vacant for a calendar month or less.

Emergency Site Work

A commenter asked HUD to provide detail regarding emergency site work performed for health and safety, emergency rehabilitation work conducted for health and safety, and fit-out of non-residential spaces occurring under a different general contractor contract. The commenter also expressed uncertainty pertaining to the applicability of these types of activities under the definition of ''substantial

improvement'' (which was included in the definition of ''development activity'' in the proposed rule) and the requirements pertaining to substantial improvement because this work is done in a manner that is either unanticipated in the project planning phase or falls outside a typical PBV project planning scope.

HUD Response: This final rule clarifies the term ''extraordinary circumstances'' in response to this comment. Emergencies generally qualify as extraordinary circumstances under this rule, though situations may arise in which an emergency instead constitutes a breach of HAP contract or a matter falling under the provisions for enforcement of HQS.

38. How Participants Are Selected (§ 983.251)

Site-Based Waiting Lists

One commenter suggested that HUD allow owners to maintain their own site-based waiting lists to expedite the tenant selection process as well as allow PHAs to establish compliance reviews to oversee owners. Another commenter encouraged HUD to maintain provisions describing roles and responsibilities of the owner and PHA in the guidance documents. This commenter disagreed with HUD requiring PHAs to formally incorporate site-specific tenant selection plans into their Administrative Plans if the plan is on file with the PHA and available to the public because incorporating the plans into the Administrative Plan will be burdensome for PHAs, due to frequent minor updates. The commenter also expressed concern regarding the statement in § 983.251(c)(7)(x) that HUD may act against the owner, PHA, or both, and suggested that if HUD intends to hold PHAs responsible for an owner's project-based waiting list, the regulations need to state that the PHA also has the right to take enforcement action directly against the owner. The commenter stated that in cases where a PHA has commenced enforcement actions against an owner, then HUD should not seek additional enforcement against the PHA.

Another commenter suggested deleting § 983.251(c)(7)(i). A commenter objected to the proposed requirement that a tenant selection plan (TSP) be included in the Administrative Plan for every owner. The commenter stated that owners may make frequent adjustments to their TSP, such as to respond to updates under the Violence Against Women Act or updated screening standards, and therefore every small TSP change, even if unrelated to waiting lists or preferences, would require an Administrative Plan amendment, and the PHA's Administrative Plan would have to be amended for every PBV project when the project is selected and then again when the TSP is approved by the PHA. The commenter suggested that selection plans should be on file with the PHA and posted online with the Administrative Plan but should not be specifically part of the Administrative Plan.

HUD Response: Under this final rule, HUD provides PHAs discretion to allow owners to maintain their own site-based waiting lists to expedite the tenant selection process. HUD requires PHAs that exercise this discretion to establish oversight procedures, which may include compliance reviews to oversee owners. HUD determined it is necessary for the minimum requirements codified in this final rule describing the roles and responsibilities of the owner and PHA to be located in the regulation so as to be easily located and consistently enforced, rather than only in guidance documents. As noted in this final rule, PHAs must formally incorporate the site-specific owner waiting list policies into their Administrative Plans. HUD does not believe incorporating the owner waiting list policy into the Administrative Plan will be cumbersome for PHAs because of frequent minor updates.

HUD maintains § 983.251(c)(7)(x) to ensure that the owner, PHA, or both, are held accountable and responsible for an owner's project-based waiting list. The administrative policy that is incorporated in a PHAs' Administrative Plan may state that the PHA also has the right to take enforcement action directly against the owner. Although there may be cases where a PHA has commenced enforcement actions against an owner, depending on the nature of the enforcement actions, HUD may still take additional enforcement actions against the PHA, if applicable.

HUD does not delete the requirement, as suggested by a commenter, at § 983.251(c)(7)(i). This final rule, however, does revise both §§ 983.251 and 983.10 by replacing tenant selection plan with owner waiting list policy. As a result of this change, the owner waiting list policy, not tenant selection plan, must be incorporated in the PHA's Administrative Plan.

Civil Rights

A commenter recommended that the proposed rule's preamble discussion that projects using preferences for families eligible for supportive services, including disability-specific services, must comply with Section 504, the Americans with Disabilities Act, and the Home and Community-Based Settings requirements be placed in § 983.251. Another commenter suggested § 983.251 be revised to require that tenant selection plans, criteria, and preferences must comply with all applicable civil rights requirements, and that all tenant selection criteria must be demonstrably related to the applicant's ability to fulfill the obligations of a subsidized tenancy, which would eliminate poor credit or eviction for nonpayment of unassisted rent or most criminal history as grounds for denial of tenancy. The commenter further stated that the rejection notice should require specific content, such as sufficient facts and the legal basis supporting the rejection as well as due process procedures to enable a fair review, even absent a tenant's request for a hearing. The commenter also suggested modifying § 983.251(c)(6) to require that applicants on the HCV waitlist receive a PHA offer to be placed on the PBV waitlists.

One commenter approved of HUD's modification to § 983.251 to require eligible families to qualify for services as well as removing restrictions that limit service preferences only to families with severe disabilities for whom such services cannot be provided in non-segregated housing. Another commenter urged HUD to revise § 983.251, to prioritize housing survivors of violence who are in the PBV program and require an emergency transfer under VAWA. Another commenter opposed banning preferences for people within a category of disability under § 983.251(d)(1) and stated that this conflicts with the Section 504 rules and is a violation of HOTMA, which permits preferences based on the class of disability associated with a project's supportive services. This commenter stated that a ban on disability-specific preferences also interferes with procuring capital resources for housing because non-PBV resources often target permanent supportive housing for people within specific categories of disability. The commenter suggested that HUD defer to the PHA's preference plan for people who qualify for disability-specific services. The commenter also explained that the waiver and remedial action process conflicts with HOTMA, which delegates the decision to the PHA, and the process is intrusive as well as costly. The commenter encouraged HUD to adopt a similar process to RAD, where the PHA and project owner in consultation with the partnering State and local officials, determine the scope of a disability-specific preference.

This commenter also suggested that HUD adopt the Centers for Medicare & Medicaid Services Homes and Community-Based Services (CMS HCBS) rules on what is the most integrated setting possible, found in 42 CFR 441.710(a), because projects meeting those standards do not require additional waiver or remedial action approval. The commenter recommended that HUD use flexible approaches to concentration, because the existing rigid policies applied to projects with dwellings for families receiving supportive services conflict with the exception to PBV income-mixing standards, which permits owners to exceed the PBV project cap for units providing supportive services. Therefore, the commenter concluded that HUD should define, within the PBV rule, integrated places that do not impose fixed limits on the concentration of disabled individuals in a development and, ultimately, meet the standards for a community-based setting.

HUD Response: HUD appreciates the commenters' recommendations. A PHA's preference for families who qualify for voluntary services, including disability-specific services under § 983.251(d), must not conflict with Section 504 rules.[17] Further, PHAs have a duty to ensure that the PBV project is compliant with all applicable nondiscrimination and equal opportunity requirements, including, but not limited to, the requirement to administer services, programs, and activities in a nondiscriminatory manner and meet the needs of qualified individuals with a disability under Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the Fair Housing Act. See 24 CFR 5.105(a), 24 CFR part 8; 28 CFR part 35; 24 CFR part 100. In addition, this language allowing a preference to families who qualify for voluntary services, including disability-specific services, must be implemented consistent with the integration mandate under Section 504 and Title II of the ADA, wherein entities are obligated to administer their programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 24 CFR 8.4(d) and 28 CFR 35.130(d)).[18] Additionally, if a PBV project offers Medicaid-funded home and community-based services as part of ''disability-specific services,'' the PHA must also fully comply with the Federal home and community-based settings requirements found at 42 CFR 441.301(c)(4), (5) (''Home and Community-Based Settings''). In addition, PHAs are obliged to ensure that assisted units for persons with a disability are distributed throughout a project (24 CFR 8.26) and to make housing assistance available in the most integrated setting appropriate to the needs of qualified individuals with disabilities—*i.e.,* a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. (See the *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of* Olmstead at *https://www.hud.gov/sites/documents/OLMSTEADGUIDNC060413.PDF*).

In response to the commenter that suggested revision of § 983.251 to provide that tenant selection criteria be demonstrably related to the applicant's ability to fulfill the obligations of a subsidized tenancy and proposing that HUD prescribe the contents of the rejection notice, HUD believes the commenter's concerns would not be appropriately addressed in § 983.251. Given the revision to § 983.251 in this final rule (described above in this discussion of § 983.251) to require the owner waiting list policy, not tenant selection plan, to be incorporated in the PHA's Administrative Plan where there will be an owner-maintained waiting list, § 983.251 is not an appropriate location for requirements relating to the owner's screening and selection of tenants.[19] The elements of the owner tenant selection policies and procedures at issue are instead covered by §§ 983.253 and 983.255. Section 983.255(b) of the current PBV regulations contains owner screening requirements and was not proposed for revision in this rulemaking. HUD determines the changes to the owner screening requirements the commenter proposes would require separate rulemaking, with opportunity for public comment. HUD notes, however, that the owner's practices under § 983.255(b) remain subject to § 983.253(a)(2), which states: ''The owner is responsible for adopting written tenant selection procedures that are consistent with the purpose of improving housing opportunities for very low-income families and reasonably related to program eligibility and an applicant's ability to perform the lease obligations.'' HUD believes these current requirements governing the owner's screening practices adequately reflect the PBV program's purpose of serving low-income families. The owner notice of grounds for rejection is currently codified at § 983.253(a)(3). HUD adds to that provision, in this final rule, a requirement for the owner to provide a copy of the notice to the PHA. If, upon receipt of the notice, the PHA finds that the owner is noncompliant with program requirements, including § 983.253(a)(2), the PHA may take action for breach of the HAP contract. HUD intends to provide further guidance on the operation of §§ 983.253 and 983.255.

HUD notes that PHAs already have the authority to and are encouraged to prioritize victims of domestic violence, dating violence, sexual assault, or stalking who are in the PBV program and require an emergency transfer under VAWA in its Administrative Plan. As stated earlier, VAWA emergency transfers must occur in accordance with HUD's VAWA regulations at 24 CFR part 5, subpart L, and program regulations.

HUD declines to modify § 983.251(c)(6). If the PHA chooses under its Administrative Plan to use a separate waiting list for admission to PBV units, under paragraphs (c)(2)(i) and (iii) of § 983.251 as proposed the PHA already must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for PBV assistance (including owner-maintained PBV waiting lists).

Question 30. Should HUD establish additional or different criteria for the removal of the family from the PBV waiting list when a family rejects an offer, or the owner rejects the family?

One commenter recommended that HUD streamline the PBV waiting lists process for easier oversight and efficient enforcement. Other commenters stated that HUD should allow PHAs to develop their own procedures to remove families from the PBV waiting list if the procedures are outlined in the Administrative Plan. Another commenter stated that PHAs should manage the removal of the family from

[17] HUD notes that § 983.251(d)(1) of this final rule cross-references the prohibition against adopting a preference for admission of persons with a specific disability at 24 CFR 982.207(b)(3). The prohibition at 24 CFR 982.207(b)(3) is not intended to detract from PHAs' discretion to give preferences to families who qualify for disability-specific services.''

[18] *See also The Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead* at *https://www.hud.gov/sites/documents/OLMSTEADGUIDNC060413.PDF.*

[19] HUD notes that in the case of an owner-maintained waiting list, the notice and hearing requirements when a family is denied admission to the waiting list are at 24 CFR 982.554, which was not proposed for change in this rulemaking, and, per § 983.251(c)(7)(vii) of this final rule, the owner provides the notice to the family.

the PBV waiting list when a family rejects an offer as adopted within their Administrative Plan. This commenter expressed that it should be optional for PHAs to monitor owner-maintained waiting lists because HUD would hold the PHA accountable for actions beyond the PHA's control. Another commenter stated HUD should not establish additional criteria; if a family rejects the unit, they should be removed from the list; and if an owner rejects the family, they should be removed from the project-based list.

One commenter stated that if a family meets the eligibility criteria and fulfilled all its obligations, an owner's rejection should not adversely affect the family's position on the PBV waiting list. One commenter stated there is no additional administrative burden involved in leaving a family on the general PBV list if the family rejects an opportunity or an owner rejects the family.

Another commenter expressed that owner-managed waiting lists have a history of discrimination, and that the proposed rule does not require enforcement, only an undefined ''oversight.'' The commenter stated that the authorities cited at § 5.105(a) are solely a list of Federal civil rights laws covering housing programs, and do not provide for specific oversight. A commenter suggested that HUD should revise § 983.251 to identify safety concerns for domestic violence survivors as a good cause to reject a unit, to prevent the survivor from choosing between housing and safety.

HUD Response: HUD appreciates the commenters' recommendations. This final rule provides PHAs with the procedural tools within their Administrative Plans to effectively streamline their PBV waiting list to create effective oversight and efficient enforcement as addressed in § 983.251. Further, this final rule allows PHAs to develop their own procedures to remove families from the PBV waiting list as long as the procedures are legally permissible and are outlined in their Administrative Plans in the case of a central PBV waiting list. Under this final rule, for an owner-maintained waiting list, the owner, not the PHA, is responsible for managing the waiting list, including processing changes in an applicant's information, contacting families when their name is reached on the waiting list, removing applicant names from the waiting list, and opening and closing the waiting list.

Although HUD appreciates the commenters' suggestions that HUD should not establish additional criteria, there can be situations in which the unit in question is not conducive to the needs of the family and is rejected, but the family still needs suitable housing, and, as a result, should not be removed from the project-based list. Therefore, HUD requires in this final rule that if a family rejects the offer of PBV assistance for good cause then the family cannot be removed from the PBV waiting list. Moreover, separate from this process, a family can always request a reasonable accommodation that may be necessary for a household member with a disability to remain on the PBV waiting list, including when the unit does not meet one's disability-related needs. Further, PHAs and owners are subject to all applicable Federal fair housing and civil rights requirements, including in their administration of this process. Even if the circumstances do not rise to the level of ''good cause'' as determined by the entity, a family may request a reasonable accommodation in accordance with Federal civil rights laws.

As for revising § 983.251 to identify safety concerns for domestic violence survivors, HUD already has protections for victims of domestic violence, dating violence, sexual assault, or stalking in 24 CFR part 5, subpart L, and these protections apply to admission to the project-based voucher program. Additionally, the provision added to this final rule specifying that if a family that rejects the offer of PBV assistance for good cause then the family cannot be removed from the PBV waiting list applies to these families; the safety concerns described in the comment constitute good cause.

Other Questions and Suggested Modifications

One commenter stated that HUD should revise § 983.251(c)(7)(x) to not take enforcement action against a PHA due to actions of an owner. This commenter stated that HUD should have the ability to act against the owner, and HUD should explicitly state it will not act against the PHA, especially when the PHA is acting in good faith to provide oversight. Another commenter recommended that HUD streamline the process for PHAs, families, and owners, modifying § 983.251(c)(7)(viii) to state that PHAs should provide the oral briefing while the owner refers a family to the PHA for a final eligibility determination to provide the family with the information needed to determine whether to accept an owner's offer and eliminate the need to submit income and other eligibility-related information to the PHA.

Commenters suggested that PHAs should be given the discretion to manage their waiting lists, including how families reject the offer of assistance or if the owner rejects the family. One commenter favored HUD keeping the provisions under § 983.251(c), regarding selection from a waiting list, in nonbinding guidance. Another commenter stated that PHAs should have discretion over owner-maintained waiting lists because the PHA cannot control whether an owner would comply. Other commenters suggested that HUD's rule should clearly state that PHAs may permit owners to maintain their own lists, regardless of whether the PHA itself maintains separate waiting lists for some or all its PBV properties in § 983.251(c)(2)(iii) and (c)(7)).

A commenter suggested that the rule should explicitly state that owners and PHAs are subject to all civil rights and fair housing requirements throughout § 983.251(c)(7). Another commenter suggested that HUD amend § 983.251(e)(1) and (3) to allow PHAs additional discretion in deciding how to handle the family's position on the PHA waiting list if the family turns down PBV. This commenter also supported PHAs having discretion over the number of offers a family may reject. Another commenter recommended that HUD should not permit PHAs to alter a family's place on a central PBV waiting list based on an owner's rejection of a family because it would harmfully impact a family's admission with respect to any other property with a PBV contract and violate a pre-HOTMA sentence of section 8(o)(13)(J) of the 1937 Act.

Commenters also recommended deleting the final sentence of § 983.251(b)(2), because HCV participants are not subject to a denial of assistance, and deleting the part explaining that the usual termination grounds would apply, as well as signaling that rescreening by PHAs is allowed.

HUD Response: HUD declines to revise § 983.251(c)(7)(x). Section 983.251(c)(7)(x) allows HUD to take enforcement actions for non-compliance against the PHA and the owner. If the PHA is not acting in good faith to provide oversight in accordance with § 983.251(c)(7)(x), HUD has the authority to enforce HUD's requirements.

As for § 983.251(c)(7)(viii), HUD maintains the process for PHAs to determine eligibility for the program. This ensures that all parties appropriately coordinate the placement of the family in the unit and will ensure compliance by PHAs with their continued responsibility for eligibility determinations. This final rule also

maintains the authority for PHAs, consistent with their Administrative Plan, to determine whether to allow for owner-maintained waiting lists. Further, HUD's final rule explicitly states that PHAs may permit owners to maintain their own lists regardless of whether the PHA itself maintains separate waiting lists for some or all its PBV properties in § 983.251(c)(2)(iii) and (c)(7). HUD will not amend § 983.251(e)(1) and (3) to limit flexibility to the PHA and owner and HUD maintains the proposed rule's option that the PHA may alter a family's place on a central PBV waiting list based on an owner's rejection of a family. HUD also declines to adopt the commenter's request to delete the final sentence of § 983.251(b)(2), because families remain subject to standard requirements for denial or termination of assistance. Lastly, HUD's final rule maintains the proposed rule requirements that owners and PHAs must comply with all applicable Federal, State, and local nondiscrimination and equal opportunity requirements (see 24 CFR 983.251(c)(7)(x) of the final rule (below)).

39. PHA Information for Accepted Family (§ 983.252)

One commenter suggested that the briefing packet include written information on the selected family's right to move with the next available voucher, because the right is unavailable to the family until after one year and so the family should be informed of the right in writing. The commenter also suggested that HUD modify § 983.252 to apply to both families selected by the PHA from its waiting list and to families selected from an owner-maintained list.

HUD Response: HUD agrees with the commenter about providing such written information and has revised the requirement to include written information on the selected family's right to move at § 983.252(b)(5). HUD will not make a change to the language regarding families selected off the waiting list but notes that the language in the proposed rule and finalized in this rule does apply to any accepted family, including participants selected from an owner-maintained list.

40. Leasing of Contract Units (§ 983.253)

A commenter recommended that HUD add the following language to § 983.253: ''PHAs are responsible for monitoring owner actions that may indicate rejection of applicants for legally impermissible reasons, as well as for informing applicants of other tenant-based and PBV waiting list options, whether referred by the PHA or on an owner's site-based waiting list.''

HUD Response: HUD declines to implement the commenter's suggested change in this final rule. PHAs have a duty and responsibility to monitor owner's actions that may indicate rejection of applicants for impermissible reasons.

41. Vacancies (§ 983.254)

Question 32. What would be a reasonable timeframe for the PHA to complete this final eligibility determination?

Commenters suggested a broad set of timeframes for the PHA to complete its final eligibility determination. Some commenters agreed that two weeks, 30 or 60 days is a reasonable timeframe for PHAs to complete final eligibility determinations. Other commenters noted that more time may be required on a case-by-case basis, to ensure proper eligibility review. Some commenters also suggested a 15-day timeframe to complete final eligibility determination for applicants on owner-maintained waiting lists. A commenter suggested that PHAs determine the timeframe for final eligibility determinations, because the PHAs may face uncontrollable factors that require more time than 30 days.

One commenter encouraged HUD to include in this final rule a reference to the authority granted to applicants by the last sentence of section 8(o)(13)(K), the Vacancies statutory provision, to bring legal actions to compel a PHA to reduce the number of PBV units committed under the contract if a unit is vacant for more than 120 days and use the funds for additional tenant-based assistance.

A commenter encouraged HUD to provide PHAs 30 calendar days to make an eligibility determination, and another commenter proposed two weeks for a PHA to make final eligibility determination. Another commenter objected to HUD's requirement that owners notify PHAs of actual or expected vacancies, and instead, the commenter proposed that owners refer families on waiting lists to the PHA, in advance of an actual vacancy, to reduce delay in filling the unit. This commenter stated that there is no reason to require a notification because the PHA is not responsible for referring applicants to the owner, rather than referring the selected family to the PHA. The commenter added that owners and PHAs should have a coordinated system to schedule PHA appointments as quickly as possible for the PHA and the selected family. This commenter recommended that PHAs be obligated to make reasonable efforts to promptly make the final eligibility determination and schedule the required oral briefing as well as eligibility. A commenter expressed that HUD should not specify a timeframe for the PHA to complete a final eligibility determination after receiving an application from an owner because PHAs have an interest in making determinations quickly, but frequent extenuating circumstances prolong resolving issues in the interest of the family, owner, or PHA.

HUD Response: HUD has reviewed the comments and has determined that in this final rule a 30-day notification to applicants to determine final eligibility determinations is reasonable. If PHAs face uncontrollable factors that require more time than 30 days to complete their final eligibility determinations, then the PHA remains compliant with the regulation so long as PHAs make every reasonable effort to complete the determination within the required timeframe. This final rule also continues to require an owner to notify the PHA of actual or expected vacancies.

42. Security Deposit: Amounts Owed by Tenant (§ 983.259)

A commenter supported HUD's proposed prohibition on charging a PBV-assisted family a higher security deposit than an unassisted family because it encourages and authorizes source of income discrimination.

HUD Response: HUD appreciates the public comment supporting the addition of § 983.259(b) prohibiting a PHA from charging assisted tenants security deposits in excess of private market practice, or in excess of amounts charged by the owner to unassisted tenants and adopts this language in this final rule.

43. Overcrowded, Under-Occupied, and Accessible Units (§ 983.260)

Question 33. Are these proposed timeframes reasonable?

Several commenters viewed the 30-day timeframe for the PHA to provide notice to the family and owner to remain in a wrong-sized unit, as well as the 90-day timeframe in which the family must move out, as reasonable if PHAs are permitted to extend the timeframe when needed.

Other commenters opposed HUD's timeframes for a family to move from wrong-sized or accessible units. One commenter stated that the timeframes are overly strict for the PHA to notify a family and owner that they are placed in either an overcrowded, under-

occupied, or accessible unit. This commenter stated that a longer timeframe is reasonable because PHAs need time for processing, and the family should be given adequate time to find a suitable home rather than taking the first unit available. Some commenters suggested increasing the maximum time for a family to move from 90 days to 180 days since this timeframe is for a scenario where the PHA offers ''another form of continued housing assistance (other than a tenant-based voucher)'' which will be subject to the availability of other units within the PBV portfolio which are outside of the family's control. One commenter proposed 180 days to eliminate PHAs having to decide between terminating families or skipping their continued assistance policies. Another commenter suggested that the timeframe should be 90 days or the next annual recertification, whichever is longer, while another commenter found 90 days as a more appropriate notification deadline and 180 days sufficient time to move. One commenter disagreed with the 90-day timeframe because PHAs with a large population in RAD units may lack sufficient turnover to support families moving out of wrong-sized units, and the 90-day limit would create an inconsistency and an unfair standard for PHAs in low-vacancy areas which usually allow 120 days for use of vouchers. This commenter supported PHAs having discretion to determine appropriate timeframes for local conditions and specify those policies in the Administrative Plan. Another commenter found the 90-day timeframe insufficient considering the current housing crisis and the need for additional time for families to locate alternative units.

One commenter requested that HUD clarify § 983.260(c)(2) to express that the timeframe begins once the PHA offers the family assistance in another unit and not from the time that the PHA determines the family is in the wrong-sized unit. Another commenter stated that HUD's proposal is not required by HOTMA and does not recognize the limits imposed by PBV turnover and right-sized unit availability, whether with external partners or within a PHA's agency-owned portfolio. Another commenter expressed that for families that live in a wrong-sized PBV unit or a unit with unneeded accessible features, the PHAs should offer the option to move with the next available tenant-based voucher, and if the voucher is unavailable or is not the family's preference, then the PHA should offer the family alternative housing assistance. The commenter also disagreed with the option of reducing the number of units under the PBV contract because a PHA is unlikely to reduce the subsidy attached to the project to offer the tenant a suitable alternative unit, unless the PHA has no tenant-based voucher available within a reasonable time and does not own public housing, and the owner has no turnover in a suitable unit. The commenter further stated that the rule should require PHAs to help families locate a new suitable unit with the tenant-based voucher they receive to relinquish correct-sized and accessible units, which is required under § 982.403 and is consistent with HOTMA requirements to assist families that need to move due to unrepaired unit defects. One commenter stated that the proposed timeframes are overly prescriptive and administratively burdensome for PHAs to follow.

HUD Response: This section outlines steps the PHA must take when they have determined a family is occupying a wrong-sized unit (according to the PHA subsidy standards), or a unit with accessibility features that the family does not require, and the unit is needed for another family that requires the unit's accessible features. Under these circumstances, it is necessary that the family move and to provide certainty regarding the amount of time a family may remain in the unit. In response to concerns raised, in this final rule, HUD lengthens the amount of time the PHA is afforded to offer a form of continued assistance, in accordance with § 983.260(b), to within 60 days of the PHA's determination.

The 90-day timeframe, related to the termination of the housing assistance payments for the wrong-sized or accessible unit and removal of the unit from the HAP contract, begins once the PHA offers a form of continued assistance. The comments submitted to HUD are persuasive that a more flexible timeframe would be more practical to suit the needs of the family moving out, the unit owner, a prospective family moving in, and the PHA. At the same time, for certainty, accountability, and to encourage the owner to continue to make their unit with accessible features available to the PHA's HCV program, some limits on the timeframe need to be maintained. Therefore, HUD has included revisions at § 983.260(c)(2)(i) and (iii) to include additional flexibility in the form of the option for a family to request and the PHA to grant one extension not to exceed up to an additional 90 days to accommodate the family's efforts to locate affordable, safe, and geographically proximate replacement housing.

In accordance with § 983.260(b)(1), the continued assistance offered may be in the form of project-based voucher assistance in an appropriate-size unit (in the same project or in another project); other project-based housing assistance (*e.g.,* by occupancy of a public housing unit); tenant-based rental assistance under the voucher program; or other comparable tenant-based assistance. Based on comments received, a new section was added at § 983.260(b)(2) that requires the PHA to remove the wrong-size or accessible unit from the HAP contract to make voucher assistance available to issue the family a tenant-based voucher if no continued housing assistance under paragraph (b)(1) is available. The unit can then be reinstated after the family vacates the property under a new provision at § 983.260(d). This will support the availability of funding the PHA can use to assist the family with continued assistance.

44. Family Right To Move (§ 983.261)

Question 40: Right To Move and § 983.261

One commenter suggested that HUD clearly define the first year of occupancy in § 983.261(a). A commenter recommended that § 983.261 clearly state the roles and responsibilities of domestic violence survivors and PHAs, considering that some PHAs view their obligation to provide continued assistance to a survivor as discretionary. This commenter suggested clarifying that a ''PHA must assure that the victim retains assistance'' and ''must'' offer continued tenant-based assistance, subject to availability of funds. One commenter suggested § 983.261(d) have a VAWA exception, because survivors should not be penalized and lose tenant-based assistance if they must terminate their lease before the end of the one-year requirement because of violence. This commenter offered the following suggestions: (1) allowing a survivor to request another form of assistance before the family issues a written notice to vacate, at the time it issues the notice, or thereafter; (2) the PHA should also offer a tenant-based voucher or comparable tenant-based rental assistance if the notice to vacate is due to violence; and (3) if such assistance is not available, then the survivor should receive priority for the next tenant-based voucher and the PHA should be encouraged to reach out to area PHAs (with survivor consent) about available units or vouchers. In case the survivor

does not feel safe in the existing unit, the commenter recommended that the PHA provide a safe unit in the interim while the survivor waits for the tenant-based voucher or allow the survivor to transfer to another PBV unit.

Another commenter stated that under § 983.261, the PHA should demonstrate the availability of tenant-based vouchers for eligible PBV families that exercise their right to move based on tenant-based voucher attrition rate. This commenter also recommended that HUD expand the PHA's discretion to set timeframes, and not be limited to ''any time after the first year of occupancy'' under § 983.261(a)), if the project provides housing assistance to families that require intensive supportive services. Another commenter recommended that HUD clarify § 983.261 to include language on terminations, by stating that a family living in a PBV-assisted unit for 12 months that has requested an HCV need not stay in the PBV unit while waiting for the transfer, as well as that a PHA may not terminate the tenants from the PBV program. One commenter suggested that HUD expand the list of reasons for transfer to include intimidated witnesses and crime victims before the one-year transfer period. A commenter suggested HUD clarify that the tenant is not automatically provided HCV assistance after 1 year of lease, and that the tenant may apply for the transfer list and may receive assistance when a voucher is available.

One commenter recommended clarifying in the rule that PHAs should periodically notify families of the right to move with continued tenant-based rental assistance, which could be provided as part of the regular income recertification process. This commenter suggested that HUD clearly state the actions the PHA must take if neither a regular voucher nor ''comparable tenant-based rental assistance'' is available at the family's requests because basic due process requires that PHAs maintain a written list of families that have requested a voucher to move from a PBV property after 12 months of occupancy and have a right to receive the next available voucher or comparable assistance.

Other commenters stated that § 983.261 is clear, but suggested splitting § 983.261(c)(1) into additional sentences for clarity.

HUD Response: HUD has revised this section by adding titles and reorganizing information so that the requirements are easier to follow. HUD added language to §§ 983.261(a) and 983.261(d) that clarifies the family must have received PBV assistance for at least a year to be eligible for continued assistance under § 983.261(b). The eligibility for continued assistance is based on the total length of time a family has received PBV assistance and not the length of time the family has resided in the PBV unit. Section 983.261(a) does not prohibit a family from terminating their lease prior to a year, just doing so would make them ineligible for continued assistance. At any time, the family must give the owner advance written notice of intent to vacate (with a copy to the PHA) in accordance with the lease, unless the family meets the exclusion criteria at § 983.261(e) related to VAWA.

The new § 983.261(f) further clarifies that PHAs must address project-based vouchers in their Emergency Transfer Plan consistent with the requirements in 24 CFR 5.2005(e), including when the victim has received PBV assistance *for less than one year* and is *not eligibl*e for continued assistance under § 983.261(b). Under a PHA's existing VAWA obligations, a family may still potentially receive tenant-based rental assistance as an external emergency transfer, even if they have not received PBV assistance for more than a year. The emergency transfer requirements do not supersede any eligibility or occupancy requirements that may apply under a covered housing program (§ 5.2005(e)(13)). This language was added to clarify the requirement of planning for these situations, but HUD cannot supersede the eligibility requirements of continued assistance. To assist the family's understanding of their right to move and the PHA's implementation of these policies, HUD has added language to §§ 983.261(b) and 983.261(c) that outlines the right to move information that must be included in the Administrative Plan, including their written policy on whether the PHA will offer families continued assistance under the voucher program or other comparable tenant-based rental assistance, procedures for how the family must contact the PHA, and how the PHA documents families waiting for continued tenant-based rental assistance.

45. When Occupancy May Exceed the Project Cap (§ 983.262)

Question 34: Does the proposed rule sufficiently address the project cap requirements in relation to a unit losing its excepted status?

A commenter stated that § 983.262(f) (now moved to § 983.262(b)(4) in this final rule) sufficiently addresses the project cap requirements in relation to a unit losing its excepted status.

Another commenter suggested adding: ''or a family eligible for supportive services, or a family that otherwise qualifies to reside in an excepted unit under paragraphs (c) or (d) of this section'' to § 983.262(b). The commenter encouraged HUD to clearly state in § 983.262(c) (now moved to § 983.262(d)(3) in this final rule) the qualifications for the supportive services exception, including: (1) if any member of the family is eligible for one or more of the available services; (2) if a member of the family successfully completes a service program and subsequently no other member of the household is eligible for one of the offered services. The commenter also proposed that HUD revise the third sentence of § 983.262 to clearly state that the exception applies even if the household member who successfully completes a service program leaves the household.

HUD Response: HUD appreciates the edits offered by commenters and believes changes to this section provide additional clarity. The proposed regulation conveyed that the unit retains its exception if any member of the family resides in the unit (not just the member that successfully completed the supportive services) and HUD, therefore, does not believe an edit is required to provide that clarification.

46. Determining the Rent to Owner (§ 983.301)

Question 37: Streamlining HUD's Utility Allowance Policies Across the RAD PBV, Traditional PBV, and HCV Programs

One commenter recommended providing PHAs with maximum flexibility in setting utility allowances for RAD PBV, traditional PBV, and HCV, noting that the statute is not very proscriptive. Another commenter stated that HUD should allow all of these programs to use the same utility allowance. A commenter stated that allowing project owners and PHAs to utilize project-specific UAs at traditional PBV properties will streamline policies between RAD PBV units and traditional PBV units and will streamline UA requirements between traditional PBV units and HOME program requirements which are incompatible and require regulatory waiver.

HUD Response: PHAs have the ability to use the same UA for RAD PBV, traditional PBV, and HCV by using the PHA's HCV UA schedule for all of these programs. Through this final rule, PHAs will have the additional flexibility of setting an area-wide EEUA that may also

be used for qualified energy-efficient RAD PBV and traditional PBV properties. Project-specific UAs add complexity, but they are optional for PHAs to implement. HUD may provide additional flexibility for setting project-specific UAs, however, HUD must ensure the policy results in accurate UAs that do not overly burden tenants. HUD recognizes the need to consider the alignment of project-specific UAs with other programs like HOME and will consider this in a notice implementing project-specific UAs.

Question 38: Should HUD permit the use of a project-specific utility allowance schedule for the HCV program?

Many commenters supported HUD allowing project-specific UAs. Some commenters said PHAs should have maximum flexibility in setting project-specific UAs, while others recommended HUD issue more requirements to ensure project-specific UAs do not negatively impact families. Commenters stated that project-specific UA schedules would eliminate conflicts with other funding sources, including HOME. One commenter recommended that PHAs have the discretion to allow project-specific UAs on a case-by-case basis or throughout their HCV program to ensure families neither experience an undue cost nor are discouraged from conserving energy.

Commenters stated that any requirement to implement site-specific UAs would be administratively burdensome for the PHA, stating that it would not streamline requirements across programs and that PHAs' SEMAP scores may be negatively impacted due to difficulties in applying the correct UA schedule. Commenters stated that HUD's efforts to reduce program expenditures and promote energy efficiency need to be consistent with statutory tenant affordability protections. Another commenter noted that HUD has not provided evidence that reduced UAs will promote energy conservation and that the relationship between reducing UAs and avoiding wasteful consumption is tenuous considering the relative inelasticity of demand for energy among low-income households.

Another commenter stated that while a project-specific UA is appropriate in instances where another housing program has established an alternative EEUA, the standard should be based on accuracy and not whether allowances would create an undue cost on families or discourage efficient use of HAP funds. A commenter recommended that HUD should remove the requirement to have PHAs update UA schedules when there is a rate change of 10 percent or more; streamlining would be achieved if the local HUD field office performs the UA analysis for their respective geographic areas. Another commenter proposed that HUD issue UAs based on locality like FMRs.

Commenters recommended that HUD delay making this provision effective until it can issue further guidance providing specific standards and requirements for developing the project-specific UAs and how to ensure tenants are not negatively impacted and allowing for public comment. Commenters additionally expressed that using average consumption of the dataset is unreasonable for low-income tenants because it results in effectively 50 percent of the tenants receiving a UA that is too low. Commenters also supported consideration of the impact of time-of-use rate plans and tenants with special needs or larger families, which require higher consumption for special equipment or because tenants spend more time at home. Project-specific UAs that are determined based on an engineering analysis need to be carefully reviewed and subject to a periodic adjustment to ensure they reflect actual costs in the project. This commenter recommended HUD apply the same methodology for multifamily properties, which uses actual consumption data. One commenter recommended that HUD's approval process include adequate notice and comment for PBV tenants affected by any PHA proposal submitted to HUD, as well as require that PBV tenants timely complete supporting information, and receive adequate time for analysis (at least 60 days), because the data complexity will usually require additional expertise.

One commenter stated that there should be no need for a PHA to engage another independent entity to approve proposed project-specific UAs, as HUD's independent review and approval should be sufficient to avoid a conflict of interest.

HUD Response: HUD appreciates commenters' support of project-specific UAs. Project-specific UAs provide an opportunity for streamlining and a more accurate UA based on project-specific consumption data that will (1) allow projects to be viable where the area-wide utility allowance is unnecessarily high, and (2) ensure participants living in the same property are receiving the same UA subsidy. Per § 983.301(f)(4) PHAs that implement a project-specific UA for a PBV property must use the same UA for tenant-based participants residing in that project. To ensure this policy is clear, HUD has added this requirement into this final rule in part 982 (§ 982.517(b)(2)(iv)). While project-specific allowances may cause some burden to administer, they are completely optional. PHAs must consider the costs and benefits to their specific program and the impact on families before deciding to request a project-specific UA.

Many suggestions were made on how to protect participant families from having a project-specific UA that is too low. HUD agrees that further protections are needed to ensure that families are not negatively impacted. HUD clarified under § 983.301(f)(4) that § 982.517(c) applies and an annual review of rates is required. HUD added that PHAs must review project-specific UAs after one year if they were not based on actual consumption data. Additional time is required to develop a process that ensures PHAs and PBV property owners are adequately considering the impact of project-specific UAs on families. HUD will continue to process these requests as waivers at HUD Headquarters until more guidance is issued via notice.

HUD appreciates the commenter's suggestion that PHAs should have the flexibility to apply project-specific or case-specific UAs for any HCV tenant, but this policy would be very difficult to manage and even more difficult to provide effective oversight. UAs provide for some adjustments through specific policies without creating a separate utility allowance for every HCV participant. Families that have additional utility allowance needs due to individual circumstances related to a disability are always able to request a reasonable accommodation (§ 982.517(e)). This applies to participants in the project-based and tenant-based programs. HUD is amending this final rule to clarify that reasonable accommodation UAs will not impact the determination of the contract rent for project-based units. Instead, the cap on contract rent will be determined using the appropriate area-wide UA (§ 983.301(f)(5)).

HUD has removed the regulatory requirement in § 983.301(g) that PHAs have an independent entity determine the project-specific UA for PHA-owned units. HUD will establish requirements for project-specific UAs in PHA-owned units in a **Federal Register** notice.

Request for Clarification

A commenter suggested HUD clarify § 983.301(b)(1) by including that the rent to owner can differ from the PHA's payment standard for the HCV program, as the statute specifies, since many

PHAs and other stakeholders have not understood this flexibility.

HUD Response: HUD believes that § 983.301(b)(1) is sufficiently clear that the rent to owner can differ from the PHA's payment standard for the HCV program. However, HUD has taken this opportunity to clarify the corresponding provision at § 983.2(c)(6)(i) and the § 983.301(b)(1) language regarding when the PHA may use an amount greater than 110 percent of the applicable FMR in its calculations.

47. Redetermination of Rent to Owner (§ 983.302)

Question 39: Agreeing to Maximum OCAF Adjustments

Commenters supported implementing the HOTMA provisions allowing an owner to request additional changes up to the statutory maximum if the OCAF is insufficient because these changes would help make PBV projects more competitive. A commenter suggested HUD consider this limit to be duplicative, because rent reasonableness standards must still be met, in effect keeping the rent amount in check. Another commenter stated that owners subject to OCAF should have the benefit of having the full OCAF percentage applied to better manage operations and improve on a property's ability to cover existing debt, and that further reducing the applicable percentage increase to properties puts additional financial strain on owners.

HUD Response: HUD appreciate the comments; however, HUD does not consider the PHA's rent limit to be duplicative rent reasonableness standards because the PHA may have reason to set the limit below the reasonable rent. Under this final rule, HUD retains the requirement that the increases through OCAF may not exceed the maximum rent for the PBV project, as determined by the PHA pursuant to § 983.301 as proposed.

Align OCAF Adjustments With Other Programs

Commenters recommended a ''lesser of'' test, like that used in the Mod Rehab program, of OCAF or 110 percent of FMR. A commenter suggested PHAs should have sole discretion to choose OCAF or 110 percent of FMR, if HUD determines that the PBV rent increase amount should be discretionary. A commenter recommended HUD treat OCAF adjustments in a traditional PBV context the same as it would in a RAD PBV context and as permitted elsewhere for properties with HUD section 8 contracts. This commenter noted that OCAF adjustments applied elsewhere in the PBV program should not be arbitrarily capped by the FMR and SAFMR established by HUD. The commenter also encouraged HUD to explore ways in which the FMRs and SAFMRs can be better aligned with rent reasonableness assessments to ensure that FMRs and SAFMRs are able to keep up with the OCAF adjustments that properties receive, which would avoid this problem altogether.

HUD Response: HUD declines to adopt the commenter's recommendation to use a ''lesser of'' test and retains the proposed rule policy, as described earlier in this section of the preamble. HUD intends to consider this rule's applicability to RAD, given HUD's waiver authority with respect to RAD, following publication of this final rule. HUD continues its commitment to ensuring FMRs and SAFMRs are accurate and updated.

OCAF Adjustments to Units Not Otherwise Regulated by Local Rent Increase Regulation Related Rules

A commenter suggested providing the option of OCAF adjustments to those units that are not otherwise regulated by local rent increase regulations or any other regulatory agreement.

HUD Response: HUD has reviewed the comment and has determined, as a matter of equitable treatment, all OCAF adjustments will remain aligned in accordance with the statutory provision in section (8)(o)(13)(H) of the 1937 Act.

Automatic Adjustments

A commenter supported the inclusion of OCAF rent increases as a discretionary option for PHAs. One commenter stated that PHAs would risk funding shortfalls if they guaranteed annual rent adjustment, and some owners may not request an increase every year, which benefits the PHA because it allows for those funds to be used elsewhere and for units in higher-cost areas.

HUD Response: HUD acknowledges commenters' support. HUD is maintaining automatic adjustments pursuant to § 983.302(b) which states that a rent increase may occur through automatic adjustment by an operating cost adjustment factor (OCAF) or as the result of an owner request for such an increase. However, the OCAF option is optional and PHAs concerned about shortfalls or anticipating a lower owner request may decide not to use OCAFs.

Periodic Adjustment Frequency

One commenter recommended that HUD also clarify proposed § 983.302(b)(2)(ii)(B) to state that periodic adjustments above the OCAF-adjusted rent level may be less frequently than annually. This commenter also suggested that the contract specify how frequently a PHA must consider such requests if made by the owner, because allowing increases annually, beyond the OCAF level, would undermine the time- and cost-saving purpose of using an OCAF.

HUD Response: HUD appreciates the commenter's suggestion. HUD decided to allow adjustments to occur during the term of the contract and prohibit a rent adjustment by an OCAF from exceeding the maximum rent (see § 983.302(b)(2)(i)). HUD also declines to require that the HAP contract specify how frequently a PHA must consider rent increase requests. Instead, as noted in this final rule, an owner can make a written request for a rent increase at any time during the term of a HAP contract. Lastly, as a point of clarification, the proposed § 983.302(b)(2)(ii)(B) has been relocated in this final rule to § 983.302(b)(3)(i).

Rent Floor

One commenter supported HUD's proposal to allow PHAs to reduce PBV rents below the initial rent to owner at any time during the HAP contract. The commenter further urged HUD to provide PHAs the tools to rectify unintended negative consequences stemming from an unestablished floor for rents and PBV rents falling below their initial rents, harming the initial underwriting.

HUD Response: HUD has considered the comment and determined that it should remain within PHA discretion whether to reduce rents below the initial rent to owner at any time during the HAP contract. HUD believes that PHAs are in the best position to balance local considerations in making such a determination. Therefore, in this final rule, HUD has deleted the sentences of the proposed rule that said: ''If the rents have already been reduced below the initial rent to owner, the PHA may not make such an election as a way to increase the rents. If rents increase (pursuant to paragraph (b) of this section) above the initial rent to owner, then the PHA may once again make that choice.''

48. Additional Requests for Comment

Question 41. HUD Is Interested in Aligning PBV Program Requirements With Housing Trust Fund (HTF) Program Requirements and Solicits Input From Stakeholders Regarding Areas in Which Alignment Will Be Particularly Beneficial

One commenter recommended modifying PBV affordability terms to 30-year contracts to mirror HTF to address the incompatibility between affordability requirements as well as remove the challenge in obtaining financing.

Other commenters supported HTF requirements conforming to the HCV/PBV requirements, rather than the opposite. A commenter encouraged HUD to work with state HTF funding recipients to incorporate preferences and/or additional points in the HTF Allocation Plans for applicants that seek to couple the receipt of HTF funds with section 8 project-based vouchers. This commenter also supported streamlining environmental review requirements under § 983.301(f) and substantial rehab/new construction through parts 50 and 58, as well as HUD allowing a single environmental review to satisfy the requirements for both HTF and the PBV program. The commenter stated that the proposed suggestion is needed because of HUD's increased flexibility due to the absence of a HTF statutory environmental review requirement. Furthermore, the commenter stated that the current requirements often result in projects receiving HTF and PBV funding to undergo separate and duplicative environmental reviews.

Another commenter suggested that additional vouchers be made available to communities that offer resources for low-income households, including access to public transportation and jobs, where rents are prohibitive. This commenter also suggested using a voucher pool to connect developments that have HTF investments to bring development and operation funding to create more opportunities.

HUD Response: HOTMA section 106(a)(4) does not allow for the contract to go beyond an initial term of 20 years; however, a PHA may execute any number of extensions (for terms up to 20 years each) such that there are up to 40 remaining years on the contract, further explained above in this discussion of comments regarding § 983.205.

Amendments to the HTF program requirements are beyond the scope of this rulemaking. Nonetheless, where the State is selecting HTF applications submitted by eligible recipients, HUD notes that the HTF Allocation Plan requires HTF grantees to provide priority for funding for projects with Federal project-based rental assistance. See 24 CFR 91.320(k)(5). The underlying PBV environmental review requirements generally are statutory; HUD cannot unilaterally amend the applicability of NEPA and other laws and executive orders. HUD notes that the HTF environmental provisions are outcome-based and exclude certain consultation procedures that are otherwise required for environmental reviews under 24 CFR parts 50 and 58. HUD intends to consider these comments for future collaborations with the HTF program.

HUD allocates funding that can be used for project-based vouchers at the PHA's discretion. How PBV funding is allocated is an essential program requirement and revising it is beyond the scope of this rulemaking. See response below to Question 43 for additional information on how PBV works and is funded.

RAD and Transfers of Assistance (Answers to Question 42)

Commenters suggested that HUD create a new regulatory provision governing the transfer of assistance. One commenter suggested that HUD should allow both partial and full transfer of PBV assistance from one project to another. Other commenters suggested that the transfer be a voluntary agreement modeled after the PBRA provision. Some commenters stated that HUD should keep the transfer of assistance process as clear and simple as possible, as it has progressively become overregulated, with two of these commenters citing specifically the environmental review process and the inspection process. One commenter stated that the local PHAs can and should make the appropriate policy regarding when PBV assistance, which they awarded and oversee, can be transferred to another property.

A commenter stated that PHAs should continue to use their vouchers awarded in connection with the Rental Assistance Demonstration (RAD) where appropriate and in compliance with the HAP contract. Another commenter stated that additional regulatory provisions are not required to govern transfers of HAP contracts because PHAs will not experience a reduction in Annual Contributions Contract (ACC) authorized units when terminating a PBV HAP contract; instead, HUD should address needs on a case-by-case basis. This commenter also stated that HUD should eliminate the 1-year notice of termination when PBV assistance is relocated without a gap in subsidy, so long as any relocation is conducted in accordance with applicable Federal requirements.

One commenter recommended defining a RAD project based on its funding stream or ownership structure, rather than lots or sites. One commenter also recommended that HUD allow PHAs flexibility to develop new PBV or public housing units if it does not exceed its Faircloth limit.

A commenter suggested that regulations governing RAD transfers of assistance consider the following factors: (1) placing proposed transfers of assistance in the PHA Annual or MTW Plan and ensuring consistency with the Consolidated Plan as well as improving the resident notification and consultation requirements triggered with a transfer of assistance and having each transfer meet the notice and comment requirements; (2) transfers of assistance must receive certificates of compliance for fair housing and civil rights requirements and undergo multiple reviews such as: HUD's civil rights review, review for compliance with site selection standards under § 983.55, 8(bb), poverty concentration standards, change in number of units, availability of accessible units or units for families with children, change in admission preferences, relocation, and change in income eligibility; (3) explicitly prohibiting re-screening tenants for factors such as criminal history and credit scores as well as not applying new screening criteria to a family coming from public housing and prohibiting unreasonable screening criteria in subsequent recertifications; (4) prohibiting PHAs from changing unit type or size without the written consent of the individual tenants; (5) refusing involuntary permanent relocation, however explicitly stating the voluntary relocation processes, including the option to select a public housing unit of the PHA, and the PHA/owner must document compliance with Uniform Relocation Act (URA) and RAD relocation rights and publicize those records to HUD upon request; (6) HUD should closely evaluate and promulgate specific rules for transfers of assistance far from the current RAD site, and consider whether the distance would impose a significant burden on residents' access to existing employment, transportation options, schooling or other critical services, and whether the transfer advances or impedes fair housing and de-concentration goals; and (7) section 3 obligations once transfers are combined with rehabilitation and new construction.

HUD Response: HUD has considered the comments and agrees that it is unnecessary to create a new regulatory process by which PBV assistance may be transferred from one property to another (though HUD has expanded options for termination of PBV contracts at § 983.206). Under this final rule, a PBV contract may terminate, as provided in § 983.206, with no corresponding reduction in the PHA's ACC units or HAP allocation. A PHA may, in conjunction with such termination, engage in the selection process in § 983.51 to select and place under contract a different PBV project, subject to all requirements of part 983. A PHA may give preference to families living in the former PBV project who wish to move (voluntarily) to the new PBV project, so long as such preference is consistent with the requirements of § 982.207, and subject to the provisions regarding in-place families at § 983.251(b), accessible units at § 983.251(c)(9), and excepted units at § 983.262(b)(2). This final rule therefore gives sufficient flexibility to PHAs to end PBV assistance at one project and begin PBV assistance at another.

HUD has reviewed the suggestions that transfer of assistance be modeled on Project-Based Rental Assistance (PBRA) transfers and determined that parallel conditions, namely with respect to HUD oversight and funding authority, do not exist in the PBV program that would enable use of the same process. Additionally, HUD does not have the statutory authority to alter several provisions of part 983 to facilitate a transfer of PBV assistance as other commenters suggested. These provisions include environmental review, inspection, and the one-year notice of contract termination. HUD notes that, aside from this statutory limitation, these aspects of the PBV program are critical elements to the purpose and functionality of the PBV program and to ensuring PBV tenants reside in decent, safe, and sanitary housing.

HUD notes that the provisions for RAD transfer of assistance, and other RAD requirements, continue to be located in the governing notices for the RAD program and are not altered by this final rule. HUD finds it inappropriate to codify in part 983 the alternative provisions created pursuant to waiver authority specific to the Demonstration. HUD encourages commenters wishing to revise the RAD requirements to respond to requests for comment on RAD provisions in the **Federal Register**. HUD further notes that PBV units are unrelated to PHAs' Faircloth authority and HUD will not consider changes to Faircloth authority as it relates to the public housing program as part of this rulemaking, given the need for robust public comment on that topic.

Question 43: Executive Order 13878 and Affordable Housing

Commenters suggested that HUD condition its funding to localities that reduce local barriers against expensive projects and provide funding only if local governments provide local fee reductions for affordable housing or adopt by-right zoning.

One commenter recommended that HUD increase the allocation of PBVs that PHAs could apply for. This commenter also suggested making the applications for the new PBVs available to jurisdictions that demonstrate that they are reducing local regulatory burden such as permitting streamlining, fee waivers, and caps on local developer fees, to incentivize decreased development and production cost.

Another commenter suggested that HUD should not consider any policies relating to PBVs designed to incentivize communities to reduce local regulatory barriers to development and production of housing. Instead, the commenter proposed that local housing authorities should be allowed to implement PBVs based on their local conditions. This commenter suggested that HUD use direct rewards and other programs relating to those municipal jurisdictions as an incentive to change local rules, instead of using the PHA as the middleman.

HUD Response: The PBV program is administered by a PHA that already administers the tenant-based voucher program under an annual contributions contract (ACC) with HUD (§ 983.5(a)(1)). If a PHA decides to operate a PBV program, the PHA's PBV program is funded with a portion of appropriated funding (budget authority) available under the PHA's voucher ACC. This pool of funding is used to pay housing assistance for both tenant-based and project-based voucher units and to pay PHA administrative fees for administration of tenant-based and project-based voucher assistance, and there is no special or additional funding for project-based vouchers (§ 983.5(b)). Additionally, A PHA has discretion whether to operate a PBV program (§ 983.5(c)). These are essential program requirements HUD will not change and implementing the recommendations would fundamentally alter how the PBV program works and is funded.

Typographic Corrections

One commenter had the following typographical corrections: corrected § 983.5(3) to cite to § 983.154(e) and not § 983.155(e), which does not exist; corrected the reference in § 983.52(d) to § 983.155(e), which should be to § 983.154(e); suggested HUD use ''new'' instead of ''newly'' in § 983.12(a) and elsewhere for consistency; in § 983.59(a), suggested HUD delete ''for exclusion'' to avoid redundancy; in § 983.59(e), corrected two references to ''program limitation'' that should be ''program cap;'' and in § 983.204(d)(2)(iii), this commenter suggested replacing ''PHA functions in accordance'' with ''PHA functions identified in.''

HUD Response: HUD thanks the commenter for these comments. HUD has revised the reference to § 983.155(e) in § 983.5(a)(3) (the reference is now to § 983.154(f), due to this correction and renumbering that occurred in this final rule) and has removed § 983.52(d). The term ''newly'' must continue to be used in the context of regulations concerning ''newly constructed housing'' as defined in § 983.3(b), to maintain consistency with that term and definition, as well as to avoid confusion with the activity of new construction applicable in other contexts within the PBV regulations. However, HUD notes that ''rehabilitation'' as used in proposed § 983.12(a) was not consistent with the term ''rehabilitated housing'' at § 983.3(b), so has amended that term accordingly. HUD disagrees with removal of the term ''for exclusion'' in § 983.59(a). However, HUD notes that the two references to ''program limitation'' as used in proposed § 983.59(e) were not consistent with the term ''program cap,'' so HUD has amended that term accordingly. HUD agrees with the commentor's suggestion to replace the language ''PHA functions in accordance'' with ''PHA functions identified in'' at § 982.451(c)(2)(iii) and § 983.204(f)(iii).

General Comment

One commenter suggested that HUD allow PHAs to convert public housing to PBV without HCV to retain the PBVs, for ACC unit consistency and to benefit PHAs going through the RAD process.

HUD Response: PHAs must have an ACC to administer a voucher program, per § 982.151. This is an essential requirement which HUD will not change.

VI. Findings and Certifications

Regulatory Review—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, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 14094 (Modernizing Regulatory Review) amends section 3(f) of Executive Order 12866, among other things.

This final rule would update HUD's regulations for the HCV and PBV programs to conform to changes made by HOTMA. These changes include alternatives to HUD's HQS inspection requirement, establishing a statutory definition of PHA-owned housing, and other elements of both programs, ranging from owner proposal selection procedures to how participants are selected. In addition to implementing these HOTMA provisions, HUD has included changes that are intended to reduce the burden on public housing agencies, by either modifying requirements or simplifying and clarifying existing regulatory language.

This final rule was determined to be a significant regulatory action under section 3(f) of Executive Order 12866 (although not an economically significant regulatory action under the Order). HUD has prepared a Regulatory Impact Analysis (RIA) that addresses the costs and benefits of this final rule. HUD's RIA is part of the docket file for this rule, which is available for public inspection at *www.regulations.gov*.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

For purposes of this rule, HUD defines a small PHA as a PHA for which the sum of the number of public housing dwelling units administered by the agency and the number of vouchers is 550 or fewer. There are approximately 2,700 such agencies; some are voucher-only, some are combined, some are public housing-only. HUD includes all of these agencies among the number that could be affected by the proposed rule. For those that operate voucher programs, the potential to be affected is evident. For public housing-only agencies, the potential effect of this final rule depends on whether the agency removes its public housing from the public housing program via one of the available legal removal tools, then project-bases any tenant protection vouchers awarded in connection with that removal.

This final rule revises HUD regulations to reduce the burden on or provide flexibility for all PHAs, owners, and other responsible entities, irrespective of whether they are small entities. For example, this final rule leverages Small Area Fair Market Rents to provide PHAs with greater autonomy in setting exception payment standard amounts. It will implement HOTMA's exceptions to the program and project caps under the PBV program, such as authorizing a PHA to project-base 100 percent of the units in any project with 25 units or fewer. It extends from 15 to 20 years the permissible duration of a PBV HAP contract, resulting in less frequent need for extensions, and eliminates the three-year window during which units may be added to an existing contract without a PHA issuing a new request for proposals (RFP). The rule will eliminate extraneous requirements specific to the project-basing of HUD–VASH and FUP vouchers, if project-basing is done consistent with PBV program rules. It will provide PHAs with greater flexibility in the establishment of utility allowance schedules. It will also implement new discretionary authority for a PHA to enter into a PBV HAP contract with an owner for housing that is newly constructed or recently rehabilitated, as long as PBV program rules are followed, even if construction or rehabilitation commenced prior to the PHA issuing an RFP. HUD estimates that such changes have the potential to generate a range of cost savings but is unable to estimate the number of small entities that would experience cost savings as a result of changes proposed by this rule, as such savings depend largely on actions that PHAs will take (or not) at their own discretion.

For the reasons presented, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Information Collection Requirements

The information collection requirements contained in this final rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2577–0226. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This final rule will not impose any Federal mandates on any State, local, or tribal governments or the private sector within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available online at *www.regulations.gov*.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt State law within the meaning of the Executive Order.

Lists of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 8

Administrative practice and procedure, Civil rights, Equal employment opportunity, Grant programs-housing and community development, Individuals with disabilities, Loan programs-housing and community development, Reporting and recordkeeping requirements.

24 CFR Part 42

Administrative practice and procedure, Grant programs, Loan programs, Manufactured homes, Rates and fares, Relocation assistance, and Reporting and recordkeeping requirements.

24 CFR Part 50

Environmental impact statements.

24 CFR Part 91

Aged, Grant programs-housing and community development, Homeless, Individuals with disabilities, Low and moderate income housing, and Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 93

Administrative practice and procedure, Grant programs-housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 247

Grant programs-housing and community development, Loan programs-housing and community development, Low and moderate income housing, and Rent subsidies.

24 CFR Part 290

Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, and Reporting and recordkeeping requirements.

24 CFR Part 882

Grant programs-housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 888

Grant programs-housing and community development, rent subsidies.

24 CFR Part 891

Aged, Grant programs-housing and community development, Individuals with disabilities, Loan programs-housing and community development, Low and moderate income housing, Public assistance programs, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 903

Administrative practice and procedure, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 908

Computer technology, Grant programs-housing and community development, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 943

Public Housing and Reporting and recordkeeping requirements.

24 CFR Part 945

Aged, Grant programs-housing and community development, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 960

Aged, Grant programs-housing and community development, Individuals with disabilities, Pets, and Public housing.

24 CFR Part 972

Grant programs-housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs-housing and community development, Grant programs-Indians, Indians, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs-housing and community development, Low and moderate income housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 985

Grant programs-housing and community development, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 1000

Aged, Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Indians, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 5, 8, 42, 50, 91, 92, 93, 247, 290, 882, 888, 891, 903, 908, 943, 945, 972, 982, 983, 985, and 1000 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority for part 5 continues to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); 42 U.S.C. 2000bb *et seq.*; 34 U.S.C. 12471 *et seq.*; Sec. 327, Pub. L. 109–115, 119 Stat. 2396; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 14156, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

■ 2. Amend § 5.100 by revising the definitions of ‘‘Household’’ and ‘‘Responsible entity’’ to read as follows:

§ 5.100 Definitions.

* * * * *

Household, for purposes of 24 CFR part 5, subpart I, and parts 960, 966, 882, and 982 of this title, means the family, foster children and adults, and PHA-approved live-in aide.

* * * * *

Responsible entity means the person or entity responsible for administering the restrictions on providing assistance to noncitizens with ineligible immigrations status. The entity responsible for administering the restrictions on providing assistance to noncitizens with ineligible immigration status under the various covered programs is as follows:

(1) For the Section 235 Program, the mortgagee.

(2) For Public Housing, the Section 8 Rental Voucher, and the Section 8 Moderate Rehabilitation programs, the PHA administering the program under an ACC with HUD.

* * * * *

■ 3. Amend § 5.504 by revising and republishing the definition of ‘‘Responsible’’ to read as follows:

§ 5.504 Definitions.

* * * * *

Responsible entity means the person or entity responsible for administering the restrictions on providing assistance to noncitizens with ineligible immigrations status. The entity responsible for administering the restrictions on providing assistance to noncitizens with ineligible immigration status under the various covered programs is as follows:

(1) For the Section 235 Program, the mortgagee.

(2) For Public Housing, the Section 8 Rental Voucher, and the Section 8 Moderate Rehabilitation programs, the PHA administering the program under an ACC with HUD.

* * * * *

§ 5.514 [AMENDED]

■ 4. Amend § 5.514 by:

■ a. Adding to the end of paragraph (f)(2)(i)(A), the word ''and'';

■ b. Amending paragraph (f)(2)(i)(B) by removing ''; or'' and adding, in its place, a period;

■ c. Removing paragraph (f)(2)(i)(C); and

■ d. In paragraphs (i)(1) introductory text and (i)(2), removing the phrase ''Rental Certificate,''.

§ 5.630 [AMENDED]

■ 5. Amend § 5.630(a)(2) by removing the phrase '', and certificate''.

§§ 5.632, 5.653, 5.655, 5.657, and 5.659 [AMENDED]

■ 6. Remove the words ''certificate or'' in the following places:

■ a. Section 5.632(b)(2);

■ b. Section 5.653(a);

■ c. Section 5.655(a);

■ d. Section 5.657(a); and

■ e. Section 5.659(a).

§ 5.801 [AMENDED]

■ 7. Amend § 5.801 by:

■ a. In paragraph (a)(2)(ii) removing the word ''Certificate'' and adding, in its place, the word ''Voucher;

■ b. In paragraph (a)(2)(iv) removing the words ''Certificate and'';

■ c. In paragraph (a)(3)(ii) removing the word ''Certificate'' and adding, in its place, the word ''Voucher''.

§§ 5.853, 5.902, and 5.903 [AMENDED]

■ 8. Remove ''project-based certificate or'' in the following places:

■ a. In § 5.853(b), in the definition of ''*Responsible entity*'';

■ b. In § 5.902, in the definition of ''*Responsible entity*''; and

■ c. Section 5.903(e)(1)(i)(C).

PART 8—NONDISCRIMINATION BASED ON HANDICAP IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

■ 9. The authority for part 8 continues to read as follows:

Authority: 29 U.S.C. 794; 42 U.S.C. 3535(d) and 5309.

■ 10. Amend § 8.28 by:

■ a. Revising the section heading;

■ b. Removing from paragraph (a) introductory text the words ''Existing housing Certificate program or a'';

■ c. Removing ''Housing Certificate or'' from paragraph (a)(3);

■ d. Removing ''Housing Certificates or'' from paragraph (a)(4); and

■ e. Revising paragraph (a)(5).

The revisions read as follows:

§ 8.28 Housing voucher programs.

(a) * * *

(5) If necessary as a reasonable accommodation for a person with disabilities, approve a family request for an exception payment standard under § 982.503(d)(5) for a regular tenancy under the Section 8 voucher program so that the program is readily accessible to and usable by persons with disabilities.

* * * * *

PART 42—DISPLACEMENT, RELOCATION ASSISTANCE, AND REAL PROPERTY ACQUISITION FOR HUD AND HUD-ASSISTED PROGRAMS

■ 11. The authority for part 42 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 4601, 5304, and 12705(b).

§ 42.350 [AMENDED]

■ 12. Amend § 42.350(e)(1) by removing, both times it appears, the phrase ''certificate or''.

PART 50—PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

■ 13. The authority for part 50 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 4321–4335; and Executive Order 11991, 3 CFR, 1977 Comp., p. 123.

§ 50.17 [AMENDED]

■ 14. Amend § 50.17(e) by removing the word ''Certificate'' and adding, in its place, the word ''Voucher''.

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

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

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

§ 91.2 [AMENDED]

■ 16. Amend § 91.2(c) by removing the words ''Certificate and''.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 17. The authority for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839, 12 U.S.C. 1701x.

§ 92.202 [AMENDED]

■ 18. Amend § 92.202(b) by removing the citation ''24 CFR 983.57(e)(2) and (3)'' and adding, in its place, the citation ''24 CFR 983.55(e)(2) and (3)''.

§ 92.253 [AMENDED]

■ 19. Amend § 92.253(d)(4) by removing the words ''certificate or'', and by removing the phrase ''certificate, voucher,'' and adding, in its place, the word ''voucher''.

§ 92.508 [AMENDED]

■ 20. Amend § 92.508(a)(3)(xiii) by removing the citation to ''24 CFR 983.57(e)(2) and (e)(3)'' and adding, in its place, the citation to ''24 CFR 983.55(e)(2) and (3)''.

PART 93—HOUSING TRUST FUND

■ 21. The authority for part 93 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 4568.

§ 93.150 [AMENDED]

■ 22. Amend § 93.150(b) by removing the citation to ''24 CFR 983.57(e)(2)'' and adding, in its place, a citation to ''24 CFR 983.55(e)(2)''.

PART 247—EVICTIONS FROM CERTAIN SUBSIDIZED AND HUD-OWNED PROJECTS

■ 23. The authority for part 247 continues to read as follows:

Authority: 12 U.S.C. 1701q, 1701s, 1715b, 1715l, and 1715z–1; 42 U.S.C. 1437a, 1437c, 1437f, and 3535(d).

§ 247.1 [AMENDED]

■ 24. Amend § 247.1(a) by removing the words ''Section 8 Existing Housing Certificate or''.

PART 290—DISPOSITION OF MULTIFAMILY PROJECTS AND SALE OF HUD-HELD MULTIFAMILY MORTGAGES

■ 25. The authority for part 290 continues to read as follows:

Authority: 12 U.S.C. 1701z–11, 1701z–12, 1713, 1715b, 1715z–1b, 1715z–11a; 42 U.S.C. 3535(d) and 3535(i).

§ 290.3 [AMENDED]

■ 26. In § 290.3, amend the definition of ''Sufficient, habitable, affordable, rental

housing is available'' by removing the words ''certificates or'' from paragraph (4).

§ 290.9 [AMENDED]

■ 27. Amend § 290.9 by:
■ a. In paragraph (b)(2), removing the words ''or rental certificate'';
■ b. In paragraph (b)(4):
■ i. Removing the words ''or rental certificate'' from the paragraph heading; and
■ ii. Removing the words ''or certificates''.
■ 28. Revise and republish § 290.19 to read as follows:

§ 290.19 Restrictions concerning nondiscrimination against Section 8 voucher holders.

The purchaser of any multifamily housing project shall not refuse unreasonably to lease a dwelling unit offered for rent, offer to sell cooperative stock, or otherwise discriminate in the terms of tenancy or cooperative purchase and sale because any tenant or purchaser is the holder of a Voucher under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), or any successor legislation. The purchaser's agreement to this condition must be contained in any contract of sale and also may be contained in any regulatory agreement, use agreement, or deed entered into in connection with the disposition.

§ 290.39 [AMENDED]

■ 29. Amend § 290.39(a) by removing the words ''certificate or''.

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

■ 30. The authority for part 882 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

§ 882.514 [AMENDED]

■ 31. Amend § 882.514(e) by removing the words ''certificate or'' wherever they appear.

PART 888—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—FAIR MARKET RENTS AND CONTRACT RENT ANNUAL ADJUSTMENT FACTORS

■ 32. The authority for part 888 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535d.

■ 33. Amend § 888.113 by:
■ a. Revising paragraphs (a) and (c)(3), and revising and republishing paragraph (h);
■ b. In paragraph (i)(2), removing the citation ''24 CFR 982.503(f)'' and adding, in its place, the citation ''24 CFR 982.503(g)''; and
■ c. Revising the first sentence of paragraph (i)(3).

The revisions read as follows:

§ 888.113 Fair market rents for existing housing: Methodology.

(a) *Basis for setting fair market rents.* Fair Market Rents (FMRs) are estimates of rent plus the cost of utilities, except telephone. FMRs are housing market-wide estimates of rents that provide opportunities to rent standard quality housing throughout the geographic area in which rental housing units are in competition. The level at which FMRs are set is expressed as a percentile point within the rent distribution of standard quality rental housing units in the FMR area. FMRs are set at the 40th percentile rent, the dollar amount below which the rent for 40 percent of standard quality rental housing units fall within the FMR area. The 40th percentile rent is drawn from the distribution of rents of all units within the FMR area that are occupied by recent movers. Adjustments are made to exclude public housing units and substandard units.

* * * * *

(c) * * *

(3) If a metropolitan area meets the criteria of paragraph (c)(1) of this section, Small Area FMRs will apply to the metropolitan area and all PHAs administering HCV programs in that area will be required to use Small Area FMRs. A PHA administering an HCV program in either a metropolitan area not subject to the application of Small Area FMRs or in a non-metropolitan area for which HUD publishes Small Area FMRs may choose to use Small Area FMRs after notification to HUD. A PHA that exercises this option in one metropolitan area or non-metropolitan county is not required to exercise this option in other metropolitan areas or non-metropolitan counties.

* * * * *

(h) *Small Area FMRs and project-based vouchers.* Unless one of the following exceptions apply, Small Area FMRs do not apply to project-based vouchers regardless of whether HUD designates the metropolitan area or the PHA notifies HUD and implements the Small Area FMRs under paragraph (c)(3) of this section. (See 24 CFR 983.301(f)(3) for separate requirements regarding the applicability of exception payment standards based on Small Area FMRs to PBV projects.)

(1) Where the proposal or project selection date under 24 CFR 983.51(g) was on or before the effective dates of either or both the Small Area FMR designation/implementation and the PHA administrative policy, the PHA and owner may mutually agree to apply the Small Area FMR. The application of the Small Area FMRs must be prospective and consistent with the PHA Administrative Plan. The owner and PHA may not subsequently choose to revert back to the use of the metropolitan-wide or county-wide FMRs for the PBV project. If the rent to owner will increase as a result of the mutual agreement to apply the Small Area FMRs to the PBV project, the rent increase shall not be effective until the next annual anniversary of the HAP contract in accordance with 24 CFR 983.302(b).

(2) Where the proposal or project selection date under 24 CFR 983.51(g) was after the effective dates of both the Small Area FMR designation/implementation and the PHA administrative policy, the Small Area FMRs shall apply to the PBV project if the PHA Administrative Plan provides that Small Area FMRs are used for all future PBV projects. If the PHA chooses to implement this administrative policy, the Small Area FMRs must apply to all future PBV projects located within the same metropolitan area or non-metropolitan county where the Small Area FMRs are in effect for the PHA's HCV program. An owner and the PHA may not subsequently choose to apply the metropolitan area or county FMR to the project, regardless of whether the PHA subsequently changes its Administrative Plan to revert to the use of metropolitan-wide or county-wide FMR for future PBV projects.

(3) For purposes of this section, the term ''effective date of the Small Area FMR designation'' means:

(i) The date that HUD designated a metropolitan area as a Small Area FMR area; or

(ii) The date that HUD approved a PHA request to voluntarily opt to use Small Area FMRs for its HCV program, as applicable.

(4) For purposes of this section, the term ''effective date of the PHA administrative policy'' means the date the administrative policy was formally adopted as part of the PHA administrative plan by the PHA Board of Commissioners or other authorized PHA officials in accordance with § 982.54(a).

(i) * * *

(3) HUD will calculate the 50th percentile rents for certain metropolitan areas for this purpose. * * *

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 34. The authority for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

§ 891.125 [AMENDED]

■ 35. Amend § 891.125(c)(3)(iii)(F) by removing the words ''Certificate and''.

PART 903—PUBLIC HOUSING AGENCY PLANS

■ 36. The authority for part 903 continues to read as follows:

Authority: 42 U.S.C. 1437c; 42 U.S.C. 1437c–1; Pub. L. 110–289; 42 U.S.C. 3535d.

§ 903.3 [AMENDED]

■ 37. Amend § 903.3(b)(2) by adding the words ''and project-based'' after the words ''tenant-based''.

■ 38. Revise § 903.4(a)(2)(i) to read as follows:

§ 903.4 What are the public housing agency plans?

(a) * * *

(2) * * *

(i) Section 8 assistance (tenant-based assistance (24 CFR part 982) and project-based assistance (24 CFR part 983) under Section 8(o) of the U.S. Housing Act of 1937, 42 U.S.C. 1437f(o)); or

* * * * *

■ 39. Amend § 903.6 by adding paragraph (c) to read as follows:

§ 903.6 What information must a PHA provide in the 5-Year Plan?

* * * * *

(c) If a PHA intends to select one or more projects for project-based assistance without competition in accordance with § 983.51(c), the PHA must include a statement of this intent in its 5-Year Plan (or an amendment to the 5-Year Plan) in order to notify the public prior to making a noncompetitive selection.

■ 40. Amend § 903.7 by:

■ a. In the introductory text, removing the phrase ''both public housing and tenant-based assistance'' and adding, in its place, the phrase ''public housing, tenant-based assistance, and project-based assistance'';

■ b. Revising paragraph (a)(1) introductory text, and paragraphs (b)(3), (c), (d), and (e)(4);

■ c. In paragraph (f), adding ''and project-based assistance'' after the phrase ''tenant-based assistance'';

■ d. Revising paragraphs (l)(1)(iii) and (2); and

■ e. Redesignating paragraph (r) as paragraph (s) and adding new paragraph (r).

The revisions and addition read as follows:

§ 903.7 What information must a PHA provide in the Annual Plan?

* * * * *

(a) * * *

(1) This statement must address the housing needs of the low-income and very low-income families who reside in the jurisdiction served by the PHA, and other families who are on the public housing and Section 8 tenant-based and project-based assistance waiting lists, including:

* * * * *

(b) * * *

(3) *Other admissions policies.* The PHA's admission policies that include any other PHA policies that govern eligibility, selection and admissions for the public housing (see part 960 of this title) and tenant-based assistance programs (see part 982, subpart E of this title) and project-based assistance programs (see part 982, subpart E of this title except as provided in § 983.3, and subpart F of 983). (The information requested on site-based waiting lists and deconcentration is applicable only to public housing.)

(c) *A statement of financial resources.* This statement must address the financial resources that are available to the PHA for the support of Federal public housing, tenant-based assistance, and project-based assistance programs administered by the PHA during the plan year. The statement must include a listing, by general categories, of the PHA's anticipated resources, such as PHA operating, capital and other anticipated Federal resources available to the PHA, as well as tenant rents and other income available to support public housing, tenant-based assistance, and project-based assistance. The statement also should include the non-Federal sources of funds supporting each Federal program, and state the planned uses for the resources.

(d) *A statement of the PHA's rent determination policies.* This statement must describe the PHA's basic discretionary policies that govern rents charged for public housing units, applicable flat rents, and the rental contributions of families receiving tenant-based assistance and project-based assistance. For tenant-based assistance and project-based assistance, this statement also shall cover any discretionary minimum tenant rents and payment standard policies.

(e) * * *

(4) The information requested on a PHA's rules, standards and policies regarding management and maintenance of housing applies only to public housing. The information requested on PHA program management and listing of administered programs applies to public housing, tenant-based assistance, and project-based assistance.

* * * * *

(l) * * *

(1) * * *

(iii) How the PHA will comply with the requirements of section 12(c) and (d) of the 1937 Act (42 U.S.C. 1437j(c) and (d)). These statutory provisions relate to community service by public housing residents and treatment of income changes in public housing, tenant-based assistance, and project-based assistance recipients resulting from welfare program requirements. PHAs must address any cooperation agreements, as described in section 12(d)(7) of the 1937 Act (42 U.S.C. 1437j(d)(7)), that the PHA has entered into or plans to enter into.

(2) The information required by paragraph (l) of this section is applicable to public housing, tenant-based assistance, and project-based assistance, except that the information regarding the PHA's compliance with the community service requirement applies only to public housing.

* * * * *

(r) *A statement of participation in the project-based assistance program.* If a PHA participates in the project-based assistance program, the PHA's Annual Plan must include a statement of the projected number of project-based units, the general location of the project-based units, and how project-basing would be consistent with its Annual Plan.

* * * * *

§ 903.11 [AMENDED]

■ 41. Amend § 903.11 by:

■ a. In paragraph (a)(3), adding ''and/or project-based assistance'' after ''tenant-based assistance'';

■ b. In paragraph (c)(1), removing the reference ''§ 903.7(a), (b), (c), (d), (g), (h), (k), (m), (n), (o), (p) and (r)'' and adding, in its place, the reference ''903.7(a), (b), (c), (d), (g), (h), (k), (m), (n), (o), (p), (r), and (s)'';

■ c. In paragraph (c)(3), adding ''and/or project-based assistance'' after ''tenant-based assistance'', and removing the reference ''903.7(a), (b), (c), (d), (g), (h), (k), (m), (n), (o), (p) and (r)'' and adding, in its place, the reference ''903.7(a), (b), (c), (d), (g), (h), (k), (m), (n), (o), (p), (r), and (s)''.

■ 42. Amend § 903.12 by:

■ a. Revising paragraphs (b) and (c)(1);

■ b. Removing paragraph (c)(2) and redesignating paragraph (c)(3) as paragraph (c)(2); and

■ c. In redesignated paragraph (c)(2), removing the reference to ''and (r)'' and adding. in its place, a reference to ''and (s)''.

The revisions read as follows:

§ 903.12 What are the streamlined Annual Plan requirements for small PHAs?

* * * * *

(b) *Streamlined Annual Plan requirements for fiscal years in which its 5-Year Plan is also due.* For the fiscal year in which its 5-Year Plan is also due, the streamlined Annual Plan of the small PHA shall consist of the information required by § 903.7(a), (b), (c), (d), (g), (h), (k), (o) (r), and (s). The information required by § 903.7(a) must be included only to the extent it pertains to the housing needs of families that are on the PHA's public housing and Section 8 tenant-based assistance and project-based assistance waiting lists. The information required by § 903.7(k) must be included only to the extent that the PHA participates in homeownership programs under Section 8(y) of the 1937 Act. The information required in *§ 903.7(r)* must be included only to the extent that the PHA participates in the project-based assistance program.

(c) * * *

(1) The information required by § 903.7(g) and (o) and, if applicable, § 903.7(b)(2) with respect to site-based waiting lists, § 903.7(k)(1)(i) with respect to homeownership programs under Section 8(y) of the 1937 Act, and § 903.7(r) with respect to participation in the project-based assistance program;

* * * * *

§ 903.13 [AMENDED]

■ 43. Amend § 903.13(b)(1) and (3) by adding ''and/or project-based assistance'' after ''tenant-based assistance'' every time it appears.

■ 44. Amend § 903.15 by revising paragraph (c) introductory text to read as follows:

§ 903.15 What is the relationship of the public housing agency plans to the Consolidated Plan and a PHA's Fair Housing Requirements?

* * * * *

(c) *Fair housing requirements.* A PHA is obligated to affirmatively further fair housing in its operating policies, procedures, and capital activities. All admission and occupancy policies for public housing and Section 8 tenant-based and project-based housing programs must comply with Fair Housing Act requirements and other civil rights laws and regulations and with a PHA's plans to affirmatively further fair housing. The PHA may not impose any specific income or racial quotas for any development or developments.

* * * * *

PART 908—ELECTRONIC TRANSMISSION OF REQUIRED FAMILY DATA FOR PUBLIC HOUSING, INDIAN HOUSING, AND THE SECTION 8 RENTAL VOUCHER, AND MODERATE REHABILITATION PROGRAMS

■ 45. The authority citation for part 908 continues to read as follows:

Authority: 42 U.S.C. 1437f, 3535(d), 3543, 3544, and 3608a.

■ 46. Revise the part heading to read as set forth above.

§ 908.101 [AMENDED]

■ 47. Amend § 908.101 by removing the phrase ''Rental Certificate,''.

PART 943—PUBLIC HOUSING AGENCY CONSORTIA AND JOINT VENTURES

■ 48. The authority for part 943 continues to read as follows:

Authority: 42 U.S.C. 1437k and 3535(d).

§ 943.120 [AMENDED]

■ 49. Amend § 943.120(a)(2) by:

■ a. Removing the words ''and certificate'' and ''certificate and''; and

■ b. Removing the word ''programs'' and adding, in its place, the word ''program''.

PART 945—DESIGNATED HOUSING—PUBLIC HOUSING DESIGNATED FOR OCCUPANCY BY DISABLED, ELDERLY, OR DISABLED AND ELDERLY FAMILIES

■ 50. The authority for part 945 continues to read as follows:

Authority: 42 U.S.C. 1473e and 3535(d).

§ 945.103 [AMENDED]

■ 51. Amend § 945.103(b)(2) by removing the words ''certificates and''.

PART 960—ADMISSION TO, AND OCCUPANCY OF, PUBLIC HOUSING

■ 52. The authority citation for part 960 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437n, 1437z–3, and 3535(d).

■ 53. Amend § 960.202 by redesignating (c) as paragraph (d) and adding new paragraph (c) to read as follows:

§ 960.202 Tenant selection policies.

* * * * *

(c) *Priority for tenant-based and project-based voucher families displaced due to HQS non-compliance.* The PHA must adopt a preference for tenant-based and project-based families displaced due to HQS noncompliance in accordance with § 982.404(e)(2) and § 983.208(d)(6)(ii).

* * * * *

PART 972—CONVERSION OF PUBLIC HOUSING TO TENANT-BASED ASSISTANCE

■ 54. The authority citation for part 972 continues to read as follows:

Authority: 42 U.S.C. 1437t, 1437z–5, and 3535(d).

§ 972.218 [AMENDED]

■ 55. Amend § 972.218(c)(2)(i) by removing the words ''certificates or''.

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 56. The authority citation for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

PART 982 [AMENDED]

■ 57. Amend part 982 by revising all references to ''administrative plan'' and ''Administrative plan'' to read ''Administrative Plan.''

■ 58. Amend § 982.4 by:

■ a. Revising paragraph (a); and

■ b. In paragraph (b):

■ c. Adding in alphabetical order definitions for ''Abatement'', ''Authorized voucher units'', and ''Building'';

■ d. Revising the definition of ''Fair market rent (FMR)'';

■ e. Adding in alphabetical order definitions for ''Foster adult'', ''Foster child'';

■ f. Revising the definition of ''Housing quality standards (HQS)'';

■ g. Adding in alphabetical order definitions for ''Independent entity'', ''PHA-owned unit'', ''Request for Tenancy Approval (RFTA)'', ''Section 8 Management Assessment Program (SEMAP)'', ''Small Area Fair Market Rents (SAFMRs)'', ''Tenant-paid utilities'', and ''Withholding''.

The revisions and additions read as follows:

§ 982.4 Definitions.

(a) *Definitions found elsewhere.* (1) The following terms are defined in 24 CFR part 5, subpart A: 1937 Act, Covered person, Drug, Drug-related

criminal activity, federally assisted housing, Guest, Household, HUD, MSA, Other person under the tenant's control, Public housing, Section 8, and Violent criminal activity.

(2) The following terms are defined in 24 CFR part 5, subpart D: Disabled family, Elderly family, Near-elderly family, and Person with disabilities.

(3) The following terms are defined in 24 CFR part 5, subpart F: Adjusted income, Annual income, Extremely low income family, Total tenant payment, Utility allowance, and Welfare assistance.

(b) * * *

Abatement. Stopping HAP payments to an owner with no potential for retroactive payment.

* * * * *

Authorized voucher units. The number of units for which a PHA is authorized to make assistance payments to owners under its annual contributions contract.

* * * * *

Building. A structure with a roof and walls that contains one or more dwelling units.

* * * * *

Fair market rent (FMR). The rent, including the cost of utilities (except telephone), as established by HUD for units of varying sizes (by number of bedrooms), that must be paid in the housing market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities. In the HCV program, the FMR may be established at the ZIP code level (see definition of Small Area Fair Market Rents), metropolitan area level, or non-metropolitan county level.

* * * * *

Foster adult. A member of the household who is 18 years of age or older and meets the definition of a foster adult under State law. In general, a foster adult is a person who is 18 years of age or older, is unable to live independently due to a debilitating physical or mental condition and is placed with the family by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.

Foster child. A member of the household who meets the definition of a foster child under State law. In general, a foster child is placed with the family by an authorized placement agency (*e.g.,* public child welfare agency) or by judgment, decree, or other order of any court of competent jurisdiction.

* * * * *

Housing quality standards (HQS). The minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for the HCV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3).

Independent entity. (i) The unit of general local government; however, if the PHA itself is the unit of general local government or an agency of such government, then only the next level of general local government (or an agency of such government) or higher may serve as the independent entity; or

(ii) A HUD-approved entity that is autonomous and recognized under State law as a separate legal entity from the PHA. The entity must not be connected financially (except regarding compensation for services performed for PHA-owned units) or in any other manner that could result in the PHA improperly influencing the entity.

* * * * *

PHA-owned unit. (i) A dwelling unit in a project that is:

(A) Owned by the PHA (including having a controlling interest in the entity that owns the project);

(B) Owned by an entity wholly controlled by the PHA; or

(C) Owned by a limited liability company or limited partnership in which the PHA (or an entity wholly controlled by the PHA) holds a controlling interest in the managing member or general partner.

(ii) A controlling interest is:

(A) Holding more than 50 percent of the stock of any corporation;

(B) Having the power to appoint more than 50 percent of the members of the board of directors of a non-stock corporation (such as a nonprofit corporation);

(C) Where more than 50 percent of the members of the board of directors of any corporation also serve as directors, officers, or employees of the PHA;

(D) Holding more than 50 percent of all managing member interests in an LLC;

(E) Holding more than 50 percent of all general partner interests in a partnership; or

(F) Equivalent levels of control in other ownership structures.

* * * * *

Request for Tenancy Approval (RFTA). A form (form HUD–52517) submitted by or on behalf of a family to a PHA once the family has identified a unit that it wishes to rent using tenant-based voucher assistance.

* * * * *

Section 8 Management Assessment Program (SEMAP). A system used by HUD to measure PHA performance in key Section 8 program areas. See 24 CFR part 985.

* * * * *

Small Area Fair Market Rents (SAFMRs or Small Area FMRs). Small Area FMRs are FMRs established for U.S. Postal Service ZIP code areas and are calculated in accordance with 24 CFR 888.113(a) and (b).

* * * * *

Tenant-paid utilities. Utilities and services that are not included in the rent to owner and are the responsibility of the assisted family, regardless of whether the payment goes to the utility company or the owner. The utilities and services are those necessary in the locality to provide housing that complies with HQS. The utilities and services may also include those required by HUD through a **Federal Register** notice after providing opportunity for public comment.

* * * * *

Withholding. Stopping HAP payments to an owner while holding them for potential retroactive disbursement.

■ 59. Amend § 982.54 by:

■ a. In paragraph (b), removing the term ''PHA plan'' and adding, in its place, the term ''PHA Plan'';

■ b. Revising paragraph (d) introductory text and paragraph (d)(4)(iii);

■ c. Adding new paragraph (d)(4)(iv);

■ d. Revising paragraphs (d)(14), (18), (21), (22), and (23); and

■ e. Adding paragraphs (d)(24) through (26).

The revisions and additions read as follows:

§ 982.54 Administrative Plan.

* * * * *

(d) The PHA Administrative Plan must cover all the PHA's local policies for administration of the program, including the PHA's policies on the following subjects (see 24 CFR 983.10 for a list of subjects specific to the project-based voucher (PBV) program that also must be included in the Administrative Plan of a PHA that operates a PBV program):

(4) * * *

(iii) Standards for denying admission or terminating assistance based on criminal activity or alcohol abuse in accordance with § 982.553, or other factors in accordance with §§ 982.552, 982.554, and 982.555; and

(iv) Policies concerning residency by a foster child, foster adult, or live-in aide, including defining when PHA consent for occupancy by a foster child, foster adult, or live-in aide must be given or may be denied;

* * * * *

(14) Payment standard policies, including:

(i) The process for establishing and revising payment standards, including whether the PHA has voluntarily adopted the use of Small Area Fair Market Rents (SAFMRs);

(ii) A description of how the PHA will administer decreases in the payment standard amount for a family continuing to reside in a unit for which the family is receiving assistance (see § 982.505(c)(3)); and

(iii) If the PHA establishes different payment standard amounts for designated areas within its jurisdiction, including exception areas, the criteria used to determine the designated areas and the payment standard amounts for those designated areas. (See § 982.503(a)(2)). All such areas must be described in the PHA's Administrative Plan or payment standard schedule;

* * * * *

(18) Policies concerning interim redeterminations of family income and composition, the frequency of determinations of family income, and income-determination practices, including whether the PHA will accept a family declaration of assets;

* * * * *

(21) Procedural guidelines and performance standards for conducting required HQS inspections, including:

(i) Any deficiency that the PHA has adopted as a life-threatening deficiency that is not a HUD-required life-threatening deficiency.

(ii) For PHAs that adopt the initial inspection non-life-threatening deficiency option:

(A) The PHA's policy on whether the provision will apply to all initial inspections or a portion of initial inspections.

(B) The PHA's policy on whether the provision will be applied to only some inspections and how the units will be selected.

(C) The PHA's policy on using withheld HAP funds to repay an owner once the unit is in compliance with HQS.

(iii) For PHAs that adopt the alternative inspection provision:

(A) The PHA's policy on how it will apply the provision to initial and periodic inspections.

(B) The specific alternative inspection method used by the PHA.

(C) The specific properties or types of properties where the alternative inspection method will be employed.

(D) For initial inspections, the maximum amount of time the PHA will withhold HAP if the owner does not correct the HQS deficiencies within the cure period, and the period of time after which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(iv) The PHA's policy on charging a reinspection fee to owners.

(22) The PHA's policy on withholding HAP for units that do not meet HQS (see § 982.404(d)(1));

(23) The PHA's policy on assisting families with relocating and finding a new unit (see § 982.404(e)(3));

(24) The PHA's policy on screening of applicants for family behavior or suitability for tenancy;

(25) Whether the PHA will permit a family to submit more than one Request for Tenancy Approval at a time (see § 982.302(b)); and

(26) In the event of insufficient funding, taking into account any cost-savings measures taken by the PHA, a description of the factors the PHA will consider when determining which HAP contracts to terminate first (*e.g.,* prioritization of PBV HAP contracts over tenant-based HAP contracts or prioritization of contracts that serve vulnerable families or individuals).

■ 60. Amend § 982.301 by:

■ a. Revising and republishing paragraph (a)

■ b. Revising paragraphs (b)(8), (10), (12), (14) and (15);

■ c. Adding paragraph (c).

The revisions, addition, and republication read as follows:

§ 982.301 Information when family is selected.

(a) *Oral briefing.* When the PHA selects a family to participate in a tenant-based program, the PHA must give the family an oral briefing.

(1) The briefing must include information on the following subjects:

(i) A description of how the program works;

(ii) Family and owner responsibilities;

(iii) Where the family may lease a unit, including renting a dwelling unit inside or outside the PHA jurisdiction, and any information on selecting a unit that HUD provides;

(iv) An explanation of how portability works; and

(v) An explanation of the advantages of areas that do not have a high concentration of low-income families.

(2) The PHA may not discourage the family from choosing to live anywhere in the PHA jurisdiction, or outside the PHA jurisdiction under portability procedures, unless otherwise expressly authorized by statute, regulation, PIH Notice, or court order. The family must be informed of how portability may affect the family's assistance through screening, subsidy standards, payment standards, and any other elements of the portability process which may affect the family's assistance.

(3) The PHA must take appropriate steps to ensure effective communication in accordance with 24 CFR 8.6 and 28 CFR part 35, subpart E, and must provide information on the reasonable accommodation process.

(b) * * *

(8) PHA subsidy standards, including when the PHA will consider granting exceptions to the standards as allowed by 24 CFR 982.402(b)(8), and when exceptions are required as a reasonable accommodation for persons with disabilities under Section 504, the Fair Housing Act, or the Americans with Disabilities Act;

* * * * *

(10) Information on Federal, State, and local equal opportunity laws, the contact information for the Section 504 coordinator, a copy of the housing discrimination complaint form, and information on how to request a reasonable accommodation or modification (including information on requesting exception payment standards as a reasonable accommodation) under Section 504, the Fair Housing Act, and the Americans with Disabilities Act;

* * * * *

(12) Notice that if the family includes a person with disabilities, the PHA is subject to the requirement under 24 CFR 8.28(a)(3) to provide a current listing of accessible units known to the PHA and, if necessary, other assistance in locating an available accessible dwelling unit;

* * * * *

(14) The advantages of areas that do not have a high concentration of low-income families which may include, access to accessible and high-quality housing, transit, employment opportunities, educational opportunities, recreational facilities, public safety stations, retail services, and health services; and

(15) A description of when the PHA is required to give a participant family the opportunity for an informal hearing and how to request a hearing.

(c) *Providing information for persons with limited English proficiency (LEP).* The PHA must take reasonable steps to ensure meaningful access by persons with limited English proficiency in accordance with Title VI of the Civil Rights Act of 1964 and HUD's implementing regulations at 24 CFR part 1.

■ 61. Amend § 982.305 by:

■ a. Revising paragraph (a) introductory text and paragraph (b)(1) introductory text;

■ b. Adding paragraph (b)(2) introductory text;
■ c. Revising paragraph (b)(2)(ii);
■ d. Redesignating paragraph (b)(3) as paragraph (b)(4), and adding new paragraph (b)(3);
■ e. Revising paragraph (c)(4); and
■ f. Adding paragraph (f).

The revision and additions read as follows:

§ 982.305 PHA approval of assisted tenancy.

(a) *Program requirements.* The PHA may not give approval for the family of the assisted tenancy, or execute a HAP contract, until the PHA has determined that:

* * * * *

(b) * * *

(1) The following must be completed before the beginning of the initial term of the lease for a unit:

* * * * *

(2) The timeframes for inspection:

* * * * *

(ii) The 15-day clock (under paragraph (b)(2)(i) of this section) is suspended during any period when the unit is not available for inspection.

(3) If the PHA has implemented, and the unit is covered by, the alternative inspection option for initial inspections under § 982.406(e), the PHA is not subject to paragraphs (a)(2), (b)(1)(i), and (b)(2) of this section.

* * * * *

(c) * * *

(4) Any HAP contract executed after the 60-day period is void, and the PHA may not pay any housing assistance payment to the owner, unless there are extenuating circumstances that prevent or prevented the PHA from meeting the 60-day deadline, then the PHA may submit to the HUD field office a request for an extension. The request, which must be submitted no later than two weeks after the 60-day deadline, must include an explanation of the extenuating circumstances and any supporting documentation. HUD at its sole discretion will determine if the extension request is approved.

* * * * *

(f) *Initial HQS inspection requirements.* (1) Unless the PHA has implemented, and determined that the unit is covered by, either of the two initial HQS inspection options in paragraphs (f)(2) and (3) of this section, the unit must be inspected by the PHA and pass HQS before:

(i) The PHA may approve the assisted tenancy and execute the HAP contract, and

(ii) The beginning of the initial lease term.

(2) If the PHA has implemented, and determines that the unit is covered by, the non-life-threatening deficiencies option at § 982.405(j), the unit must be inspected by the PHA and must have no life-threatening deficiencies before:

(i) The PHA may approve the assisted tenancy and execute the HAP contract; and

(ii) The beginning of the initial lease term.

(3) If the PHA has implemented and determines that the unit is covered by the alternative inspection option at § 982.406(e), then the PHA must determine that the unit was inspected in the previous 24 months by an inspection that meets the requirements of § 982.406 before:

(i) The PHA may approve the assisted tenancy and execute the HAP contract; and

(ii) The beginning of the initial lease term.

(4) If the PHA has implemented and determines that the unit is covered by both the no life-threatening deficiencies option and the alternative inspection option, the unit is subject only to paragraph (f)(3) of this section, not paragraph (f)(2) of this section.

■ 62. Amend § 982.352 by:
■ a. Adding ''or'' at the end of paragraph (a)(5); and
■ b. Revising paragraph (b).

The revision reads as follows:

§ 982.352 Eligible housing.

* * * * *

(b) *PHA-owned housing.* (1) PHA-owned units, as defined in § 982.4, may be assisted under the tenant-based program only if all the following conditions are satisfied:

(i) The PHA must inform the family, both orally and in writing, that the family has the right to select any eligible unit available for lease.

(ii) A PHA-owned unit is freely selected by the family, without PHA pressure or steering.

(iii) The unit selected by the family is not ineligible housing.

(iv) During assisted occupancy, the family may not benefit from any form of housing subsidy that is prohibited under paragraph (c) of this section.

(v)(A) The PHA must obtain the services of an independent entity, as defined in § 982.4, to perform the following PHA functions as required under the program rule:

(*1*) To determine rent reasonableness in accordance with § 982.507. The independent entity shall communicate the rent reasonableness determination to the family and the PHA.

(*2*) To assist the family in negotiating the rent to owner in accordance with § 982.506.

(*3*) To inspect the unit for compliance with HQS in accordance with §§ 982.305(a) and 982.405. The independent entity shall communicate the results of each such inspection to the family and the PHA.

(B) The PHA may compensate the independent entity from PHA administrative fees (including fees credited to the administrative fee reserve) for the services performed by the independent entity. The PHA may not use other program receipts to compensate the independent entity for such services. The PHA and the independent entity may not charge the family any fee or charge for the services provided by the independent entity.

(2) [Reserved]

* * * * *

■ 63. Revise § 982.401 to read as follows:

§ 982.401 Housing quality standards.

As defined in § 982.4, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3).

§ 982.402 [Amended]

■ 64. Amend § 982.402(b)(2) by removing the words ''housing quality standards (HQS)'' and adding, in their place, the term ''HQS''.

■ 65. Revise and republish § 982.404 to read as follows:

§ 982.404 Maintenance: Owner and family responsibility; PHA remedies.

(a) *Owner obligation.* (1) The owner must maintain the unit in accordance with HQS. A unit is not in compliance with HQS if the PHA or other inspector authorized by the State or local government determines that the unit has HQS deficiencies based upon an inspection, the agency or inspector notifies the owner in writing of the HQS deficiencies, and the deficiencies are not remedied within the appropriate timeframe.

(2) If the owner fails to maintain the dwelling unit in accordance with HQS, the PHA must take enforcement action in accordance with this section.

(3) If a deficiency is life-threatening, the owner must correct the deficiency within 24 hours of notification. For other deficiencies, the owner must correct the deficiency within 30 calendar days of notification (or any reasonable PHA-approved extension).

(4) In the case of an HQS deficiency that the PHA determines is caused by the tenant, any member of the household, or any guest or other person under the tenant's control, other than

any damage resulting from ordinary use, the PHA may waive the owner's responsibility to remedy the violation. The HAP to the owner may not be withheld or abated if the owner responsibility has been waived. However, the PHA may terminate assistance to a family because of an HQS breach beyond damage resulting from ordinary use caused by any member of the household or any guest or other person under the tenant's control.

(b) *Family obligation.* (1) The family may be held responsible for a breach of the HQS that is caused by any of the following:

(i) The family fails to pay for any utilities that the owner is not required to pay for, but which are to be paid by the tenant;

(ii) The family fails to provide and maintain any appliances that the owner is not required to provide, but which are to be provided by the tenant; or

(iii) Any member of the household or guest damages the dwelling unit or premises (damages beyond ordinary wear and tear)

(2) If the PHA has waived the owner's responsibility to remedy the violation in accordance with paragraph (a)(4) of this section, the following applies:

(i) If the HQS breach caused by the family is life-threatening, the family must take all steps permissible under the lease and State and local law to ensure the deficiency is corrected within 24 hours of notification.

(ii) For other family-caused deficiencies, the family must take all steps permissible under the lease and State and local law to ensure that the deficiency is corrected within 30 calendar days of notification (or any PHA-approved extension).

(3) If the family has caused a breach of the HQS, the PHA must take prompt and vigorous action to enforce the family obligations. The PHA may terminate assistance for the family in accordance with § 982.552.

(c) *Determination of noncompliance with HQS.* The unit is in noncompliance with HQS if:

(1) The PHA or authorized inspector determines the unit has HQS deficiencies based upon an inspection;

(2) The PHA notified the owner in writing of the unit HQS deficiencies; and

(3) The unit HQS deficiencies are not corrected in accordance with the timeframes established in paragraph (a)(3) of this section.

(d) *PHA remedies for HQS deficiencies identified during inspections other than the initial inspection.* This subsection covers PHA actions when HQS deficiencies are identified as a result of an inspection other than the initial inspection (see § 982.405). For PHA HQS enforcement actions for HQS deficiencies under the initial HQS inspection NLT or alternative inspection options, see §§ 982.405(j) and 982.406(e), respectively.

(1) A PHA may withhold assistance payments for units that have HQS deficiencies once the PHA has notified the owner in writing of the deficiencies. The PHA must identify in its Administrative Plan the conditions under which it will withhold HAP. If the unit is brought into compliance during the applicable cure period (within 24 hours of notification for life-threatening deficiencies and within 30 days of notification (or other reasonable period established by the PHA) for non-life-threatening deficiencies), the PHA:

(i) Must resume assistance payments; and

(ii) Must provide assistance payments to cover the time period for which the assistance payments were withheld.

(2)(i) The PHA must abate the HAP, including amounts that had been withheld, if the owner fails to make the repairs within the applicable cure period (within 24 hours of notification for life-threatening deficiencies and within 30 days of notification (or other reasonable period established by the PHA) for non-life-threatening deficiencies).

(ii) If a PHA abates the assistance payments under this paragraph, the PHA must notify the family and the owner that it is abating payments and that if the unit does not meet HQS within 60 days (or a reasonable longer period established by the PHA) after the determination of noncompliance in accordance with paragraph (c) of this section, the PHA will terminate the HAP contract for the unit, and the family will have to move if the family wishes to receive continued assistance. The PHA must issue the family its voucher to move at least 30 days prior to the termination of the HAP contract.

(3) An owner may not terminate the tenancy of any family due to the withholding or abatement of assistance under paragraph (a) of this section. During the period that assistance is abated, the family may terminate the tenancy by notifying the owner and the PHA. If the family chooses to terminate the tenancy, the HAP contract will automatically terminate on the effective date of the tenancy termination or the date the family vacates the unit, whichever is earlier. The PHA must promptly issue the family its voucher to move.

(4) If the family did not terminate the tenancy and the owner makes the repairs and the unit complies with HQS within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must recommence payments to the owner. The PHA does not make any payments to the owner for the period of time that the payments were abated.

(5) If the owner fails to make the repairs within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must terminate the HAP contract.

(e) *Relocation due to HQS deficiencies.* (1) The PHA must give any family residing in a unit for which the HAP contract is terminated under paragraph (d)(5) of this section due to a failure to correct HQS deficiencies at least 90 days or a longer period as the PHA determines is reasonably necessary following the termination of the HAP contract to lease a new unit.

(2) If the family is unable to lease a new unit within the period provided by the PHA under paragraph (e)(1) of this section and the PHA owns or operates public housing, the PHA must offer, and, if accepted, provide the family a selection preference for an appropriate-size public housing unit that first becomes available for occupancy after the time period expires.

(3) PHAs may assist families relocating under this paragraph (e) in finding a new unit, including using up to 2 months of the withheld and abated assistance payments for costs directly associated with relocating to a new unit, including security deposits, temporary housing costs, or other reasonable moving costs as determined by the PHA based on their locality. If the PHA uses the withheld and abated assistance payments to assist with the family's relocation costs, the PHA must provide security deposit assistance to the family as necessary. PHAs must assist families with disabilities in locating available accessible units in accordance with 24 CFR 8.28(a)(3). If the family receives security deposit assistance from the PHA for the new unit, the PHA may require the family to remit the security deposit returned by the owner of the new unit at such time that the lease is terminated, up to the amount of the security deposit assistance provided by the PHA for that unit. The PHA must include in its Administrative Plan the policies it will implement for this provision.

(f) *Applicability.* This section is applicable to HAP contracts that were either executed on or after or renewed after June 6, 2024. For purposes of this paragraph, a HAP contract is renewed if

the HAP contract continues beyond the initial term of the lease. For all other HAP contracts, § 982.404 as in effect on June 6, 2024 remains applicable.

■ 66. Revise § 982.405 to read as follows:

§ 982.405 PHA unit inspection.

(a) *Initial Inspections.* The PHA must inspect the unit leased to a family prior to the initial term of the lease to determine if the unit meets the HQS. (*See* § 982.305(b)(2) concerning timing of initial inspection by the PHA.)

(b) *Periodic Inspections.* The PHA must inspect the unit at least biennially during assisted occupancy to ensure that the unit continues to meet the HQS, except that a small rural PHA, as defined in § 902.101 of this title, must inspect a unit once every three years during assisted occupancy to ensure that the unit continues to meet the HQS.

(c) *Supervisory Quality Control Inspections.* The PHA must conduct supervisory quality control HQS inspections.

(d) *Interim Inspections.* When a participant family or government official notifies the PHA of a potential deficiency, the following conditions apply:

(1) *Life-Threatening.* If the reported deficiency is life-threatening, the PHA must, within 24 hours of notification, both inspect the housing unit and notify the owner if the life-threatening deficiency is confirmed. The owner must then make the repairs within 24 hours of PHA notification.

(2) *Non-Life-Threatening.* If the reported deficiency is non-life-threatening, the PHA must, within 15 days of notification, both inspect the unit and notify the owner if the deficiency is confirmed. The owner must then make the repairs within 30 days of notification from the PHA or within any PHA-approved extension.

(3) *Extraordinary circumstances.* In the event of extraordinary circumstances, such as if a unit is within a presidentially declared disaster area, HUD may approve an exception of the 24-hour or the 15-day inspection requirement until such time as an inspection is feasible.

(e) *Scheduling inspections.* In scheduling inspections, the PHA must consider complaints and any other information brought to the attention of the PHA.

(f) *PHA notification of owner.* The PHA must notify the owner of deficiencies shown by the inspection.

(g) *Charge to family for inspection.* The PHA may not charge the family for an initial inspection or reinspection of the unit.

(h) *Charge to owner for inspection.* The PHA may not charge the owner for the inspection of the unit prior to the initial term of the lease or for a first inspection during assisted occupancy of the unit. The PHA may establish a reasonable fee to owners for a reinspection if an owner notifies the PHA that a repair has been made or the allotted time for repairs has elapsed and a reinspection reveals that any deficiency cited in the previous inspection that the owner is responsible for repairing, pursuant to § 982.404(a), was not corrected. The owner may not pass this fee along to the family. Fees collected under this paragraph (h) will be included in a PHA's administrative fee reserve and may be used only for activities related to the provision of the HCV program.

(i) *Verification methods.* When a PHA must verify correction of a deficiency, the PHA may use verification methods other than another on-site inspection. The PHA may establish different verification methods for initial and non-initial inspections or for different HQS deficiencies. Upon either an inspection for initial occupancy or a reinspection, the PHA may accept photographic evidence or other reliable evidence from the owner to verify that a deficiency has been corrected.

(j) *Initial HQS inspection option: No life-threatening deficiencies.* (1) A PHA may elect to approve an assisted tenancy, execute the HAP contract, and begin making assistance payments for a unit that failed the initial HQS inspection, provided that the unit has no life-threatening deficiencies. A PHA that implements this option (NLT option) may apply the option to all the PHA's initial inspections or may limit the use of the option to certain units. The PHA's Administrative Plan must specify the circumstances under which the PHA will exercise the NLT option. If the PHA has established, and the unit is covered by, both the NLT option and the alternative inspections option for the initial HQS inspection, see § 982.406(f).

(2) The PHA must notify the owner and the family if the NLT option is available for the unit selected by the family. After completing the inspection and determining there are no life-threatening deficiencies, the PHA provides both the owner and the family with a list of all the non-life-threatening deficiencies identified by the initial HQS inspection and, should the owner not complete the repairs within 30 days, the maximum amount of time the PHA will withhold HAP before abating assistance. The PHA must also inform the family that if the family accepts the unit and the owner fails to make the repairs within the cure period, which may not exceed 180 days from the effective date of the HAP contract, the PHA will terminate the HAP contract, and the family will have to move to another unit in order to receive voucher assistance. The family may choose to decline the unit based on the deficiencies and continue its housing search.

(3) If the family decides to lease the unit, the PHA and the owner execute the HAP contract, and the family enters into the assisted lease with the owner. The PHA commences making assistance payments to the owner.

(4) The owner must correct the deficiencies within 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments until the owner makes the repairs and the PHA verifies the correction. Once the deficiencies are corrected, the PHA may use the withheld housing assistance payments to make payments for the period that payments were withheld.

(5) A PHA relying on the non-life-threatening inspection provision must identify in the PHA Administrative Plan all the optional policies identified in § 982.54(d)(21)(i) and (ii).

(6) The PHA establishes in the Administrative Plan:

(i) The maximum amount of time it will withhold payments if the owner fails to correct the deficiencies within the required cure period before abating payments; and

(ii) The date by which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

■ 67. Revise and republish § 982.406 to read as follows:

§ 982.406 Use of alternative inspections.

(a) *In general.* A PHA may comply with the inspection requirements in § 982.405(a) and (b) by relying on an alternative inspection (*i.e.,* an inspection conducted for another housing program) only if the PHA is able to obtain the results of the alternative inspection. The PHA may implement the use of alternative inspections for both initial and periodic inspections or may limit the use of alternative inspections to either initial or periodic inspections. The PHA may limit the use of alternative inspections to certain units, as provided in the PHA's Administrative Plan.

(b) *Administrative Plan.* A PHA relying on an alternative inspection must identify in the PHA Administrative Plan all the optional policies identified in § 982.54(d)(21)(iii).

(c) *Eligible inspection methods.* (1) A PHA may rely upon inspections of housing assisted under the HOME Investment Partnerships (HOME) program or housing financed using Low-Income Housing Tax Credits (LIHTCs), or inspections performed by HUD.

(2) If a PHA wishes to rely on an inspection method other than a method listed in paragraph (c)(1) of this section, then, prior to amending its administrative plan, the PHA must submit to the Real Estate Assessment Center (REAC) a copy of the inspection method it wishes to use, along with its analysis of the inspection method that shows that the method ''provides the same or greater protection to occupants of dwelling units'' as would HQS.

(i) A PHA may rely upon such alternative inspection method only upon receiving approval from REAC to do so.

(ii) A PHA that uses an alternative inspection method approved under this paragraph must monitor changes to the standards and requirements applicable to such method. If any change is made to the alternative inspection method, then the PHA must submit to REAC a copy of the revised standards and requirements, along with a revised comparison to HQS. If the PHA or REAC determines that the revision would cause the alternative inspection to no longer meet or exceed HQS, then the PHA may no longer rely upon the alternative inspection method to comply with the inspection requirement at § 982.405(a) and (b).

(d) *Use of alternative inspection.* (1) If an alternative inspection method employs sampling, then a PHA may rely on such alternative inspection method for purposes of an initial or periodic inspection only if units occupied by voucher program participants are included in the population of units forming the basis of the sample.

(2) In order for a PHA to rely upon the results of an alternative inspection for purposes of an initial or periodic inspection, a property inspected pursuant to such method must meet the standards or requirements regarding housing quality or safety applicable to properties assisted under the program using the alternative inspection method. To make the determination of whether such standards or requirements are met, the PHA must adhere to the following procedures:

(i) If a property is inspected under an alternative inspection method, and the property receives a ''pass'' score, then the PHA may rely on that inspection.

(ii) If a property is inspected under an alternative inspection method, and the property receives a ''fail'' score, then the PHA may not rely on that inspection.

(iii) If a property is inspected under an alternative inspection method that does not employ a pass/fail determination—for example, in the case of a program where deficiencies are simply identified—then the PHA must review the list of deficiencies to determine whether any cited deficiency would have resulted in a ''fail'' score under HQS. If no such deficiency exists, then the PHA may rely on the inspection. If such a deficiency does exist, then the PHA may not rely on the inspection.

(3) Under any circumstance described in paragraph (d)(2) of this section in which a PHA is prohibited from relying on an alternative inspection method for a property, the PHA must, within a reasonable period of time, conduct an HQS inspection of any units in the property occupied by voucher program participants and follow HQS procedures to remedy any identified deficiencies.

(e) *Initial inspections using the alternative inspection option.* (1) The PHA may approve the tenancy, allow the family to enter into the lease agreement, and execute the HAP contract for a unit that has been inspected in the previous 24 months where the alternative inspection meets the requirements of this section. If the PHA has established and the unit is covered by both the NLT option under § 982.405(j) and the alternative inspections option for the initial HQS inspection, see paragraph (f) of this section.

(2) The PHA notifies the owner and the family that the unit selected by the family is eligible for the alternative inspection option. The PHA must provide the family with the PHA list of HQS deficiencies that are considered life-threatening as part of this notification. If the owner and family agree to the use of this option, the PHA approves the assisted tenancy, allows the family to enter into the lease agreement with the owner, and executes the HAP contract on the basis of the alternative inspection.

(3) The PHA must conduct an HQS inspection within 30 days of receiving the Request for Tenancy Approval. If the family reports a deficiency to the PHA prior to the PHA's HQS inspection, the PHA must inspect the unit within the time period required under § 982.405(d) or within 30 days of the effective date of the HAP contract, whichever time period ends first.

(4) The PHA must enter into the HAP contract with the owner before conducting the HQS inspection. The PHA may not make housing assistance payments to the owner until the PHA has inspected the unit.

(5) The PHA may commence housing assistance payments to the owner and make housing assistance payments retroactive to the effective date of the HAP contract only after the unit passes the PHA's HQS inspection. If the unit does not pass the HQS inspection, the PHA may not make housing assistance payments to the owner until all the deficiencies have been corrected. If a deficiency is life-threatening, the owner must correct the deficiency within 24 hours of notification from the PHA. For other deficiencies, the owner must correct the deficiency within no more than 30 calendar days (or any PHA-approved extension) of notification from the PHA. If the owner corrects the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract.

(6) The PHA establishes in the Administrative Plan:

(i) The maximum amount of time it will withhold payments if the owner does not correct the deficiencies within the required cure period before abating payments; and

(ii) The date by which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(f) *Initial inspection: using the alternative inspection option in combination with the non-life-threatening deficiencies option.* (1) The PHA notifies the owner and the family that both the alternative inspection option and the NLT option are available for the unit selected by the family. The PHA must provide the family the list of HQS deficiencies that are considered life-threatening as part of this notification. If the owner and family agree to the use of both options, the PHA approves the assisted tenancy, allows the family to enter into the lease agreement with the owner, and executes the HAP contract on the basis of the alternative inspection.

(2) The PHA must conduct an HQS inspection within 30 days after the family and owner submit a complete Request for Tenancy Approval. If the family reports a deficiency to the PHA prior to the PHA's HQS inspection, the PHA must inspect the unit within the time period required under § 982.405(d) or within 30 days of the effective date

of the HAP contract, whichever time period ends first.

(3) The PHA must enter into the HAP contract with the owner before conducting the HQS inspection. The PHA may not make housing assistance payments to the owner until the PHA has inspected the unit. If the unit passes the HQS inspection, the PHA commences making housing assistance payments to the owner and makes payments retroactive to the effective date of the HAP contract.

(4) If the unit fails the PHA's HQS inspection but has no life-threatening deficiencies, the PHA commences making housing assistance payments, which are made retroactive to the effective date of the HAP contract. The owner must correct the deficiencies within 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments until the owner makes the repairs and the PHA verifies the correction. Once the unit is in compliance with HQS, the PHA may use the withheld housing assistance payments to make payments for the period that payments were withheld.

(5) If the unit does not pass the HQS inspection and has life-threatening deficiencies, the PHA may not commence making housing assistance payments to the owner until all the deficiencies have been corrected. The owner must correct all life-threatening deficiencies within 24 hours of notification from the PHA. For other deficiencies, the owner must correct the deficiency within 30 days (or any PHA-approved extension) of notification from the PHA. If the owner corrects the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract.

(6) The PHA establishes in the Administrative Plan:

(i) The maximum amount of time it will withhold payments if the owner fails to correct the deficiencies within the required cure period before abating payments; and

(ii) The date by which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(g) Records retention. As with all other inspection reports, and as required by § 982.158(f)(4), reports for inspections conducted pursuant to an alternative inspection method must be obtained by the PHA. Such reports must be available for HUD inspection for at least three years from the date of the latest inspection.

■ 68. Amend § 982.451 by:

■ a. Adding paragraph headings to paragraphs (a) and (b);

■ b. Revising paragraph (b)(4)(i) introductory text;

■ c. In paragraph (b)(5)(iii) removing the phrase ''program; or'' and adding in its place the phrase ''program or''.

The revision and additions read as follows:

§ 982.451 Housing assistance payments contract.

(a) *Form and term.*

* * * * *

(b) *Housing assistance payment amount.*

(4)(i) The part of the rent to owner that is paid by the tenant may not be more than:

* * * * *

■ 69. Delayed indefinitely, amend § 982.451 by adding paragraph (c) to read as follows:

§ 982.451 Housing assistance payments contract.

* * * * *

(c) *PHA-owned units.* For PHA-owned units that are not owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability company or limited partnership owned by the PHA), the PHA must choose one of the following options:

(1) Prior to execution of a HAP contract, the PHA must establish a separate legal entity to serve as the owner. That separate legal entity must execute the HAP contract with the PHA. The separate legal entity must have the legal capacity to lease units and must be one of the following:

(i) A non-profit affiliate or instrumentality of the PHA;

(ii) A limited liability corporation;

(iii) A limited partnership;

(iv) A corporation; or

(v) Any other legally acceptable entity recognized under State law.

(2) The PHA signs the HUD-prescribed PHA-owned certification covering a PHA-owned unit instead of executing the HAP contract for the PHA-owned unit. By signing the PHA-owned certification, the PHA certifies that it will fulfill all the required program responsibilities of the private owner under the HAP contract, and that it will also fulfill all of the program responsibilities required of the PHA for the PHA-owned unit.

(i) The PHA-owned certification serves as the equivalent of the HAP contract, and subjects the PHA, as owner, to all of the requirements of the HAP contract contained in part 982. Where the PHA has elected to use the PHA-owned certification, all references to the HAP contract throughout part 982 must be interpreted to be references to the PHA-owned certification.

(ii) The PHA must obtain the services of an independent entity to perform the required PHA functions identified in § 982.352(b)(1)(v)(A) before signing the PHA-owned certification.

(iii) The PHA may not use the PHA-owned certification if the PHA-owned unit is owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability corporation or limited partnership controlled by the PHA).

■ 70. Revise § 982.503 to read as follows:

§ 982.503 Payment standard areas, schedule, and amounts.

(a) *Payment standard areas.* (1) Annually, HUD publishes fair market rents (FMRs) for U.S. Postal Service ZIP code areas, metropolitan areas, and nonmetropolitan counties (see 24 CFR 888.113). Within each of these FMR areas, the applicable FMR is:

(i) The HUD-published Small Area FMR for:

(A) Any metropolitan area designated as a Small Area FMR area by HUD in accordance with 24 CFR 888.113(c)(1).

(B) Any area where a PHA has notified HUD that the PHA will voluntarily use SAFMRs in accordance with 24 CFR 888.113(c)(3).

(ii) The HUD-published metropolitan FMR for any other metropolitan area.

(iii) The HUD-published FMR for any other non-metropolitan county.

(2) The PHA must adopt a payment standard schedule that establishes voucher payment standard amounts for each FMR area in the PHA jurisdiction. These payment standard amounts are used to calculate the monthly housing assistance payment for a family (§ 982.505).

(3) The PHA may designate payment standard areas within each FMR area. The PHA may establish different payment standard amounts for such designated areas. If the PHA designates payment standard areas, then it must include in its Administrative Plan the criteria used to determine the designated areas and the payment standard amounts for those areas.

(i) The PHA may designate payment standard areas within which payment standards will be established according to paragraph (c) (basic range) or paragraph (d) (exception payment standard), of this section.

(ii) A PHA-designated payment standard area may be no smaller than a census tract block group.

(b) *Payment standard schedule.* For each payment standard area, the PHA must establish a payment standard amount for each unit size, measured by number of bedrooms (zero-bedroom, one-bedroom, and so on). These payment standard amounts comprise the PHA's payment standard schedule.

(c) *Basic range payment standard amounts.* A basic range payment standard amount is any dollar amount that is in the range from 90 percent up to 110 percent of the published FMR for a unit size.

(1) The PHA may establish a payment standard amount within the basic range without HUD approval or prior notification to HUD.

(2) The PHA's basic range payment standard amount for each unit size may be based on the same percentage of the published FMR (*i.e.,* all payment standard amounts may be set at 100 percent of the FMR), or the PHA may establish different payment standard amounts for different unit sizes (for example, 90 percent for efficiencies, 100 percent for 1-bedroom units, 110 percent for larger units).

(3) The PHA must revise its payment standard amounts and schedule no later than 3 months following the effective date of the published FMR if revisions are necessary to stay within the basic range.

(d) *Exception payment standard amounts.* An exception payment standard amount is a dollar amount that exceeds 110 percent of the published FMR.

(1) The PHA may establish exception payment standard amounts for all units, or for units of a particular size. The exception payment standard may be established for a designated part of the FMR area (called an ''exception area'') or for the entire FMR area. The exception area must meet the minimum area requirement at § 982.503(a)(3)(ii).

(2) A PHA that is not in a designated Small Area FMR area or has not opted voluntarily to implement Small Area FMRs under 24 CFR 888.113(c)(3) may establish exception payment standards for a ZIP code area that exceed the basic range for the metropolitan area or county FMR as long as the amounts established by the PHA do not exceed 110 percent of the HUD published SAFMR for the applicable ZIP code. The exception payment standard must apply to the entire ZIP code area. If an exception area crosses one or more FMR boundaries, then the maximum exception payment standard amount that a PHA may adopt for the exception area without HUD approval is 110 percent of the ZIP code area with the lowest SAFMR amount. If the PHA qualifies for an exception payment standard above 110 percent of the applicable FMR under paragraph (d)(3) or (4) of this section, it may establish exception payment standards up to the same percentage of the SAFMR for the applicable ZIP code.

(3) A PHA may establish exception payment standard amounts between 110 percent and 120 percent of the applicable FMR for such duration as HUD specifies by notice upon notification to HUD that the PHA meets at least one of the following criteria:

(i) Fewer than 75 percent of the families to whom the PHA issued tenant-based rental vouchers during the most recent 12-month period for which there is success rate data available have become participants in the voucher program;

(ii) More than 40 percent of families with tenant-based rental assistance administered by the agency pay more than 30 percent of adjusted income as the family share; or

(iii) Such other criteria as the Secretary establishes by notice.

(4) Except as provided in paragraphs (d)(2), (3), and (5) of this section, the PHA must request approval from HUD to establish an exception payment standard amount that exceeds 110 percent of the applicable FMR. In its request to HUD, the PHA must provide rental market data demonstrating that the requested exception payment standard amount is needed for families to access rental units. The rental market data must include a rent estimate for the entire FMR area compared with a rent estimate for the proposed exception area. To apply the exception payment standard to the entire FMR area, the rental market data provided by the PHA must also provide data that demonstrates that the annual percentage of rent inflation in the FMR area is greater than the rental inflation adjustment factor in the calculation of the published FMR. Once HUD has approved the exception payment standard for the requesting PHA, any other PHA with jurisdiction in the HUD approved exception payment standard area may also use the exception payment standard amount.

(5) If required as a reasonable accommodation in accordance with 24 CFR part 8 for a person with a disability, the PHA may establish, without HUD approval or prior notification to HUD, an exception payment standard amount for an individual family that does not exceed 120 percent of the applicable FMR. A PHA may establish a payment standard greater than 120 percent of the applicable FMR as a reasonable accommodation for a person with a disability in accordance with 24 CFR part 8, after requesting and receiving HUD approval.

(e) *Payment standard amount below 90 percent of the applicable FMR.* HUD may consider a PHA request for approval to establish a payment standard amount that is lower than the basic range. At HUD's sole discretion, HUD may approve PHA establishment of a payment standard lower than the basic range. In determining whether to approve the PHA request, HUD will consider appropriate factors, including rent burden of families assisted under the program. Unless it is necessary to prevent termination of program participants, HUD will not approve a lower payment standard if the proposed payment standard would, if it were used to calculate the housing assistance payments for current participants in the PHA's voucher program using currently available data, cause the family share for more than 40 percent of participants with tenant-based rental assistance to exceed 30 percent of adjusted monthly income.

(f) *Phaseout of success rate payment standard amounts.* HUD will no longer approve success rate payment standards. However, a PHA that was approved to establish a success rate payment standard amount under this paragraph as in effect prior to June 6, 2024 shall not be required to reduce such payment standard amount as a result of the discontinuance of success rate payment standards.

(g) *Payment standard protection for PHAs that meet deconcentration objectives.* This paragraph applies only to a PHA with jurisdiction in an FMR area where the FMR had previously been set at the 50th percentile rent to provide a broad range of housing opportunities throughout a metropolitan area, pursuant to 24 CFR 888.113(i)(3), but is now set at the 40th percentile rent.

(1) Such a PHA may obtain HUD Field Office approval of a payment standard amount based on the 50th percentile rent if the PHA scored the maximum number of points on the deconcentration bonus indicator in 24 CFR 985.3(h) in the prior year, or in two of the last three years.

(2) HUD approval of payment standard amounts based on the 50th percentile rent shall be for all unit sizes in the FMR area that had previously been set at the 50th percentile rent pursuant to 24 CFR 888.113(i)(3). A PHA may opt to establish a payment standard amount based on the 50th

percentile rent for one or more unit sizes in all or a designated part of the PHA jurisdiction within the FMR area.

(h) *HUD review of PHA payment standard schedules.* (1) HUD will monitor rent burdens of families assisted with tenant-based rental assistance in a PHA's voucher program. HUD will review the PHA's payment standard for a particular unit size if HUD finds that 40 percent or more of such families occupying units of that unit size currently pay more than 30 percent of adjusted monthly income as the family share. Such determination may be based on the most recent examinations of family income.

(2) After such review, HUD may, at its discretion, require the PHA to modify payment standard amounts for any unit size on the PHA payment standard schedule. HUD may require the PHA to establish an increased payment standard amount within the basic range.

■ 71. Amend § 982.505 by revising and republishing paragraph (c) and removing paragraph (d) to read as follows:

§ 982.505 How to calculate housing assistance payment.

* * * * *

(c) Payment standard for family—(1) *Applying the payment standard.* The payment standard for the family is the lower of:

(i) The payment standard amount for the family unit size; or

(ii) The payment standard amount for the size of the dwelling unit rented by the family.

(2) *Separate payment standards.* If the PHA has established a separate payment standard amount for a designated part of an FMR area in accordance with § 982.503 (including an exception payment standard amount as determined in accordance with § 982.503(d)), and the dwelling unit is located in such designated part, the PHA must use the appropriate payment standard amount for such designated part to calculate the payment standard for the family.

(3) *Decrease in the payment standard amount during the HAP contract term.* The PHA may choose not to reduce the payment standard amount used to calculate the subsidy for a family for as long as the family continues to reside in the unit for which the family is receiving assistance.

(i) If the PHA chooses to reduce the payment standard amount used to calculate such a family's subsidy in accordance with its Administrative Plan, then the initial reduction to the family's payment standard amount may not be applied any earlier than two years following the effective date of the decrease in the payment standard, and then only if the family has received the notice required under paragraph (c)(3)(iii) of this section.

(ii) The PHA may choose to reduce the payment standard amount for the family to the current payment standard amount in effect on the PHA voucher payment standard schedule, or it may reduce the payment standard amount to an amount that is higher than the normally applicable payment standard amount on the PHA voucher payment standard schedule. After an initial reduction, the PHA may further reduce the payment standard amount for the family during the time the family resides in the unit, provided any subsequent reductions continue to result in a payment standard amount that meets or exceeds the normally applicable payment standard amount on the PHA voucher payment standard schedule.

(iii) The PHA must provide the family with at least 12 months' written notice of any reduction in the payment standard amount that will affect the family if the family remains in place. In the written notice, the PHA must state the new payment standard amount, explain that the family's new payment standard amount will be the greater of the amount listed in the current written notice or the new amount (if any) on the PHA's payment standard schedule at the end of the 12-month period, and make clear where the family will find the PHA's payment standard schedule.

(iv) The PHA must administer decreases in the payment standard amount for the family in accordance with the PHA policy as described in the PHA Administrative Plan.

(4) *Increase in the payment standard amount during the HAP contract term.* If the payment standard amount is increased during the term of the HAP contract, the PHA must use the increased payment standard amount to calculate the monthly housing assistance payment for the family beginning no later than the earliest of:

(i) The effective date of an increase in the gross rent that would result in an increase in the family share;

(ii) The family's first regular or interim reexamination; or

(iii) One year following the effective date of the increase in the payment standard amount.

(5) *PHA policy on payment standard increases.* The PHA may adopt a policy to apply a payment standard increase at any time earlier than the date calculated according to paragraph (c)(4).

(6) *Changes in family unit size during the HAP contract term.* Irrespective of any increase or decrease in the payment standard amount, if the family unit size either increases or decreases during the HAP contract term, the new family unit size may be used to determine the payment standard amount for the family immediately but no later than the family's first regular reexamination following the change in family unit size.

■ 72. Amend § 982.517 by revising the first sentence of paragraph (a)(2), and paragraphs (b) and (e) to read as follows:

§ 982.517 Utility allowance schedule.

(a) * * *

(2) The PHA must provide a copy of the utility allowance schedule to HUD. * * *

(b) *How allowances are determined.* (1)(i) A PHA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with HQS. The PHA's utility allowance schedule and utility allowance for families must also include any utilities and services required by HUD after publication in the **Federal Register** for public comment.

(ii) In the utility allowance schedule, the PHA must classify utilities and other housing services according to the following general categories: space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); applicable surcharges; and other specified housing services.

(iii) The PHA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air conditioners.

(iv) The PHA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television.

(2)(i) The PHA must maintain an area-wide utility allowance schedule. The area-wide utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.

(ii) The PHA may maintain an area-wide, energy-efficient utility allowance schedule to be used for units that are in a building that meets Leadership in

Energy and Environmental Design (LEED) or Energy Star standards. HUD may subsequently identify additional Energy Savings Design standards or criteria for applying the allowance to retrofitted units in a building that does not meet the standard, which will be modified or added through a document published in the **Federal Register** for 30 days of public comment, followed by a final document announcing the modified standards and the date on which the modifications take effect. The energy-efficient utility allowance (EEUA) schedule is to be maintained in addition to, not in place of, the area-wide utility allowance schedule described in paragraph (b)(2)(i) of this section, unless all units within a PHA's jurisdiction meet one or more of the required standards.

(iii) The PHA may base its utility allowance payments on actual flat fees charged by an owner for utilities that are billed directly by the owner, but only if the flat fee charged by the owner is no greater than the PHA's applicable utility allowance for the utilities covered by the fee. If an owner charges a flat fee for only some of the utilities, then the PHA must pay a separate allowance for any tenant-paid utilities that are not covered in the flat fee.

(iv) For tenant-based participants residing in units within a project that has an approved project-specific utility allowance under § 983.301(f)(4), the PHA must use the project-specific utility allowance schedule (see 24 CFR 983.301(f)(4)).

(v) The PHA must state its policy for utility allowance payments in its Administrative Plan and apply it consistently to all similarly situated households.

* * * * *

(e) *Higher utility allowance as reasonable accommodation for a person with disabilities.* On request from a household that includes a person with disabilities, the PHA must approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation under 24 CFR part 8, the Fair Housing Act and 24 CFR part 100, or Titles II or III of the Americans with Disabilities Act and 28 CFR parts 35 and 36, to make the program accessible to and usable by the household member with a disability.

§ 982.552 [AMENDED]

■ 73. Amend § 982.552 by removing paragraph (c)(1)(viii) and redesignating paragraphs (c)(1)(ix) through (xi) as paragraphs (c)(1)(viii) through (x) respectively.

■ 74. Amend § 982.605 by revising the first sentence of paragraph (a) to read as follows:

§ 982.605 SRO: Housing quality standards.

(a) * * * As defined in § 982.4, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for housing assisted under the HCV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3). * * *

* * * * *

■ 75. Amend § 982.609 by revising the first sentence of paragraph (a) to read as follows:

§ 982.609 Congregate housing: Housing quality standards.

(a) * * * As defined in § 982.4, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for housing assisted under the HCV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3). * * *

* * * * *

■ 76. Amend § 982.614 by revising paragraph (a) to read as follows:

§ 982.614 Group home: Housing quality standards.

(a) *Compliance with HQS.* The PHA may not give approval to reside in a group home unless the unit, including the portion of the unit available for use by the assisted person under the lease, meets HQS. As defined in § 982.4, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for housing assisted under the HCV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3).

* * * * *

■ 77. Amend § 982.618 by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

§ 982.618 Shared housing: Housing quality standards.

(a) *Compliance with HQS.* The PHA may not give approval to reside in shared housing unless the entire unit, including the portion of the unit available for use by the assisted family under its lease, meets HQS.

(b) * * * As defined in § 982.4, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for housing assisted under the HCV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3). * * *

* * * * *

■ 78. Amend § 982.621 by revising the first sentence of the introductory text to read as follows:

§ 982.621 Manufactured home space rental: Housing quality standards.

As defined in § 982.4, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for housing assisted under the HCV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3). * * *

* * * * *

■ 79. Revise § 982.623 to read as follows:

§ 982.623 Manufactured home space rental: Housing assistance payment.

(a) *Amount of monthly housing assistance payment.* The monthly housing assistance payment is calculated as the lower of:

(1) The PHA payment standard, determined in accordance with § 982.503 minus the total tenant payment; or

(2) The family's eligible housing expenses minus the total tenant payment.

(b) *Eligible housing expenses.* The family's eligible housing expenses are the total of:

(1) The rent charged by the owner for the manufactured home space.

(2) Charges for the maintenance and management the space owner must provide under the lease.

(3) The monthly payments made by the family to amortize the cost of purchasing the manufactured home established at the time of application to a lender for financing the purchase of the manufactured home if monthly payments are still being made, including any required insurance and property taxes included in the loan payment to the lender.

(i) Any increase in debt service or term due to refinancing after purchase of the home may not be included in the amortization cost.

(ii) Debt service for installation charges incurred by a family may be included in the monthly amortization payments. Installation charges incurred before the family became an assisted family may be included in the amortization cost if monthly payments are still being made to amortize the charges.

(4) The applicable allowances for tenant-paid utilities, as determined under §§ 982.517 and 982.624.

(c) *Distribution of housing assistance payment.* In general, the monthly housing assistance payment is distributed as follows:

(1) The PHA pays the owner of the space the lesser of the housing assistance payment or the portion of the monthly rent due to the owner. The

portion of the monthly rent due to the owner is the total of:

(i) The actual rent charged by the owner for the manufactured home space; and

(ii) Charges for the maintenance and management the space owner must provide under the lease.

(2) If the housing assistance payment exceeds the portion of the monthly rent due to the owner, the PHA may pay the balance of the housing assistance payment to the family. Alternatively, the PHA may pay the balance to the lender or utility company, in an amount no greater than the amount due for the month to each, respectively, subject to the lender's or utility company's willingness to accept the PHA's payment on behalf of the family. If the PHA elects to pay the lender or the utility company directly, the PHA must notify the family of the amount paid to the lender or the utility company and must pay any remaining balance directly to the family.

(d) *PHA option: Single housing assistance payment to the family.* (1) If the owner of the manufactured home space agrees, the PHA may make the entire housing assistance payment to the family, and the family shall be responsible for paying the owner directly for the full amount of rent of the manufactured home space due to the owner, including owner maintenance and management charges. If the PHA exercises this option, the PHA may not make any payments directly to the lender or utility company.

(2) The PHA and owner of the manufactured home space must still execute the HAP contract, and the owner is still responsible for fulfilling all of the owner obligations under the HAP contract, including but not limited to complying with HQS and rent reasonableness requirements. The owner's acceptance of the family's monthly rent payment during the term of the HAP contract serves as the owner's certification to the reasonableness of the rent charged for the space in accordance with § 982.622(b)(4).

(3) If the family and owner agree to the single housing assistance payment, the owner is responsible for collecting the full amount of the rent and other charges under the lease directly from the family. The PHA is not responsible for any amounts owed by the family to the owner and may not pay any claim by the owner against the family.

■ 80. Amend § 982.625 by adding headings to paragraphs (a), (b), (c)(1), (f), and (g) to read as follows:

§ 982.625 Homeownership option: General.

(a) *Applicability.* * * *

(b) *Family status.* * * *

(c) * * *

(1) *Allowable forms of homeownership assistance.* * * *

* * * * *

(f) *Live-in aide.* * * *

(g) *PHA capacity.* * * *

* * * * *

■ 81. Amend § 982.628 by:

■ a. In paragraph (a)(1), removing '', (a)(7)'' from the citation; and

■ b. Revising paragraphs (d) introductory text, (d)(3) introductory text, and (e)(3).

The revisions read as follows:

§ 982.628 Homeownership option: Eligible units.

* * * * *

(d) *PHA-owned units.* A family may purchase a PHA-owned unit, as defined in § 982.4, with homeownership assistance only if the following conditions are satisfied:

* * * * *

(3) The PHA must obtain the services of an independent entity, as defined in § 982.4 and in accordance with § 982.352(b)(1)(v)(B), to perform the following PHA functions:

* * * * *

(e) * * *

(3) The unit has passed the required HQS inspection (see § 982.631(a)) and independent inspection (see § 982.631(b)).

■ 82. Amend § 982.630 by:

■ a. Adding headings to paragraphs (a), (b), (c), and (d); and

■ b. Revising paragraph (e).

The revision and additions read as follows:

§ 982.630 Homeownership option: Homeownership counseling.

(a) *Pre-assistance counseling.* * * *

(b) *Counseling topics.* * * *

(c) *Local circumstances.* * * *

(d) *Additional counseling.* * * *

(e) *HUD-certified housing counselor.* Any homeownership counseling provided to families in connection with this section must be conducted by a HUD certified housing counselor working for an agency approved to participate in HUD's Housing Counseling Program.

■ 83. Amend § 982.635 by:

■ a. Revising paragraph (b)(3); and

■ b. In paragraphs (c)(2)(vii) and (3)(vii), removing ''part 8 of this title'' and adding, in its place, ''parts 8 and 100 of this title''.

The revision reads as follows:

§ 982.635 Homeownership option: Amount and distribution of monthly homeownership assistance payment.

* * * * *

(b) * * *

(3) The payment standard amount may not be lower than what the payment standard amount was at commencement of homeownership assistance.

* * * * *

■ 84. Amend § 982.641 by removing ''and'' from the end of paragraph (d)(2), revising paragraph (d)(3), adding paragraph (d)(4), and revising paragraph (f)(3) to read as follows:

§ 982.641 Homeownership option: Applicability of other requirements.

* * * * *

(d) * * *

(3) Section 982.405 (PHA unit inspection); and

(4) Section 982.406 (Use of alternative inspections).

* * * * *

(f) * * *

(3) Section 982.517 (Utility allowance schedule), except that § 982.517(d) does not apply because the utility allowance is always based on the size of the home bought by the family with homeownership assistance.

* * * * *

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

■ 85. The authority for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

Subpart A—General

■ 86. Amend § 983.2 by revising and republishing paragraph (c) to read as follows:

§ 983.2 When the tenant-based voucher rule (24 CFR part 982) applies.

* * * * *

(c) *Specific 24 CFR part 982 provisions that do not apply to PBV assistance.* The following specific provisions in 24 CFR part 982 do not apply to PBV assistance under part 983:

(1) In subpart D of part 982: paragraph (e)(2) of 24 CFR 982.158;

(2) In subpart E of part 982: paragraph (e) of 24 CFR 982.201, paragraph (b)(2) of 24 CFR 982.202, and paragraph (d) of 24 CFR 982.204;

(3) Subpart G of part 982 does not apply, with the following exceptions:

(i) Section 982.310 (owner termination of tenancy) applies to the PBV program, but to the extent that those provisions differ from § 983.257, the provisions of § 983.257 govern; and

(ii) Section 982.312 (absence from unit) applies to the PBV Program, but to the extent that those provisions differ from § 983.256(g), the provisions of § 983.256(g) govern; and

(iii) Section 982.316 (live-in aide) applies to the PBV Program;

(4) Subpart H of part 982;

(5) In subpart I of part 982: 24 CFR 982.401; paragraphs (a)(3), (c), and (d) of 24 CFR 982.402; 24 CFR 982.403; 24 CFR 982.404; paragraphs (a), (b), (d), (i), and (j) of 24 CFR 982.405; paragraphs (a), (e), and (f) of 24 CFR 982.406; and 24 CFR 982.407;

(6) In subpart J of part 982: paragraphs (a), (b)(3), (b)(4), and (c) of § 982.451; and § 982.455;

(7) Subpart K of part 982: subpart K does not apply, except that the following provisions apply to the PBV Program:

(i) In 24 CFR 982.503, paragraphs (a)(1) and (d)(1)–(4) do apply;

(ii) Section 982.516 (family income and composition; regular and interim examinations);

(iii) Section 982.517 of this title (utility allowance schedule), except that 24 CFR 982.517(d) does not apply.

(8) In subpart M of part 982:

(i) Sections 982.603, 982.607, 982.611, 982.613(c)(2), 982.619(a), (b)(1), (b)(4), (c); and

(ii) Provisions concerning shared housing (§ 982.615 through § 982.618), manufactured home space rental (§ 982.622 through § 982.624), and the homeownership option (§ 982.625 through § 982.641).

■ 87. Revise and republish § 983.3 to read as follows:

§ 983.3 PBV definitions.

(a) *General.* This section defines PBV terms used in this part. For administrative ease and convenience, those part 982 terms that are also used in this part are identified in this section. In limited cases, where there is a slight difference with the part 982 term, an annotation is made in this section.

(b) *Definitions.* The following definitions apply to this part:

Abatement. See 24 CFR 982.4.

Administrative fee. See 24 CFR 982.4.

Administrative fee reserve. See 24 CFR 982.4.

Administrative Plan. See 24 CFR 982.4.

Admission. The point when the family becomes a participant in the PHA's tenant-based or project-based voucher program. If the family is not already a tenant-based voucher participant, the date of admission for the project-based voucher program is the first day of the initial lease term (the commencement of the assisted tenancy) in the PBV unit. After admission, and so long as the family is continuously assisted with tenant-based or project-based voucher assistance from the PHA, a shift from tenant-based or project-based assistance to the other form of voucher assistance is not a new admission.

Agreement to enter into HAP contract (Agreement). A written contract between the PHA and the owner in the form prescribed by HUD. The Agreement defines requirements for development activity undertaken for units to be assisted under this section. When development is completed by the owner in accordance with the Agreement, the PHA enters into a HAP contract with the owner. The Agreement is not used for existing housing assisted under this section.

Applicant. A family that has applied for admission to the PBV program but is not yet a program participant.

Area where vouchers are difficult to use. An area where a voucher is difficult to use is:

(i) A census tract with a poverty rate of 20 percent or less, as determined by HUD;

(ii) A ZIP code area where the rental vacancy rate is less than 4 percent, as determined by HUD; or

(iii) A ZIP code area where 90 percent of the Small Area FMR is more than 110 percent of the metropolitan area or county FMR.

Assisted living facility. A residence facility (including a facility located in a larger multifamily property) that meets all the following criteria:

(i) The facility is licensed and regulated as an assisted living facility by the State, municipality, or other political subdivision;

(ii) The facility makes available supportive services to assist residents in carrying out activities of daily living; and

(iii) The facility provides separate dwelling units for residents and includes common rooms and other facilities appropriate and available to provide supportive services for the residents.

Authorized voucher units. See 24 CFR 982.4.

Budget authority. See 24 CFR 982.4.

Building. See 24 CFR 982.4.

Comparable tenant-based rental assistance. A tenant-based subsidy to enable a family to obtain decent, safe, and sanitary housing in the PHA jurisdiction, which meets the following minimum requirements:

(i) The family's monthly payment is not more than 40 percent of the family's adjusted monthly gross income;

(ii) The rental assistance contains no limitation as to the length of time the family may receive the assistance;

(iii) The family is not required to be employed, to seek employment, or to participate in supportive services in order to receive the rental assistance; and

(iv) The family is able to use the rental assistance in one or more other PHAs' jurisdictions.

Congregate housing. See 24 CFR 982.4.

Continuously assisted. See 24 CFR 982.4.

Contract units. The housing units covered by a HAP contract.

Cooperative. See 24 CFR 982.4.

Cooperative member. See 24 CFR 982.4.

Covered housing provider. For the PBV program, ''covered housing provider,'' as such term is used in HUD's regulations in 24 CFR part 5, subpart L (Protection for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking) refers to the PHA or owner (as defined in 24 CFR 982.4), as applicable given the responsibilities of the covered housing provider as set forth in 24 CFR part 5, subpart L. For example, the PHA is the covered housing provider responsible for providing the notice of occupancy rights under VAWA and certification form described at 24 CFR 5.2005(a). In addition, the owner is the covered housing provider that may choose to bifurcate a lease as described at 24 CFR 5.2009(a), while the PHA is the covered housing provider responsible for complying with emergency transfer plan provisions at 24 CFR 5.2005(e).

Development activity. New construction or rehabilitation work done after the proposal or project selection date in order for a newly constructed or rehabilitated housing project to be covered by a PBV HAP contract, including work done pursuant to a rider to the HAP contract in accordance with § 983.157.

Excepted units. Units in a project not counted toward the project cap because they exclusively serve or are made available to certain families. See § 983.54(c)(2).

Excluded units. Units in a project not counted toward the program cap or project cap because they meet certain criteria. See § 983.59.

Existing housing. A project that meets the following criteria:

(i) All the proposed contract units in the project either fully comply or substantially comply with HQS on the proposal or project selection date, as determined per § 983.103(a). (The units must fully comply with HQS at the time

required by § 983.103(c)). The units substantially comply with HQS if:

(A) The units only require repairs to current components or replacement of equipment and/or materials by items of substantially the same kind to correct deficiencies; and

(B) The PHA determines all deficiencies can reasonably be corrected within a 30-day period, taking into consideration the totality of the deficiencies in the project.

(ii) The PHA determines the project is not reasonably expected to require substantial improvement and the owner certifies it has no plans to undertake substantial improvement from the proposal submission date (for projects subject to competitive selection) or the project selection date (for projects excepted from competitive selection) through the first two years of the HAP contract.

Family. See 24 CFR 982.4.

Family self-sufficiency program. See 24 CFR 982.4.

Gross rent. See 24 CFR 982.4.

Group home. See 24 CFR 982.4.

HAP contract. See 24 CFR 982.4.

Household. See 24 CFR 5.100.

Housing assistance payment. The monthly assistance payment for a PBV unit by a PHA, which includes:

(i) A payment to the owner for rent to owner under the family's lease minus the tenant rent; and

(ii) An additional payment to or on behalf of the family, if the utility allowance exceeds the total tenant payment, in the amount of such excess.

Housing credit agency. For purposes of performing subsidy layering reviews for proposed PBV projects, a housing credit agency includes a State housing finance agency, a State participating jurisdiction under HUD's HOME program (see 24 CFR part 92), or other State housing agencies that meet the definition of ''housing credit agency'' as defined by Section 42 of the Internal Revenue Code of 1986.

Housing quality standards (HQS). The minimum quality standards developed by HUD in accordance with 24 CFR 5.703 for the PBV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3).

Independent entity. See 24 CFR 982.4, except that the independent entity is subject to the requirements in § 983.57 (instead of 24 CFR 982.352(b) and 24 CFR 982.628(d)) for the PBV program.

Initial rent to owner. See 24 CFR 982.4.

In-place family. A family residing in a proposed contract unit on the proposal or project selection date.

Jurisdiction. See 24 CFR 982.4.

Lease. See 24 CFR 982.4.

Manufactured home. See 24 CFR 982.4.

Multifamily building. A building with five or more dwelling units (assisted or unassisted).

Newly constructed housing. A project containing housing units that do not exist on the proposal or project selection date and are developed after the date of selection for use under the PBV program.

Owner. See 24 CFR 982.4.

Partially assisted project. A project in which there are fewer contract units than residential units.

Participant. A family that has been admitted and is currently assisted in the PBV (or HCV) program. If the family is not already a tenant-based voucher participant, the family becomes a participant on the effective date of the initial lease term (the commencement of the assisted tenancy) in the PBV unit.

PHA Plan. See 24 CFR 982.4.

PHA-owned unit. See 24 CFR 982.4.

Premises. The project in which the contract unit is located, including common areas and grounds.

Program. The voucher program under Section 8 of the 1937 Act, including tenant-based or project-based assistance.

Program receipts. See 24 CFR 982.4.

Project. A project can be a single building, multiple contiguous buildings, or multiple buildings on contiguous parcels of land. ''Contiguous'' in this definition includes ''adjacent to,'' as well as touching along a boundary or a point. A PHA may, in its Administrative Plan, establish the circumstances under which it will define a project as only one of the following: a single building, multiple contiguous buildings, or multiple buildings on contiguous parcels of land.

Proposal or project selection date. See § 983.51(g).

Public housing agency (PHA). See 24 CFR 982.4.

Reasonable rent. See 24 CFR 982.4.

Rehabilitated housing. A project which is developed for use under the PBV program, in which all proposed contract units exist on the proposal or project selection date, but which does not qualify as existing housing.

Rent to owner. The total monthly rent payable by the family and the PHA to the owner under the lease for a contract unit. Rent to owner includes payment for any housing services, maintenance, and utilities to be provided by the owner in accordance with the lease. (Rent to owner must not include charges for non-housing services including payment for food, furniture, or supportive services provided in accordance with the lease.)

Responsible entity (RE) (for environmental review). The unit of general local government within which the project is located that exercises land use responsibility or, if HUD determines this infeasible, the county or, if HUD determines that infeasible, the State.

Single-family building. A building with no more than four dwelling units (assisted or unassisted).

Single room occupancy housing (SRO). See 24 CFR 982.4.

Site. The grounds where the contract units are located or will be located after development.

Small Area Fair Market Rents (SAFMRs). See 24 CFR 982.4. (See also 24 CFR 888.113(c)(5).)

Special housing type. Subpart M of 24 CFR part 982 states the special regulatory requirements for different special housing types. Subpart M provisions on shared housing, manufactured home space rental, and the homeownership option do not apply to PBV assistance under this part.

Subsidy standards. See 24 CFR 982.4.

Substantial improvement. One of the following activities undertaken at a time beginning from the proposal submission date (for projects subject to competitive selection) or from the project selection date (for projects excepted from competitive selection), or undertaken during the term of the PBV HAP contract:

(i) Remodeling that alters the nature or type of housing units in a project;

(ii) Reconstruction; or

(iii) A substantial improvement in the quality or kind of equipment and materials. The replacement of equipment and/or materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does not constitute substantial improvement.

Tenant. See 24 CFR 982.4.

Tenant rent. The amount payable monthly by the family as rent to the unit owner, as described in § 983.353(b). (See also 24 CFR 5.520(c)(1)).

Tenant-paid utilities. See 24 CFR 982.4.

Total tenant payment. See 24 CFR 5.628.

Utility allowance. See 24 CFR 5.603.

Utility reimbursement. See 24 CFR 5.603.

Waiting list admission. An admission from the PHA- or owner-maintained PBV waiting list in accordance with § 983.251.

Wrong-size unit. A unit occupied by a family that does not conform to the PHA's subsidy standard for family size, by being either too large or too small compared to the standard.

§ 983.4 [Amended]

■ 88. Amend § 983.4 by removing the provision for ''*Definitions.*''.

■ 89. Revise and republish § 983.5 to read as follows:

§ 983.5 Description of the PBV program.

(a) *How PBV works.* (1) The PBV program is administered by a PHA that already administers the tenant-based voucher program under the consolidated annual contributions contract (ACC) in 24 CFR 982.151. In the PBV program, the assistance is ''attached to the structure,'' which may be a multifamily building or single-family building. (See description of the difference between ''project-based'' and ''tenant-based'' rental assistance at 24 CFR 982.1(b)).

(2) The PHA enters into a HAP contract with an owner for units in existing housing or in newly constructed or rehabilitated housing.

(3) In the case of new construction or rehabilitation, the owner may develop the housing pursuant to an Agreement (§ 983.154) between the owner and the PHA. In the Agreement, the PHA agrees to execute a HAP contract after the owner completes the construction or rehabilitation of the units. Alternatively:

(i) The owner may develop the housing without an Agreement, before execution of a HAP contract, in accordance with § 983.154(f); or

(ii) In the case of rehabilitation, the owner may develop the housing or complete development activity after execution of the HAP contract, in accordance with § 983.157.

(4) During the term of the HAP contract, the PHA makes housing assistance payments to the owner for units leased and occupied by eligible families.

(b) *How PBV is funded.* If a PHA decides to operate a PBV program, the PHA's PBV program is funded with a portion of appropriated funding (budget authority) available under the PHA's voucher ACC. This funding is used to pay housing assistance for both tenant-based and project-based voucher units. Likewise, the administrative fee funding made available to a PHA is used for the administration of both tenant-based and project-based voucher assistance.

(c) *PHA discretion to operate PBV program.* A PHA has discretion whether to operate a PBV program. HUD approval is not required, except that the PHA must notify HUD of its intent to project-base its vouchers and when the PHA executes, amends, or extends a HAP contract. The PHA must also state in its Administrative Plan that it will engage in project-basing and must amend its Administrative Plan to include all PBV-related matters over which the PHA is exercising its policymaking discretion, including the subjects listed in § 983.10, as applicable.

■ 90. Revise and republish § 983.6 to read as follows:

§ 983.6 Maximum number of PBV units (percentage limitation).

(a) *In general.* Except as provided in paragraphs (d) and (e) of this section, a PHA may commit project-based assistance to no more than 20 percent of its authorized voucher units, as adjusted as provided in paragraph (e) of this section, at the time of commitment. An analysis of impact must be conducted in accordance with § 983.58, if a PHA is project-basing 50 percent or more of the PHA's authorized voucher units.

(1) A PHA is not required to reduce the number of units to which it has committed PBV assistance under an Agreement or HAP contract if the number of authorized voucher units is subsequently reduced and the number of PBV units consequently exceeds the program limitation.

(2) A PHA that was within the program limit prior to April 18, 2017, and exceeded the program limit on that date due solely to the change in how the program cap is calculated is not required to reduce the number of PBV units under an Agreement or HAP contract.

(3) In the circumstances described in paragraphs (a)(1) and (2) of this section, the PHA may not add units to PBV HAP contracts, or enter into new Agreements or HAP contracts (except for HAP contracts resulting from Agreements entered into before the reduction of authorized units or April 18, 2017, as applicable), unless such units meet the conditions described in paragraph (d) or (e) of this section.

(b) *Units subject to percentage limitation.* All PBV units which the PHA has selected (from the time of the proposal or project selection date) or which are under an Agreement or HAP contract for PBV assistance count toward the 20 percent maximum or increased cap, as applicable, except as provided in paragraph (e).

(c) *PHA determination.* The PHA is responsible for determining the amount of budget authority that is available for project-based vouchers and for ensuring that the amount of assistance that is attached to units is within the amounts available under the ACC.

(d) *Increased cap.* A PHA may project-base an additional 10 percent of its authorized voucher units at the time of commitment, as adjusted as provided in paragraph (e) of this section, provided the additional units meet the conditions in paragraphs (d)(1) or (2) of this section:

(1) The units are part of a HAP contract executed on or after April 18, 2017, or are added on or after that date to any current HAP contract, including a contract entered into prior to April 18, 2017, and the units fall into at least one of the following categories:

(i) The units are specifically made available to house individuals and families that meet the definition of homeless under Section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302), included in 24 CFR 578.3.

(ii) The units are specifically made available to house families that are comprised of or include a veteran. For purposes of the increased cap, a veteran means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom.

(iii) The units provide supportive housing to persons with disabilities or to elderly persons, as defined in 24 CFR 5.403. Supportive housing means that the project makes supportive services available for all of the assisted families in the project and provides a range of services tailored to the needs of the residents occupying such housing. Such supportive services need not be provided by the owner or on site but must be reasonably available to the families receiving PBV assistance in the project. The PHA's Administrative Plan must describe the type and availability of supportive services the PHA will consider as qualifying for the 10 percent increased cap.

(iv) The units are located in an area where vouchers are difficult to use as defined in § 983.3.

(v) The units replace, on a different site, the units listed in § 983.59(b)(1) and (2) for which the PHA had authority under § 983.59 to commit PBV assistance on the original site without the units counting toward the program cap or project cap. The units are eligible under this category only if the PHA has not committed and will not commit PBV assistance to the original site pursuant to the normally applicable exclusions of those units under § 983.59. If the PHA subsequently plans to commit PBV assistance to units on the original site, those proposed units count toward and must comply with the 20 percent maximum or increased cap of this section, as applicable, and the project cap requirements of § 983.54.

(2) The units are part of a HAP contract executed on or after December 27, 2020, or are added on or after that date to any current HAP contract, including a contract entered into prior to December 27, 2020, and meet the following requirements:

(i) The units are exclusively made available to eligible youth as described in Section 8(x)(2)(B) of the U.S. Housing Act; and

(ii) If the units exclusively made available to eligible youth use Family Unification Program (FUP) assistance that is normally available for eligible families and youth described in Section 8(x)(2) of the U.S. Housing Act, the PHA determines and documents that the limitation of the units to youth is consistent with the local housing needs of both eligible FUP populations (families and youth) and amends its Administrative Plan to specify that FUP PBV assistance is solely for eligible youth.

(3) The PBV HAP contract must specify, and the owner must set aside, the number of units meeting the conditions of paragraphs (d)(1)(i), (ii), (iii) and (d)(2) of this section. To qualify for the increased program cap for units meeting the conditions of paragraphs (d)(1)(i), (ii), (iii) and (d)(2) of this section, the unit must be occupied by the type of family specified in the applicable paragraph consistent with the requirements of § 983.262.

(e) *Units previously subject to federally required rent restrictions or that received long-term rental assistance from HUD.* Units that meet the requirements of § 983.59 do not count toward the program cap. Such units are removed from the number of authorized voucher units for purposes of calculating the percentages under paragraphs (a) and (d) of this section.

■ 91. Revise § 983.10 to read as follows:

§ 983.10 PBV provisions in the Administrative Plan.

(a) *PHA policymaking discretion.* If a PHA exercises its discretion to operate a PBV program, the PHA's Administrative Plan as required by 24 CFR 982.54 of this title must include all the PHA's local policies on PBV-related matters over which the PHA is exercising its policymaking discretion.

(b) *PHA policies.* The PHA Administrative Plan must cover, at a minimum, the following PHA policies, as applicable:

(1) The definition of ''project'' as consistent with this part (§ 983.3(b));

(2) The program cap:

(i) A description of the types and availability of services that will qualify units under the supportive services authority under the program cap (§ 983.6(d)(1)(iii)); and

(ii) The PHA's policy limiting Family Unification Program assistance normally available for eligible families and youth described in Section 8(x)(2) of the U.S. Housing Act to youth (§ 983.6(d)(2)(ii));

(3) A description of the circumstances under which the PHA will use the competitive and noncompetitive selection methods and the procedures for submission and selection of PBV proposals (§ 983.51(a));

(3) A description of the circumstances under which the PHA will use the competitive and noncompetitive selection methods and the procedures for submission and selection of PBV proposals (§ 983.51(a));

(4) The project cap:

(i) The PHA's policy limiting Family Unification Program assistance normally available for eligible families and youth described in Section 8(x)(2) of the U.S. Housing Act to youth (§ 983.54(c)(2)(ii)); and

(ii) A description of the types and availability of services that will qualify units under the supportive services exception from the project cap (§ 983.54(c)(2)(iii));

(5) The site selection standards:

(i) The PHA's standard for deconcentrating poverty and expanding housing and economic opportunities (§ 983.55(b)(1)); and

(ii) The PHA's site selection policy (§ 983.55(c));

(6) PHA inspection policies:

(i) The timing of an initial inspection of existing housing (§ 983.103(c)(1));

(ii) Whether the PHA adopts for initial inspection of PBV existing housing the non-life-threatening deficiencies option, the alternative inspection option, or both, and whether the PHA adopts for periodic inspection of PBV housing the alternative inspection option. If so, state all policies as required by 24 CFR 982.54(d)(21)(ii) and (iii), as they relate to the PHA's PBV program (§ 983.103(c)(2) through (4) and (e)(3));

(iii) The frequency of periodic inspections (§ 983.103(e) and (i)); and

(iv) Any verification methods other than on-site inspection for different inspection types or for different HQS deficiencies (§ 983.103(h)).

(7) A description of the circumstances (if any) under which the PHA will establish additional requirements for quality, architecture, or design of PBV housing at the time of initial rehabilitation or new construction (§§ 983.154(e)(11), 983.157(e)(4));

(8) A description of the circumstances (if any) under which the PHA will enter a PBV HAP contract for newly constructed and rehabilitated housing without first entering into an Agreement or execute an Agreement after construction or rehabilitation that complied with applicable requirements of § 983.153 has commenced (§ 983.154(f)(1));

(9) The PHA's policy on the form and manner in which the owner must submit evidence and certify that work has been completed (§ 983.155);

(10) Rehabilitated housing developed after HAP contract execution:

(i) A description of the circumstances (if any) under which the PHA will enter a PBV HAP contract for rehabilitated housing that allows for development activity to occur after HAP contract execution (§ 983.157(a)(2));

(ii) The timing of the initial inspection (§ 983.157(c)(4));

(iii) The form and manner of owner notifications of changes in the status of contract units (§ 983.157(e)(5)); and

(iv) The period for compliance (if any) for development activity that has not been completed by the deadline (§ 983.157(h)(1));

(11) The PHA's policy on amending PBV HAP contracts to substitute or add contract units (§ 983.207(f));

(12) PHA housing quality policies;

(i) A description of the circumstances (if any) under which the PHA will establish additional requirements for continued compliance with quality, architecture, or design of PBV housing during the term of the HAP contract (§ 983.208(a)(3));

(ii) The PHA's policy on the conditions under which it will withhold HAP and the conditions under which it will abate HAP or terminate the contract for units other than the unit with HQS deficiencies (§ 983.208(d)); and

(iii) The PHA's policy on assisting families with relocating and finding a new unit (§ 983.208(d)(6)(iii));

(13) A description of the PHA's waiting list policies for admission to PBV units, including any information on the owner waiting list policy (§ 983.251(c) and (e));

(14) A description of the PHA's policy on whether to conduct tenant screening and offer information to an owner (§ 983.255(a)(2) and (c)(4));

(15) The PHA's policy on continued housing assistance for a family that occupies a wrong-sized unit or a unit with accessibility features that the family does not require (§ 983.260(b));

(16) The PHA's policy on a family's right to move:

(i) The form of tenant-based rental assistance that the PHA will offer families (§ 983.261(b)); and

(ii) The procedures for tenants to request tenant-based rental assistance to move (§ 983.261(c));

(17) The PHA's policy regarding which options it will take if a unit is no longer qualified for excepted status or the increased program cap (§ 983.262(b)(4));

(18) The PHA's policy regarding continued occupancy of a unit under

the increased program cap for supportive housing for persons with disabilities or elderly persons and units excepted based on elderly or disabled family status after a change in family composition removing the elderly family member or family member with a disability (§ 983.262(c)(3)(ii), (d)(1), and (d)(2));

(19) The PHA's policy regarding the PHA-determined amount it will use to calculate rent to owner (§ 983.301(b)(1) and (c)(2)(i));

(20) The PHA's policy on the required timing and form of owner requests for a rent increase (§ 983.302(a)(1));

(21) The PHA's policy on providing vacancy payments, including the required form and manner of requests for vacancy payments (§ 983.352(b)(1) and (4));

(22) The PHA's policy on utility reimbursements (§ 983.353(d)(2)); and

(23) The PHA's policy on applying SAFMRs to its PBV program per 24 CFR 888.113(h).

■ 92. Add § 983.11 to subpart A to read as follows:

§ 983.11 Prohibition of excess public assistance.

(a) *PBV assistance for newly constructed and rehabilitated housing.* The PHA may provide PBV assistance for newly constructed and rehabilitated housing only in accordance with HUD subsidy layering regulations (24 CFR 4.13) and other requirements.

(b) *PBV assistance for existing housing.* The subsidy layering requirements are not applicable to existing housing.

(c) *Development activity before HAP contract.* For the subsidy layering requirements related to development activity to place newly constructed or rehabilitated housing under a HAP contract, see § 983.153(b).

(d) *Additional assistance after HAP contract.* (1) For newly constructed or rehabilitated housing under a HAP contract, the owner must disclose to the PHA, in accordance with HUD requirements, information regarding any additional related assistance from the Federal Government, a State, or a unit of general local government, or any agency or instrumentality thereof. Such related assistance includes but is not limited to any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance.

(2) If the additional related assistance in paragraph (d)(1) of this section meets certain threshold and other requirements established by HUD through publication in the **Federal Register**, a subsidy layering review may be required to determine if it would result in excess public assistance to the project.

(3) Housing assistance payments must not be more than is necessary, as determined in accordance with HUD requirements, to provide affordable housing after taking account of such related assistance. The PHA must adjust, in accordance with HUD requirements, the amount of the housing assistance payments to the owner to compensate in whole or in part for such related assistance.

■ 93. Add § 983.12 to subpart A to read as follows:

§ 983.12 Project record retention.

(a) *Records retained according to the contract term.* For each PBV project, the PHA must maintain the following records throughout the HAP contract term and for three years thereafter:

(1) Records to document the basis for PHA selection of the proposal, if selection is competitive, or project, if selection is noncompetitive, including records of the PHA's site selection determination (see § 983.55) and records to document the completion of the review of the selection process in the case of PHA-owned units and copies of the written notice of proposal selection and response of the appropriate party;

(2) The analysis of impact (see § 983.58(b)), if applicable;

(3) The subsidy layering determination, if applicable;

(4) The environmental review record, if applicable;

(5) The Agreement to enter into HAP contract, if applicable;

(6) Evidence of completion (see § 983.155), if applicable;

(7) The HAP contract and any rider and/or amendments, including amendments to extend the term of the contract;

(8) Records to document the basis for PHA determination and redetermination of rent to owner;

(9) Records to document HUD approval of the independent entity or entities, in the case of PHA-owned units;

(10) Records of the accessibility features of the project and each contract unit; and

(11) Other records as HUD may require.

(b) [RESERVED]

■ 94. Revise subpart B to read as follows:

Subpart B—Selection of PBV Proposals and Projects

Sec.

983.51 Proposal and project selection procedures.
983.52 Prohibition of assistance for ineligible units.
983.53 Prohibition of assistance for units in subsidized housing.
983.54 Cap on number of PBV units in each project (income-mixing requirement).
983.55 Site selection standards.
983.56 Environmental review.
983.57 PHA-owned units.
983.58 PHA determination prior to selection.
983.59 Units excepted from program cap and project cap.

Authority: 42 U.S.C. 1437f and 3535(d).

§ 983.51 Proposal and project selection procedures.

(a) *General procedures for submission and selection.* The PHA Administrative Plan must describe the procedures for submission and selection of PBV proposals under the methods of competitive selection in paragraph (b) of this section and selection of projects under an exception to competitive selection under paragraph (c) of this section. The description must include under what circumstances the PHA will use the selection methods described in paragraphs (b) and (c) of this section. The PHA may allow for entities that have site control to submit proposals provided the entity will be the owner prior to entering into the Agreement or HAP contract. Before selecting a PBV proposal or project, the PHA must determine that the PBV proposal or project complies with HUD program regulations and requirements, including a determination that the property is eligible housing (§§ 983.52 and 983.53), complies with the cap on the number of PBV units per project (§ 983.54), and meets the site selection standards (§ 983.55). An owner may submit, and a PHA may select, a single proposal covering multiple projects where each project consists of a single-family building, provided all projects are the same housing type (existing, rehabilitated, or newly constructed).

(b) *Methods of competitive selection.* The PHA must select PBV proposals in accordance with the selection procedures in the PHA Administrative Plan. (See paragraph (f) of this section for information about the selection of PHA-owned units.) The PHA must select PBV proposals by either of the following two methods:

(1) The PHA may issue a request for proposals (RFP), selecting a PBV proposal through a competition. The PHA's RFP may not limit proposals to a single site or impose restrictions that explicitly or practically preclude owner submission of proposals for PBV housing on different sites. A PHA may establish selection procedures in the Administrative Plan that combine or are

in conjunction with other Federal, State, or local government housing assistance, community development, or supportive services competitive selection processes. If the PHA selection process is combined and administered in conjunction with another RFP process, the PHA remains responsible for complying with § 983.51. See § 983.157(a)(2) for additional requirements for an RFP for rehabilitated housing.

(2) The PHA may select, without issuing an RFP, a proposal for housing assisted under a Federal, State, or local government housing assistance, community development, or supportive services program that required competitive selection of proposals, where the proposal has been selected in accordance with such program's competitive selection requirements within three years of the PBV proposal selection date. The PHA may not select a housing assistance proposal using this method if the competition involved any consideration that the project would receive PBV assistance.

(c) *Exceptions to competitive selection.* Prior to selection under this paragraph (c), the PHA must notify the public of its intent to noncompetitively select one or more projects for PBV assistance through its 5-Year Plan.

(1) A PHA engaged in an initiative to improve, develop, or replace a public housing property or site may select for PBV assistance an existing, newly constructed, or rehabilitated project in which the PHA has an ownership interest or over which the PHA has control without following a competitive process.

(i) With respect to replacement housing, the PHA does not have to replace the housing on the same site as the original public housing, but the number of contract units in the replacement project may not exceed the number of units in the original public housing project by more than a de minimis amount for this exception to apply.

(ii) The public housing properties or sites may be in the public housing inventory at the time of project selection or they may have been removed from the public housing inventory through any available legal removal tool within five years of the project selection date.

(2) A PHA may select for future PBV assistance a project currently under the public housing program, or a project that is replacing the public housing project, in which a PHA has no ownership interest, or which a PHA has no control over, without following a competitive process, provided:

(i) The public housing project is either still in the public housing inventory or had been removed from the public housing inventory through any available legal removal tool within five years of the project selection date;

(ii) The PHA that owned or owns the public housing project does not administer the HCV program;

(iii) The project selected for PBV assistance was specifically identified as replacement housing for the impacted public housing residents as part of the public housing demolition/disposition application, voluntary conversion application, or any other application process submitted to and approved by HUD to remove the public housing project from the public housing inventory; and

(iv) With respect to replacement housing, the PHA does not have to replace the housing on the same site as the original public housing, but the number of contract units in the replacement project may not exceed the number of units in the original public housing project by more than a de minimis amount for this exception to apply.

(3) A PHA may select for PBV assistance a project consisting of PHA-owned units as defined at 24 CFR 982.4 without following a competitive process.

(i) The project units must continue to meet the definition of PHA-owned for the initial two years of the HAP contract unless there is a transfer of ownership approved by HUD.

(ii) The PHA must meet any conditions with respect to selection for PBV assistance of a project consisting of PHA-owned units without following a competitive process as may be established by HUD through publication in the **Federal Register** notice after providing opportunity for public comment.

(4) A PHA may select for PBV assistance a project that underwent an eligibility event within five years of the project selection date, in which a family (or families) qualifies for enhanced voucher assistance under Section 8(t) of the Act and provides informed consent to relinquish its enhanced voucher for PBV assistance, without following a competitive process.

(d) *Public notice of PHA request for PBV proposals.* If the PHA will be selecting proposals under paragraph (b)(1) of this section, PHA procedures for selecting PBV proposals must be designed and actually operated to provide broad public notice of the opportunity to offer PBV proposals for consideration by the PHA. The public notice procedures may include publication of the public notice in a local newspaper of general circulation and other means designed and actually operated to provide broad public notice. The public notice of the PHA request for PBV proposals must specify the submission deadline. Detailed application and selection information must be provided at the request of interested parties.

(e) *Inspections required prior to proposal or project selection.* (1) The PHA must examine the proposed site before the proposal or project selection date to determine whether the site complies with the site selection standards in accordance with § 983.55.

(2) The PHA may execute a HAP contract for existing housing if:

(i) All proposed contract units in the project fully or substantially comply with the HQS on the proposal or project selection date, which the PHA must determine via inspection;

(iii) The project meets the initial inspection requirements in accordance with § 983.103(c).

(iii) The project meets the initial inspection requirements in accordance with § 983.103(c).

(f) *PHA written notice of proposal or project selection.* (1) For selection of proposals through competitive methods under paragraph (b) of this section, the PHA must give prompt written notice of proposal selection to the party that submitted a selected proposal and must also give prompt public notice of such selection. The PHA's requirement to provide public notice may be met via publication of the public notice in a local newspaper of general circulation or other means designed and actually operated to provide broad public notice. The written notice of proposal selection must require the owner or party that submitted the selected proposal to provide a written response to the PHA accepting the terms and requirements stated in the notice.

(2) For selection of projects through exceptions to competition under paragraph (c) of this section, the PHA must give prompt written notice of project selection to the owner following the PHA board's resolution approving the project-basing of assistance at the specific project. The written notice of project selection must require the owner of the project selected to provide a written response to the PHA accepting the terms and requirements stated in the notice.

(3) Regardless of the method of selection, if the project contains PHA-owned units that are not owned by a separate legal entity from the PHA, the PHA must provide the written notice of proposal or project selection to the

responsible PHA official, and that official must certify in writing that the PHA accepts the terms and requirements stated in the notice.

(4) When an environmental review is required, if such a review has not been conducted prior to the project or proposal selection date, the PHA's written notice of project or proposal selection must state that the selection is subject to completion of a favorable environmental review and that the project or proposal may be rejected based on the results of the environmental review in accordance with 983.56(c).

(5) See § 983.153(c)(3) for additional notice requirements for newly constructed housing and rehabilitated housing.

(g) *Proposal or project selection date.* (1) The proposal selection date is the date on which the PHA provides written notice to the party that submitted the selected proposal under either paragraph (b)(1) or (2) of this section.

(2) For properties selected in accordance with § 983.51(c), the project selection date is the date of the PHA's board resolution approving the project-basing of assistance at the specific project.

(h) *PHA-owned units.* A PHA-owned unit may be assisted under the PBV program only if the HUD field office or the independent entity reviews the project selection process the PHA undertook and determines that the project was appropriately selected based on the selection procedures specified in the PHA Administrative Plan. Under no circumstance may a HAP contract be effective for any of the subsidized housing types set forth in § 983.53(a). With the exception of projects selected in accordance with § 983.51(c), the PHA's selection procedures must be designed in a manner that does not effectively eliminate the submission of proposals for non-PHA-owned units or give preferential treatment (*e.g.,* additional points) to PHA-owned units.

(i) *Public review of PHA selection decision documentation.* The PHA must make documentation available for public inspection regarding the basis for the PHA selection of a PBV proposal.

(j) *Previous participation clearance.* HUD approval of specific projects or owners is not required. For example, owner proposal selection does not require submission of form HUD–2530 (Previous Participation Certification) or other HUD previous participation clearance.

(k) *Excluded from Federal procurement.* A PHA may not commit project-based assistance to a project if the owner or any principal or interested party is debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424 or is listed on the U.S. General Services Administration list of parties excluded from Federal procurement or non-procurement programs.

§ 983.52 Prohibition of assistance for ineligible units.

(a) *Ineligible unit.* A HAP contract must not be effective and no PBV assistance may be provided for any of the following:

(1) Shared housing;

(2) Units on the grounds of a penal, reformatory, medical, mental, or similar public or private institution;

(3) Nursing homes or facilities providing continuous psychiatric, medical, nursing services, board and care, or intermediate care. However, the PHA may execute a HAP contract and provide PBV assistance for a dwelling unit in an assisted living facility that provides home health care services such as nursing and therapy for residents of the housing;

(4) Units that are owned or controlled by an educational institution or its affiliate and are designated for occupancy by students of the institution;

(5) Manufactured homes are ineligible only if the manufactured home is not permanently affixed to a permanent foundation or the owner does not own fee title to the real property (land) on which the manufactured home is located; and

(6) Transitional Housing.

(b) *Prohibition against assistance for owner-occupied unit.* A HAP contract must not be effective and no PBV assistance may be provided for a unit occupied by an owner of the housing. A member of a cooperative who owns shares in the project assisted under the PBV program shall not be considered an owner for purposes of participation in the PBV program.

(c) *Prohibition against selecting unit occupied by an ineligible family.* Before a PHA places a specific unit under a HAP contract, the PHA must determine whether the unit is occupied and, if occupied, whether the unit's occupants are eligible for assistance in accordance with § 982.201 of this title. Additionally, for a family to be eligible for assistance in the specific unit, the unit must be appropriate for the size of the family under the PHA's subsidy standards and the total tenant payment for the family must be less than the gross rent for the unit, such that the unit will be eligible for a monthly HAP. The PHA must not enter into a HAP contract for a unit occupied by a family ineligible for participation in the PBV program.

(d) *Prohibition against assistance for units for which commencement of construction or rehabilitation occurred in violation of program requirements.* Unless a PHA has exercised the discretion at § 983.154(f), to undertake development activity without an Agreement or to execute an Agreement after construction or rehabilitation that complied with applicable requirements of § 983.153 has commenced, or at § 983.157, to undertake development activity after execution of the HAP contract, the PHA may not execute a HAP contract for units on which construction or rehabilitation commenced after the date of proposal submission (for housing subject to competitive selection) or the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection) and prior to the effective date of an Agreement. At HUD's sole discretion, HUD may approve a PHA's request for an exception to this prohibition. In determining whether to approve the PHA request, HUD will consider appropriate factors, including the nature and extent of the construction or rehabilitation that has commenced.

(1) Units for which rehabilitation or new construction began after proposal submission or the date of board resolution but prior to the effective date of an Agreement (if applicable), as described in this paragraph (d), do not subsequently qualify as existing housing.

(2) Units that were newly constructed or rehabilitated in violation of program requirements do not qualify as existing housing.

§ 983.53 Prohibition of assistance for units in subsidized housing.

(a) *Types of subsidized housing prohibited from receiving PBV assistance.* A HAP contract must not be effective and no PBV assistance may be provided for any of the following:

(1) A public housing dwelling unit;

(2) A unit subsidized with any other form of Section 8 assistance (tenant-based or project-based);

(3) A unit subsidized with any governmental rent subsidy (a subsidy that pays all or any part of the rent);

(4) A unit subsidized with any governmental subsidy that covers all or any part of the operating costs of the housing;

(5) A unit subsidized with rental assistance payments under Section 521 of the Housing Act of 1949, 42 U.S.C. 1490a (a Rural Housing Service

Program). However, the PHA may attach assistance for a unit subsidized with Section 515 interest reduction payments (42 U.S.C. 1485);

(6) A Section 202 project for non-elderly persons with disabilities (assistance under Section 162 of the Housing and Community Development Act of 1987, 12 U.S.C. 1701q note);

(7) Section 811 project-based supportive housing for persons with disabilities (42 U.S.C. 8013);

(8) Section 202 supportive housing for the elderly (12 U.S.C. 1701q);

(9) A unit subsidized with any form of tenant-based rental assistance (as defined at 24 CFR 982.1(b)(2)) (*e.g.,* a unit subsidized with tenant-based rental assistance under the HOME program, 42 U.S.C. 12701 *et seq.*); or

(10) A unit with any other duplicative Federal, State, or local housing subsidy, as determined by HUD or by the PHA in accordance with HUD requirements. For this purpose, ''housing subsidy'' does not include the housing component of a welfare payment; a social security payment; or a Federal, State, or local tax concession (such as relief from local real property taxes).

(b) [RESERVED]

§ 983.54 Cap on number of PBV units in each project (income-mixing requirement).

(a) *Project cap.* Except as provided in paragraph (b) or (c) of this section, a PHA may not select a proposal to provide PBV assistance or enter into an Agreement or HAP contract if the number of assisted units in a project is more than the greater of 25 percent of the number of dwelling units (assisted and unassisted, as adjusted as provided in paragraph (c)(3)) in the project or 25 units.

(b) *Higher project cap.* A PHA may provide PBV assistance to the greater of 25 units or 40 percent of the number of dwelling units (assisted and unassisted, as adjusted as provided in paragraph (c)(3) of this section) in the project if the project is located in an area where vouchers are difficult to use as defined in § 983.3.

(c) *Exceptions to the project cap.* (1) A project is not limited to a single exception category but may include excepted units from any of the exception categories under paragraph (2) and excluded units under paragraph (3) below.

(2) PBV units are not counted toward the project cap in the following cases:

(i) Units exclusively serving elderly families, as defined in 24 CFR 5.403;

(ii) Units exclusively made available to eligible youth described in Section 8(x)(2)(B) of the U.S. Housing Act. If the units exclusively made available to eligible youth use Family Unification Program (FUP) assistance that is normally available for eligible families and youth, the PHA must determine that the limitation of the units to youth is consistent with the local housing needs of both eligible FUP populations (families and youth), maintain documentation to support this determination, and amend its Administrative Plan to include the limitation of these FUP PBV units to eligible youth; or

(iii) Units exclusively made available to households eligible for supportive services available to the residents of the project assisted with PBV assistance. The project must make supportive services available to all PBV-assisted families in the project, but the family may not be required to participate in the services as a condition of living in the excepted unit. Such supportive services need not be provided by the owner or on-site but must be reasonably available to the families receiving PBV assistance in the project and designed to help the families in the project achieve self-sufficiency or live in the community as independently as possible. The supportive services must be made available to the family within a reasonable time as defined by the PHA, but not to exceed 120 calendar days from the family's request. The PHA must include in its Administrative Plan the types of services offered to families that will enable the units to qualify under the exception and the extent to which such services will be provided (*e.g.,* length of time services will be provided to a family, frequency of services, and depth of services), and the reasonable time by which such services must be made available to the family, not to exceed 120 calendar days. A PHA that manages an FSS program may offer FSS to meet the exception. The PHA may also make the supportive services used in connection with the FSS program available to non-FSS PBV families at the project.

(3) Units that are excluded under § 983.59 do not count toward the project cap. Such units are removed from the number of dwelling units for purposes of calculating the percentages under paragraphs (a) and (b) of this section.

(4)(i) The PBV HAP contract must specify, and the owner must set aside, the number of excepted units made available for occupancy by families who qualify for the exception.

(ii) For a unit to be considered excepted it must be occupied by a family who qualifies for the exception.

(d) *HAP contracts already in effect.* (1) In general, HAP contracts in effect prior to April 18, 2017, when the exception at paragraph (c)(2)(iii) of this section came into effect and a prior exception for disabled families was removed, or prior to December 27, 2020, when the exception at paragraph (c)(2)(ii) of this section came into effect, are governed by those HAP contracts' terms concerning the number and type of excepted units in a project. The owner must continue to designate the same number of contract units and assist the same number and type of excepted units as provided under the HAP contract during the remaining term of the HAP contract and any extension.

(2) The owner and the PHA may mutually agree to change the requirements for excepted units under the HAP contract to comply with the excepted unit requirements in subsection (c) of this section. However, any change to the HAP contract may only be made if the change does not jeopardize an assisted family's eligibility for continued assistance at the project.

(e) *PHA determination.* The PHA determines the number of units in the project for which the PHA will provide project-based assistance, including whether and how many units will be excepted, subject to the provisions of this section. See § 983.262 for occupancy requirements of excepted units.

(f) *HUD monitoring.* HUD may establish additional monitoring and oversight requirements for PBV projects in which more than 40 percent of the dwelling units are assisted under a PBV HAP contract through a **Federal Register** Notice, subject to public comment.

§ 983.55 Site selection standards.

(a) *Applicability.* The site selection requirements in paragraph (d) of this section apply only to site selection for existing housing and rehabilitated PBV housing. The site selection requirements in paragraph (e) of this section apply only to site selection for newly constructed PBV housing. Other provisions of this section apply to selection of a site for any form of PBV housing, including existing housing, newly constructed housing, and rehabilitated housing.

(b) *Compliance with PBV goals, civil rights requirements, and site and neighborhood standards.* The PHA may not select a project or proposal for existing, newly constructed, or rehabilitated PBV housing on a site or enter into an Agreement or HAP contract for units on the site, unless the PHA has determined that:

(1) Project-based assistance for housing at the selected site is consistent

with the goal of deconcentrating poverty and expanding housing and economic opportunities. The standard for deconcentrating poverty and expanding housing and economic opportunities must be consistent with the PHA Plan under 24 CFR part 903 and the PHA Administrative Plan. In developing the standards to apply in determining whether a proposed PBV development will be selected, a PHA must consider the following:

(i) Whether the census tract in which the proposed PBV development will be located is in a HUD-designated Enterprise Zone, Economic Community, or Renewal Community;

(ii) Whether a PBV development will be located in a census tract where the concentration of assisted units will be or has decreased as a result of public housing demolition;

(iii) Whether the census tract in which the proposed PBV development will be located is undergoing significant revitalization;

(iv) Whether State, local, or Federal dollars have been invested in the area that has assisted in the achievement of the statutory requirement;

(v) Whether new market rate units are being developed in the same census tract where the proposed PBV development will be located and the likelihood that such market rate units will positively impact the poverty rate in the area;

(vi) If the poverty rate in the area where the proposed PBV development will be located is greater than 20 percent, the PHA must consider whether in the past five years there has been an overall decline in the poverty rate;

(vii) Whether there are meaningful opportunities for educational and economic advancement in the census tract where the proposed PBV development will be located.

(2) The site is suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d(4)) and HUD's implementing regulations at 24 CFR part 1; Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601–3629) and HUD's implementing regulations at 24 CFR parts 100 through 199; Executive Order 11063 (27 FR 11527; 3 CFR, 1959–1963 Comp., p. 652) and HUD's implementing regulations at 24 CFR part 107. The site must also be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of the Americans with Disabilities Act (42 U.S.C. 12131–12134) and implementing regulations (28 CFR part 35), and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's implementing regulations at 24 CFR part 8, including meeting the Section 504 site selection requirements described in 24 CFR 8.4(b)(5).

(3) The site and neighborhood is reasonably free from disturbing noises and reverberations and other dangers to the health, safety, and general welfare of the occupants. The site and neighborhood may not be subject to serious adverse environmental conditions, natural or manmade, that could affect the health or safety of the project occupants, such as dangerous walks or steps; contamination; instability; flooding, poor drainage, septic tank back-ups or sewage hazards; mudslides; abnormal air pollution, smoke or dust; excessive noise, vibration or vehicular traffic; excessive accumulations of trash; vermin or rodent infestation; or fire hazards.

(c) *PHA PBV site selection policy.* (1) The PHA Administrative Plan must establish the PHA's policy for selection of PBV sites in accordance with this section.

(2) The site selection policy must explain how the PHA's site selection procedures promote the PBV goals.

(3) The PHA must select PBV sites in accordance with the PHA's site selection policy in the PHA Administrative Plan.

(d) *Existing and rehabilitated housing site and neighborhood standards.* A site for existing or rehabilitated housing must meet the following site and neighborhood standards. The site must:

(1) Be adequate in size, exposure, and contour to accommodate the number and type of units proposed, and adequate utilities and streets must be available to service the site. (The existence of a private disposal system and private sanitary water supply for the site, approved in accordance with law, may be considered adequate utilities.)

(2) Promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(3) Be accessible to social, recreational, educational, commercial, and health facilities and services and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.

(4) Be so located that travel time and cost via public transportation or private automobile from the neighborhood to places of employment providing a range of jobs for lower-income workers is not excessive. While it is important that housing for the elderly not be totally isolated from employment opportunities, this requirement need not be adhered to rigidly for such projects.

(e) *New construction site and neighborhood standards.* A site for newly constructed housing must meet the following site and neighborhood standards:

(1) The site must be adequate in size, exposure, and contour to accommodate the number and type of units proposed, and adequate utilities (water, sewer, gas, and electricity) and streets must be available to service the site.

(2) The site must not be located in an area of minority concentration, except as permitted under paragraph (e)(3) of this section, and must not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

(3) A project may be located in an area of minority concentration only if:

(i) Sufficient, comparable opportunities exist for housing for minority families in the income range to be served by the proposed project outside areas of minority concentration (see paragraphs (e)(3)(iii) through (v) of this section for further guidance on this criterion); or

(ii) The project is necessary to meet overriding housing needs that cannot be met in that housing market area (see paragraph (e)(3)(vi) of this section for further guidance on this criterion).

(iii) As used in paragraph (e)(3)(i) of this section, "sufficient" does not require that in every locality there be an equal number of assisted units within and outside of areas of minority concentration. Rather, application of this standard should produce a reasonable distribution of assisted units each year, that, over a period of several years, will approach an appropriate balance of housing choices within and outside areas of minority concentration. An appropriate balance in any jurisdiction must be determined in light of local conditions affecting the range of housing choices available for low-income minority families and in relation to the racial mix of the locality's population.

(iv) Units may be considered "comparable opportunities," as used in paragraph (e)(3)(i) of this section, if they have the same household type (elderly, disabled, family, large family) and tenure type (owner/renter); require approximately the same tenant contribution towards rent; serve the same income group; are located in the

same housing market; and are in standard condition.

(v) Application of this sufficient, comparable opportunities standard involves assessing the overall impact of HUD-assisted housing on the availability of housing choices for low-income minority families in and outside areas of minority concentration, and must take into account the extent to which the following factors are present, along with other factors relevant to housing choice:

(A) A significant number of assisted housing units are available outside areas of minority concentration.

(B) There is significant integration of assisted housing projects constructed or rehabilitated in the past 10 years, relative to the racial mix of the eligible population.

(C) There are racially integrated neighborhoods in the locality.

(D) Programs are operated by the locality to assist minority families that wish to find housing outside areas of minority concentration.

(E) Minority families have benefited from local activities (*e.g.,* acquisition and write-down of sites, tax relief programs for homeowners, acquisitions of units for use as assisted housing units) undertaken to expand choice for minority families outside of areas of minority concentration.

(F) A significant proportion of minority households has been successful in finding units in non-minority areas under the tenant-based assistance programs.

(G) Comparable housing opportunities have been made available outside areas of minority concentration through other programs.

(vi) Application of the ''overriding housing needs'' criterion, for example, permits approval of sites that are an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood and of sites in a neighborhood experiencing significant private investment that is demonstrably improving the economic character of the area (a ''revitalizing area''). An ''overriding housing need,'' however, may not serve as the basis for determining that a site is acceptable, if the only reason the need cannot otherwise be feasibly met is that discrimination on the basis of race, color, religion, sex, national origin, age, familial status, or disability renders sites outside areas of minority concentration unavailable or if the use of this standard in recent years has had the effect of circumventing the obligation to provide housing choice.

(4) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(5) The neighborhood must not be one that is seriously detrimental to family life or in which substandard dwellings or other undesirable conditions predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

(6) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.

(7) Except for housing designed for elderly persons, travel time and cost via public transportation or private automobile from the neighborhood to places of employment providing a range of jobs for lower-income workers, must not be excessive.

§ 983.56 Environmental review.

(a) *HUD environmental regulations.* (1) HUD environmental regulations at 24 CFR parts 50 and 58 apply to activities under the PBV program, except as provided in paragraph (a)(2) of this section.

(2) For projects or proposals that were selected in accordance with the site selection standards at § 983.55 in effect on or after June 6, 2024, no environmental review is required to be undertaken before entering into a HAP contract for existing housing, except to the extent a Federal environmental review is required by law or regulation relating to funding other than PBV housing assistance payments.

(b) *Who performs the environmental review?* Under 24 CFR part 58, the unit of general local government within which the project is located that exercises land use responsibility, the county, or the State (the ''responsible entity'' or ''RE''), is responsible for the Federal environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and related applicable Federal laws and authorities in accordance with 24 CFR 58.5 and 58.6. If a PHA objects in writing to having the RE perform the Federal environmental review, or if the RE declines to perform it, then HUD may perform the review itself (24 CFR 58.11). 24 CFR part 50 governs HUD performance of the review.

(c) *Notice of applicability.* When an environmental review is required, if such a review has not been conducted prior to the proposal or project selection date, then the PHA's written notice of proposal or project selection must state that the selection is subject to completion of a favorable environmental review and that the project may be rejected based on the results of the environmental review.

(d) *Environmental review limitations.* When an environmental review is required, a PHA may not execute an Agreement or HAP contract with an owner, and the PHA, the owner, and its contractors may not acquire, rehabilitate, convert, lease, repair, dispose of, demolish, or construct real property or commit or expend program or local funds for these activities, until one of the following occurs:

(1) The responsible entity has determined that the activities to be undertaken are exempt under 24 CFR 58.34(a) or categorically excluded and not subject to compliance with environmental laws under 24 CFR 58.35(b);

(2) The responsible entity has completed the environmental review procedures required by 24 CFR part 58, and HUD has approved the PHA's Request for Release of Funds and Certification (form HUD–7015.15). HUD approves the Request for Release of Funds and Certification by issuing a Letter to Proceed or form HUD–7015.16, thereby authorizing the PHA to execute an Agreement or HAP contract, as applicable; or

(3) HUD has performed an environmental review under 24 CFR part 50 and has notified the PHA in writing of environmental clearance.

(e) *Environmental review restrictions.* HUD will not issue a Letter to Proceed or form HUD–7015.16 to the PHA or provide environmental clearance if the PHA, the owner, or its contractors have undertaken any of the activities described in paragraph (d) of this section.

(f) *Mitigating measures.* The PHA must document any mitigating measures or other conditions as provided in 24 CFR part 50 or 58, as applicable, and must complete or require the owner to carry out such measures and conditions.

(g) *PHA duty to supply information.* The PHA must supply all available, relevant information necessary for the RE (or HUD, if applicable) to perform the required environmental review.

§ 983.57 PHA-owned units.

(a) *Selection of PHA-owned units.* The selection of PHA-owned units must be done in accordance with § 983.51(h).

(b) *Independent entity functions.* In connection with PHA-owned units:

(1) The independent entity must determine rent to owner, including rent reasonableness and calculating any rent

adjustments by an OCAF (where applicable), in accordance with §§ 983.301 through 983.305.

(2) The independent entity must perform unit inspections in accordance with § 983.103(g).

(3) When the owner carries out development activity under § 983.152 or substantial improvement under §§ 983.207(d) or 983.212, the independent entity must review the evidence and work completion certification submitted by the owner in accordance with § 983.155(b) and determine if the units are complete in accordance with § 983.156.

(4) The independent entity must determine whether to approve substantial improvement to units under a HAP contract in accordance with § 983.212.

(c) *Payment to independent entity.* The PHA may compensate the independent entity from PHA administrative fees (including fees credited to the administrative fee reserve) for the services performed by the independent entity. The PHA may not use other program receipts to compensate the independent entity for such services. The PHA and the independent entity may not charge the family any fee or charge for the services provided by the independent entity.

§ 983.58 PHA determination prior to selection.

(a) *Analysis of units and budget.* A PHA must calculate the number of authorized voucher units that it is permitted to project-base in accordance with § 983.6 and determine the amount of budget authority that it has available for project-basing in accordance with § 983.5(b), before it issues a request for proposals in accordance with § 983.51(b)(1), makes a selection based on a previous competition in accordance with § 983.51(b)(2), amends an existing HAP contract to add units in accordance with § 983.207(b), or noncompetitively selects a project in accordance with § 983.51(c).

(b) *Analysis of impact.* Prior to selecting a project for PBV assistance, a PHA must perform an analysis of the impact if project-basing 50 percent or more of the PHA's authorized voucher units. The analysis should consider the ability of the PHA to meet the needs of the community across its tenant-based and project-based voucher portfolio, including the impact on, among others: families on the waiting list and eligible PBV families that wish to move under § 983.261. The analysis performed by the PHA must be available as part of the public record.

§ 983.59 Units excluded from program cap and project cap.

(a) *General.* For HAP contracts entered into on or after April 18, 2017, the PHA may commit project-based assistance to units that meet the requirements for exclusion in paragraph (b) of this section. Such units do not count toward the program cap or project cap described in §§ 983.6 and 983.54, respectively.

(b) *Requirements for exclusion of existing or rehabilitated units.* Excluded units must, in the five years prior to the request for proposals (RFP) or the proposal or project selection date in the case of selection without RFP, fall into one of the following categories provided that the units are removed from all categories prior to the effective date of the HAP contract:

(1) The units have received one of the following forms of HUD assistance:

(i) Public Housing Capital or Operating Funds (Section 9 of the 1937 Act);

(ii) Project-Based Rental Assistance (Section 8 of the 1937 Act). Project-based rental assistance under Section 8 includes the Section 8 moderate rehabilitation program, including the single-room occupancy (SRO) program;

(iii) Housing For the Elderly (Section 202 of the Housing Act of 1959);

(iv) Housing for Persons with Disabilities (Section 811 of the Cranston-Gonzalez National Affordable Housing Act);

(v) Rental Assistance Program (RAP) (Section 236(f)(2) of the National Housing Act); or

(vi) Flexible Subsidy Program (Section 201 of the Housing and Community Development Amendments Act of 1978).

(2) The units have been subject to a federally required rent restriction under one of the following programs:

(i) The Low-Income Housing Tax Credit program (26 U.S.C. 42);

(ii) Section 515 Rural Rental Housing Loans (42 U.S.C. 1485); or

(iii) The following HUD programs:

(A) Section 236;

(B) Section 221(d)(3) Below Market Interest Rate;

(C) Housing For the Elderly (Section 202 of the Housing Act of 1959);

(D) Housing for Persons with Disabilities (Section 811 of the Cranston-Gonzalez National Affordable Housing Act);

(E) Flexible Subsidy Program (Section 201 of the Housing and Community Development Amendments Act of 1978); or

(iv) Any other program identified by HUD through **Federal Register** notice subject to public comment.

(c) *Replacement units.* Newly constructed units developed under the PBV program may be excluded from the program cap and project cap provided the primary purpose of the newly constructed units is or was to replace units that meet the criteria of paragraph (b)(1) or (2) of this section. The newly constructed unit must be located on the same site as the unit it is replacing; however, an expansion of or modification to the prior project's site boundaries as a result of the design of the newly constructed project is acceptable as long as a majority of the replacement units are built back on the site of the original project and any replacement units that are not located on the existing site are part of a project that shares a common border with, are across a public right of way from, or touch that site. In addition, in order for the replacement units to be excluded from the program and project caps, one of the following must be true:

(1) Former residents of the original project must be provided with a selection preference that provides the residents with the right of first occupancy at the PBV newly constructed project when it is ready for occupancy.

(2) Prior to the demolition of the original project, the PBV newly constructed project must have been identified as replacement housing for that original project as part of a documented plan for the redevelopment of the site.

(d) *Unit size configuration and number of units for newly constructed and rehabilitated projects.* The unit size configuration of the PBV newly constructed or rehabilitated project may differ from the unit size configuration of the original project that the PBV units are replacing. In addition, the total number of PBV-assisted units may differ from the number of units in the original project. However, only the total number of units in the original project are excluded from the program cap and the project cap. Units that exceed the total number of covered units in the original project are subject to the program cap and the project cap.

(e) *Inapplicability of other program and project cap exceptions.* The 10 percent exception under § 983.6 and the project cap exception under § 983.54(c)(2) are inapplicable to excluded units under this section.

Subpart C—Dwelling Units

■ 95. Amend § 983.101 by revising paragraphs (a) and (e) to read as follows:

§ 983.101 Housing quality standards.

(a) *HQS applicability.* As defined in § 983.3, HQS refers to the minimum quality standards developed by HUD in accordance with 24 CFR 5.703 of this title for housing assisted under the PBV program, including any variations approved by HUD for the PHA under 24 CFR 5.705(a)(3).

* * * * *

(e) *Additional PHA quality and design requirements.* This section establishes the minimum federal housing quality standards for PBV housing. However, the PHA may elect to establish additional requirements for quality, architecture, or design of PBV housing.

■ 96. Revise § 983.103 to read as follows:

§ 983.103 Inspecting units.

(a) *Pre-selection inspection.* If the units to be assisted already exist, the PHA must inspect all units before the proposal or project selection date and must determine if the project meets the definition of existing housing. If the project is existing housing, the PHA may not execute the HAP contract until all units meet the initial inspection requirements in accordance with paragraph (c) of this section.

(b) *Initial inspection of newly constructed and rehabilitated projects and units that underwent substantial improvement to be added to a HAP contract.* Following completion of work pursuant to § 983.155, the PHA must complete the following inspection(s), as applicable in accordance with § 983.156:

(1) For rehabilitated housing that is developed prior to the HAP contract term or newly constructed housing, the PHA must inspect each proposed newly constructed and rehabilitated PBV unit before execution of the HAP contract. Each proposed PBV unit must fully comply with HQS prior to HAP contract execution.

(2) For rehabilitated housing that will undergo development activity after HAP contract execution per § 983.157, the PHA must conduct unit inspections in accordance with the requirements of § 983.157.

(3) Inspect each unit that underwent substantial improvement pursuant to §§ 983.207(d) or 983.212. Each PBV unit that underwent substantial improvement must fully comply with HQS prior to the PHA adding the unit to the HAP contract, returning the unit temporarily removed to the HAP contract, allowing re-occupancy of the unit, and resuming housing assistance payments, as applicable.

(c) *Initial inspection requirements for existing housing*—(1) *In general.* In accordance with this paragraph, the PHA may adopt in its Administrative Plan the non-life-threatening deficiencies option or the alternative inspection option, or both, for initial inspections of existing housing. If the PHA has not adopted the initial inspection non-life-threatening deficiency option (NLT option) or the alternative inspection option for the project, the PHA must inspect and determine that all of the proposed PBV units fully comply with HQS before entering the HAP contract. The PHA must establish in its Administrative Plan the amount of time that may elapse between the initial inspection of existing housing and execution of a HAP contract for that unit.

(2) *Initial inspection—NLT option.* (i) A PHA may execute the HAP contract and begin making assistance payments for all of the assisted units, including units that failed the initial HQS inspection, provided that no units have life-threatening deficiencies and if the owner agrees to the NLT option. If the PHA has established and the unit is covered by both the NLT option and the alternative inspections option under paragraph (c)(3) of this section for the initial HQS inspection, see paragraph (c)(4) of this section.

(ii) After completing the inspections and determining there are no life-threatening deficiencies, for any unit with non-life-threatening deficiencies, the PHA must provide both the owner and the family (any eligible in-place family (§ 983.251(d)) or any family referred from the PBV waiting list being offered that unit) a list of the non-life-threatening deficiencies identified by the initial HQS inspection and an explanation of the maximum amount of time the PHA will withhold HAP before abating assistance if the owner does not complete the repairs within 30 days. The PHA must also inform the family that if the family accepts the unit and the owner fails to make the repairs within the cure period, which may not exceed 180 days from the effective date of the HAP contract, the PHA will remove the unit from the HAP contract, and the family will be issued a voucher to move to another unit in order to receive voucher assistance. If the PHA's Administrative Plan provides that the PHA will terminate the PBV HAP contract if the owner fails to correct deficiencies in any unit in the project within the cure period, the PHA must also provide the notice described above to families referred to units without any deficiencies. The family referred from the waiting list may choose to decline the unit and remain on the waiting list. An eligible in-place family may decline the unit, and the PHA must issue the family a tenant-based voucher to move from the unit in that circumstance.

(iii) If the family decides to lease the unit, the family enters into the assisted lease with the owner. The PHA commences making assistance payments to the owner.

(iv) The owner must correct the deficiencies within 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments for the unit until the owner makes the repairs and the PHA verifies the correction. Once the deficiencies are corrected, the PHA must use the withheld housing assistance payments to make payments for the period that payments were withheld.

(v) The PHA must state in its Administrative Plan the maximum amount of time it will withhold payments before abating payments and the number of days after which the PHA will either terminate the PBV HAP contract or remove the unit from the HAP contract as a result of the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract. If the PHA terminates the PBV HAP contract or removes the unit from the HAP contract as a result of the owner's failure to correct the deficiencies, the PHA must provide any affected family tenant-based assistance as provided in § 983.206(b).

(vi) The owner may not terminate the tenancy of a family because of the withholding or abatement of assistance payments. During any period the assistance is abated under the NLT option, the family may terminate the tenancy by notifying the owner and the PHA, and the PHA must provide the family tenant-based assistance. In the case of an in-place family, the family may also choose to terminate the tenancy during the withholding period following the 30-day cure period, and the PHA must offer the family either another assisted unit in the PBV project that fully complies with HQS or tenant-based assistance.

(3) *Initial inspection—alternative inspection option.* The PHA may adopt the alternative inspection option for initial inspections of existing housing, subject to the procedures and requirements specified in 24 CFR 982.406(b), (c), (d), and (g).

(i) After the PHA determines the project meets the definition of existing housing in accordance with paragraph (a) of this section, the PHA may execute the HAP contract for the project if the project has been inspected in the

previous 24 months using an alternative inspection that meets the requirements of 24 CFR 982.406, as opposed to re-inspecting the project to make sure all units fully comply with HQS before executing the HAP contract, if the owner agrees to the use of the alternative inspection option. If the PHA has established and the unit is covered by both the NLT option under paragraph (c)(2) of this section and the alternative inspection option for the initial HQS inspection, see paragraph (c)(4) of this section.

(ii) The PHA notifies all families (any eligible in-place family (§ 983.251(d)) or any family referred from the PBV waiting list being offered a contract unit) that will occupy a contract unit before the PHA conducts the HQS inspection that the alternative inspection option is in effect for the project. The PHA must provide each family with the PHA list of HQS deficiencies that are considered life-threatening as part of this notification. A family on the waiting list may decline to accept an offered unit due to unit conditions and retain its place on the PBV waiting list.

(iii) The PHA must conduct an HQS inspection within 30 days of the proposal or project selection date. If the family reports a deficiency to the PHA prior to the PHA's inspection, the PHA must inspect the unit within the time period required under paragraph (f) of this section or within 30 days of the effective date of the HAP contract, whichever time period ends first.

(iv) The PHA may not commence housing assistance payments to the owner until the PHA has inspected all the units under the HAP contract and determined they meet HQS.

(v) If the PHA inspection finds that any contract unit contains HQS deficiencies, the PHA may not make housing assistance payments to the owner until all the deficiencies have been corrected in all contract units. If a deficiency is life-threatening, the owner must correct the deficiency within 24 hours of notification from the PHA. For other deficiencies, the owner must correct the deficiency within 30 calendar days (or any PHA-approved extension) of notification from the PHA. If the owner corrects the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract or the PBV lease effective dates, whichever is later.

(vi) The PHA establishes in the Administrative Plan the maximum amount of time it will withhold payments if the owner does not correct the deficiencies within the required cure period before abating payments and the date by which the PHA will either remove the unit from the HAP contract or terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract. If the PHA terminates the PBV HAP contract or removes the unit from the HAP contract as a result of the owner's failure to correct the deficiencies, the PHA must provide any affected family tenant-based assistance as provided in § 983.206(b) of this title.

(vii) If the owner fails to make the repairs within the applicable time periods, the PHA must abate the payments for the non-compliant units, while continuing to withhold payments for the HQS compliant units until all the units meet HQS or the unit removal or contract termination occurs. If the deficiencies are corrected, the PHA must use the withheld housing assistance payments to make payments for the period that payments were withheld.

(viii) The owner may not terminate the tenancy of a family because of the withholding or abatement of assistance payments. During the abatement period, a family may terminate the tenancy by notifying the owner, and the PHA must provide the family tenant-based assistance. If the PHA terminates the PBV HAP contract or removes the unit from the HAP contract as a result of the owner's failure to correct the deficiencies, the PHA must provide any affected family tenant-based assistance as provided in § 983.206(b) of this title.

(4) *Initial inspection—use of both the NLT and alternative options.* The PHA may adopt both the NLT option and the alternative inspection option for initial inspections of existing housing, subject to the procedures and requirements specified in 24 CFR 982.406(b), (c), (d), and (g).

(i) If the owner agrees to both the NLT option and the alternative inspection option, then the PHA notifies all families (any eligible in-place family (§ 983.251(d)) or any family referred from the PBV waiting list that will occupy the unit before the PHA conducts the HQS inspection) that both the NLT option and the alternative inspection option will be used for the family's unit. As part of this notification, the PHA must provide the family with the PHA's list of HQS deficiencies that are considered life-threatening. A family on the waiting list may decline to move into a unit due to unit conditions and retain its place on the PBV waiting list. Following inspection (see paragraph (c)(4)(ii) of this section), the PHA must provide any family referred from the PBV waiting list that will occupy a unit with non-life-threatening deficiencies a list of the non-life-threatening deficiencies identified by the initial HQS inspection and an explanation of the maximum amount of time the PHA will withhold HAP before abating assistance if the owner does not complete the repairs within 30 days. The PHA must also inform the family that if the family accepts the unit and the owner fails to make the repairs within the cure period, which may not exceed 180 days from the effective date of the HAP contract, the PHA will remove the unit from the HAP contract, and the family will be issued a voucher to move to another unit in order to receive voucher assistance. The family referred from the waiting list may choose to decline the unit and remain on the PBV waiting list.

(ii) The PHA executes the HAP contract with the owner on the basis of the alternative inspection. The PHA must conduct an HQS inspection within 30 days after the proposal or project selection date. If the family reports a deficiency to the PHA during this interim period, the PHA must inspect the unit within the time period required under paragraph (f) of this section or within 30 days of the proposal or project selection date, whichever time period ends first.

(iii) The PHA may not make housing assistance payments to the owner until the PHA has inspected all the assisted units.

(iv) If none of the units have any life-threatening deficiencies, the PHA commences payments and makes retroactive payments to the effective date of the HAP contract or the PBV lease effective dates, whichever is later, for all the assisted units. For any unit that failed the PHA's HQS inspection but has no life-threatening deficiencies, the owner must correct the deficiencies within no more than 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments for that unit until the owner makes the repairs and the PHA verifies the correction. Once the unit is in compliance with HQS, the PHA must use the withheld housing assistance payments to make payments for the period that payments were withheld.

(v) If any units have life-threatening deficiencies, the PHA may not commence making housing assistance payments to the owner for any units until all the HQS deficiencies (life-threatening and non-life-threatening) have been corrected. The PHA must not refer families from the PBV waiting list

to occupy units with life-threatening deficiencies. The owner must correct all life-threatening deficiencies within no more than 24 hours. For other deficiencies, the owner must correct the deficiency within no more than 30 calendar days (or any PHA-approved extension). If the owner corrects all of the deficiencies within the required cure period, the PHA must make the housing assistance payments retroactive to the effective date of the HAP contract or the PBV lease effective dates, whichever is later. If the owner fails to make the repairs within the applicable time periods, the PHA must abate the payments for the non-compliant units, while continuing to withhold payments for the HQS compliant units until all the units meet HQS or the unit removal or contract termination occurs. If the deficiencies are corrected, the PHA must use the withheld housing assistance payments to make payments for the period that payments were withheld.

(vi) The owner may not terminate the tenancy of the family because of the withholding or abatement of assistance payments. During the period the assistance is abated, a family may terminate the tenancy by notifying the owner, and the PHA must provide the family tenant-based assistance. If the PHA terminates the PBV HAP contract or removes the unit from the HAP contract as a result of the owner's failure to correct the deficiencies, the PHA must provide any affected family with tenant-based assistance as provided in § 983.206(b) of this title. The PHA must establish in its Administrative Plan:

(A) The maximum amount of time it will withhold payments if the owner fails to correct the deficiencies within the required cure period before abating payments; and

(B) The number of days after which the PHA will terminate the HAP contract or remove the unit from the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(d) *Turnover inspections.* Before providing assistance to a new family in a contract unit, the PHA must inspect the unit. The PHA must not provide assistance on behalf of a family for a unit that fails to comply fully with HQS.

(e) *Periodic inspections.* (1) At least biennially during the term of the HAP contract, the PHA must inspect a random sample, consisting of at least 20 percent of the contract units in each building, to determine if the contract units and the premises are maintained in accordance with HQS. Turnover inspections pursuant to paragraph (d) of this section are not counted toward meeting this inspection requirement. Instead of biennially, a small rural PHA, as defined in § 902.101 of this title, must inspect the random sample of units in accordance with this paragraph at least once every three years. The PHA must establish in its Administrative Plan the frequency of periodic inspections. This requirement applies in the case of a HAP contract that is undergoing development activity after HAP contract execution per § 983.157; however, if the periodic inspection occurs during the period of development activity covered by the rider and fewer than 20 percent of contract units in each building are designated in the rider as available for occupancy, the PHA is only required to inspect the units in that building that are designated as available for occupancy.

(2) If more than 20 percent of the sample of inspected contract units in a building fail the initial inspection, then the PHA must reinspect 100 percent of the contract units in the building.

(3) A PHA may also use alternative inspections to meet the requirements for periodic inspections in this paragraph (e), subject to the procedures and requirements specified in 24 CFR 982.406(b), (c), (d), and (g).

(f) *Other inspections.* (1) *Interim inspections:* When a participant family or government official notifies the PHA of a potential deficiency, the following conditions apply:

(i) *Life-threatening.* If the reported deficiency is life-threatening, the PHA must, within 24 hours, both inspect the housing unit and notify the owner if the life-threatening deficiency is confirmed. The owner must then make the repairs within 24 hours of PHA notification.

(ii) *Non-life-threatening.* If the reported deficiency is non-life-threatening, the PHA must, within 15 days, both inspect the unit and notify the owner if the deficiency is confirmed. The owner must then make the repairs within 30 days of the notification from the PHA or within any PHA-approved extension.

(iii) *Extraordinary circumstances.* In the event of extraordinary circumstances, such as if a unit is within a presidentially declared disaster area, HUD may approve an exception of the 24-hour or the 15-day inspection requirement until such time as an inspection is feasible.

(2) *Follow-up inspections:* The PHA must conduct follow-up inspections needed to determine if the owner (or, if applicable, the family) has corrected an HQS violation, except where the PHA is using a verification method as described in paragraph (h) of this section, and must conduct inspections to determine the basis for exercise of contractual and other remedies for owner or family violation of the HQS. (Family HQS obligations are specified in 24 CFR 982.404(b).)

(3) *Supervisory quality control inspections:* In conducting PHA supervisory quality control HQS inspections, the PHA should include a representative sample of both tenant-based and project-based units.

(g) *Inspecting PHA-owned units.* (1) In the case of PHA-owned units, the inspections required under this section must be performed by an independent entity designated in accordance with § 983.57, rather than by the PHA.

(2) The independent entity must furnish a copy of each inspection report to the PHA.

(3) The PHA must take all necessary actions in response to inspection reports from the independent entity, including exercise of contractual remedies for violation of the HAP contract by the PHA owner.

(h) *Verification methods.* When a PHA must verify correction of a deficiency, the PHA may use verification methods other than another on-site inspection. The PHA may establish different verification methods for initial and subsequent inspections or for different HQS deficiencies, which must be detailed in its Administrative Plan. Upon either an inspection for initial occupancy or a reinspection, the PHA may accept photographic evidence or other reliable evidence from the owner to verify that a deficiency has been corrected.

(i) *Projects with government financing.* In the case of a PBV project financed under a Federal, State, or local housing program that is subject to an alternative inspection, the PHA may rely upon inspections conducted at least triennially to demonstrate compliance with the alternative inspection option under paragraph (c) of this section or the periodic inspection requirement of paragraph (e) of this section, in accordance with its policy established in the PHA Administrative Plan.

■ 97. In subpart D, revise § 983.151 through § 983.156 to read as follows:

Subpart D—Requirements for Rehabilitated and Newly Constructed Units

Sec.
983.151 Applicability.
983.152 Nature of development activity.
983.153 Development requirements.
983.154 Development agreement.
983.155 Completion of work.
983.156 PHA acceptance of completed units.

§ 983.151 Applicability.

This subpart applies to development activity, as defined in § 983.3, under the PBV program.

§ 983.152 Nature of development activity.

(a) *Purpose of development activity.* An owner may undertake development activity, as defined at § 983.3, for the purpose of:

(1) Placing a newly constructed or rehabilitated project under a HAP contract; or

(2) For a rehabilitated project that will undergo development activity after HAP contract execution, completing the requirements of the rider in accordance with § 983.157.

(b) *Development requirements.* Development activity must comply with the requirements of §§ 983.153 through 983.157.

§ 983.153 Development requirements.

(a) *Environmental review requirements.* The development activity must comply with any applicable environmental review requirements at § 983.56.

(b) *Subsidy layering review.* (1) The PHA may provide PBV assistance only in accordance with the HUD subsidy layering regulations (24 CFR 4.13) and other requirements. A subsidy layering review is required when an owner undertakes development activity and housing assistance payment subsidy under the PBV program is combined with other governmental housing assistance from Federal, State, or local agencies, including assistance such as tax concessions or tax credits. The subsidy layering review is intended to prevent excessive public assistance for the housing by combining (layering) housing assistance payment subsidy under the PBV program with other governmental housing assistance from Federal, State, or local agencies, including assistance such as tax concessions or tax credits.

(2) When a subsidy layering review is required, it must occur before a PHA attaches assistance to a project. Specifically, the PHA may not execute an Agreement or HAP contract with an owner until HUD or a housing credit agency approved by HUD has conducted any required subsidy layering review and determined that the PBV assistance is in accordance with HUD subsidy layering requirements.

(3) A further subsidy layering review is not required if HUD's designee has conducted a review in accordance with HUD's PBV subsidy layering review guidelines and that review included a review of PBV assistance.

(4) The owner must disclose to the PHA any change to the information provided for purposes of the subsidy layering review, including the amount of assistance or number of units to be developed, that occurs after the subsidy layering review has been conducted and before all contract units are placed under the HAP contract, in accordance with HUD requirements. A subsidy layering review may be required to determine if such a change would result in excess public assistance to the project, as required by HUD through notification in the **Federal Register**.

(5) The HAP contract must contain the owner's certification that the project has not received and will not receive (before or during the term of the HAP contract) any public assistance for acquisition, development, or operation of the housing other than assistance disclosed in the subsidy layering review in accordance with HUD requirements, unless the owner discloses additional assistance in accordance with HUD requirements. A subsidy layering review is required for newly constructed or rehabilitated housing under a HAP contract that receives additional assistance, as described in § 983.11(d).

(6) Existing housing is exempt from subsidy layering requirements.

(c) *Labor standards.* (1) Labor standards as described in paragraphs (c)(2) of this section apply to development activity. When the PHA exercises its discretion at §§ 983.154(f) or 983.157(a) to allow the owner to conduct some or all development activity while the proposed PBV units are not under an Agreement or HAP contract, the applicable parties must comply with the labor standards in paragraph (c)(2) of this section from the date of proposal submission (for housing subject to competitive selection) or from the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection).

(2) In the case of development involving nine or more contract units (whether or not completed in stages):

(i) The owner and the owner's contractors and subcontractors must pay Davis-Bacon wages to laborers and mechanics employed in development of the housing; and

(ii) The owner and the owner's contractors and subcontractors must comply with the Contract Work Hours and Safety Standards Act, Department of Labor regulations in 29 CFR part 5, and other applicable Federal labor relations laws and regulations. The PHA must monitor compliance with labor standards.

(3) For any project to which labor standards apply, the PHA's written notice to the party that submitted the selected proposal or board resolution approving project-basing of assistance at the specific project, as applicable per § 983.51(f), must state that any construction contracts must incorporate a Davis-Bacon contract clause and the current applicable prevailing wage determination.

(d) *Equal employment opportunity.* Development activity is subject to the Federal equal employment opportunity requirements of Executive Orders 11246 as amended (3 CFR, 1964–1965 Comp., p. 339), 11625 (3 CFR, 1971–1975 Comp., p. 616), 12432 (3 CFR, 1983 Comp., p. 198), and 12138 (3 CFR, 1977 Comp., p. 393).

(e) *Accessibility.* As applicable, the design and construction requirements of the Fair Housing Act and implementing regulations at 24 CFR 100.205; the accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8, including 8.22 and 8.23; and Title II of the Americans with Disabilities Act (42 U.S.C. 12131–12134) and implementing regulations at 28 CFR part 35, including §§ 35.150 and 35.151, apply to development activity. A description of any required work item resulting from these requirements must be included in the Agreement (if applicable), as specified in § 983.154(e)(6) or HAP contract (if applicable), as specified in § 983.157(e)(1).

(f) *Broadband infrastructure.* (1) Any development activity that constitutes substantial rehabilitation as defined by 24 CFR 5.100 of a building with more than four rental units and where the proposal or project selection date or the start of the development activity while under a HAP contract is after January 19, 2017, must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(i) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(ii) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(iii) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

(2) A description of any required work item resulting from this requirement must be included in the Agreement (if

applicable), as specified in § 983.154(e)(7) or HAP contract (if applicable), as specified in § 983.157(e)(2).

(g) *Eligibility to participate in Federal programs and activities.* (1) An owner or project principal who is on the U.S. General Services Administration list of parties excluded from Federal procurement and non-procurement programs, or who is debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424, may not participate in development activity or the rehabilitation of units subject to a HAP contract. Both the Agreement (if applicable) and the HAP contract must include a certification by the owner that the owner and other project principals (including the officers and principal members, shareholders, investors, and other parties having a substantial interest in the project) are not on such list and are not debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424.

(2) An owner must disclose any possible conflict of interest that would be a violation of the Agreement (if applicable), the HAP contract, or HUD regulations, in accordance with § 982.161 of this title.

§ 983.154 Development agreement.

(a) *Agreement to enter into HAP contract (Agreement).* Except as specified in paragraphs (f) and (g) of this section, the PHA and owner must enter into an Agreement that will govern development activity. In the Agreement, the owner agrees to develop the contract units to comply with HQS, and the PHA agrees that, upon timely completion of such development activity in accordance with the terms of the Agreement, the PHA will enter into an initial HAP contract with the owner for the contract units. The Agreement must cover a single project, except one Agreement may cover multiple projects that each consist of a single-family building.

(b) *Timing of Agreement.* The effective date of the Agreement must be on or after the date the Agreement is executed. The Agreement must be executed and effective prior to the commencement of development activity as described in paragraph (d) of this section, except as provided in paragraphs (f) and (g) of this section, and must be in the form required by HUD (see 24 CFR 982.162(b)).

(c) *Agreement amendment.* The PHA and owner may agree to amend the contents of the Agreement described in paragraph (e) of this section by executing an addendum to the Agreement, so long as such amendments are consistent with all requirements of this part 983. The PHA and owner may only execute an addendum affecting a unit prior to the PHA accepting the completed unit.

(d) *Commencement of development activity.* Development activity must not commence after the date of proposal submission (for housing subject to competitive selection) or the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection) and before the effective date of the Agreement, except as provided in paragraphs (f) and (g) of this section.

(1) In the case of new construction, development activity begins with excavation or site preparation (including clearing of the land).

(2) In the case of rehabilitation, development activity begins with the physical commencement of rehabilitation activity on the housing.

(e) *Contents of Agreement.* At a minimum, the Agreement must describe the following features of the housing to be developed and assisted under the PBV program and development activity to be performed:

(1) The site;

(2) The location of contract units on site;

(3) The number of contract units by area (square footage) and number of bedrooms and bathrooms;

(4) The services, maintenance, or equipment to be supplied by the owner without charges in addition to the rent to owner;

(5) The utilities available to the contract units, including a specification of utility services to be paid by the owner (without charges in addition to rent) and utility services to be paid by the tenant;

(6) A description of any required work item necessary to comply with the accessibility requirements of § 983.153(e);

(7) A description of any required work item if the requirement at § 983.153(f) to install broadband infrastructure applies;

(8) Estimated initial rents to owner for the contract units;

(9) A description of the work to be performed under the Agreement:

(i) For rehabilitation, the work description must include the rehabilitation work write-up and, where determined necessary by the PHA, specifications and plans (see paragraph (g) of this section for additional requirements that apply under the option for development activity after HAP contract at 983.157); and

(ii) For new construction, the work description must include the working drawings and specifications;

(10) The deadline for completion of the work to be performed under the Agreement; and

(11) Any requirements the PHA elects to establish in addition to HQS for design, architecture, or quality. The PHA must specify the conditions under which it will require additional housing quality requirements in the Administrative Plan.

(f) *PHA discretion.* With respect to development activity, the PHA may decide not to use an Agreement or may choose to execute an Agreement after construction or rehabilitation that complied with applicable requirements of § 983.153 has commenced.

(1) In its Administrative Plan, the PHA must explain the circumstances (if any) under which the PHA will enter a PBV HAP contract for newly constructed or rehabilitated housing without first entering into an Agreement and under which the PHA will enter into an Agreement after construction or rehabilitation that complied with applicable requirements of § 983.153 has commenced.

(2) The following conditions apply:

(i) The owner of the project must be able to document its compliance with all applicable requirements of § 983.153 from the date of proposal submission (for housing subject to competitive selection) or from the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection);

(ii) For housing subject to competitive selection, the PHA must confirm prior to the proposal selection date that the owner has complied with all applicable requirements of § 983.153 from the date of proposal submission. For housing excepted from competitive selection, the PHA must confirm prior to executing the Agreement (if applicable) or HAP contract that the owner has complied with all applicable requirements of § 983.153 from the date of the PHA's board resolution approving the project-basing of assistance at the project; and

(iii) The PHA must comply with the notice requirement of § 983.153(c)(3).

§ 983.155 Completion of work.

(a) *General requirement.* The owner must submit evidence and certify to the PHA, in the form and manner required by the PHA's Administrative Plan, that development activity under § 983.152 or substantial improvement under §§ 983.207(d) or 983.212 has been completed, and that all such work was completed in accordance with the

applicable requirements. The PHA must review the evidence to determine whether the development activity or substantial improvement was completed in accordance with the applicable requirements.

(b) *PHA-owned units.* In the case of PHA-owned units, the owner must submit evidence and certify to the independent entity (see § 983.57(b)(3)), in the form and manner required by the PHA's Administrative Plan, that development activity under § 983.152 or substantial improvement under §§ 983.207(d) or 983.212 has been completed, and that all such work was completed in accordance with the applicable requirements. The independent entity must review the evidence to determine whether the development activity or substantial improvement was completed in accordance with the applicable requirements.

§ 983.156 PHA acceptance of completed units.

(a) *Inspection of units.* After the PHA has received all required evidence of completion and the owner's certification that all work was completed in accordance with the applicable requirements, the PHA must inspect the completed units to determine whether they comply with HUD's HQS (see § 983.103(b)) and any additional design, architecture, or quality requirements specified by the PHA.

(b) *Execution or amendment of the HAP contract.* If the PHA determines that the development activity or substantial improvement was completed in accordance with the applicable requirements at § 983.155 and the completed units meet HUD's HQS and any additional design, architecture, or quality requirements specified by the PHA per paragraph (a) of this section, then the PHA must:

(1) For units developed pursuant to § 983.152(a)(1) which will not undergo development activity after HAP contract execution per § 983.157, submit the HAP contract for execution by the owner and execute the HAP contract;

(2) For rehabilitated housing projects for which development activity has commenced prior to HAP contract execution, but which will undergo development activity after HAP contract execution under § 983.157(b), submit the HAP contract for execution by the owner and execute the HAP contract;

(3) For development activity conducted after HAP contract execution, amend the HAP contract rider to designate the completed units as available for occupancy (§ 983.157(f)(1)(ii)) or, if the owner has completed all development activity as provided in the rider, amend the HAP contract to terminate the rider (§ 983.157(d)); or

(4) For units that underwent substantial improvement in order to be added to the HAP contract, amend the HAP contract to add the units to the HAP contract (§ 983.207(d)).

(c) *Staged completion of contract units.* Contract units developed pursuant to § 983.152(a)(1) which will not undergo development activity after HAP contract execution per § 983.157 may be placed under the HAP contract in stages commencing on different dates. In such a case, the PHA must determine separately for each stage whether the development activity was completed in accordance with the applicable requirements per § 983.155 and that the units meet HUD's HQS and any additional design, architecture, or quality requirements specified by the PHA per paragraph (a) of this section. If the first stage is determined compliant, then the PHA must submit the HAP contract for execution by the owner and must execute the HAP contract for PBV rehabilitated housing and newly constructed housing projects. As each subsequent stage is determined compliant, the PHA and owner must amend the HAP contract to add the units to the HAP contract (see § 983.207(g)).

(d) *PHA-owned units.* The independent entity must perform the inspection required in paragraph (a) of this section and make the determination(s) required in paragraphs (b) and (c) of this section in the case of PHA-owned units (see § 983.57(b)(3)).

■ 98. Delayed indefinitely, amend § 983.154 by adding paragraphs (g) and (h) to read as follows:

§ 983.154 Development agreement.

* * * * *

(g) *Rehabilitated housing option: development activity during HAP contract term.* The PHA may permit some or all development activity to occur during the term of the HAP contract under the rehabilitated housing option in § 983.157. Under this option, the PHA may choose to execute an Agreement for any development activity undertaken before the HAP contract is effect. If the PHA will execute an Agreement for development activity undertaken before the HAP contract is effective, the work description required per paragraph (e)(9)(i) of this section must specify the work activities that will be performed during the term of the Agreement.

(h) *PHA-owned units.* For PBV projects containing PHA-owned units that are not owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability company or limited partnership owned by the PHA), the PHA must choose one of the following options if it does not exercise its discretion at paragraphs (f) or (g) of this section not to use an Agreement:

(1) Prior to execution of the Agreement, the PHA must establish a separate legal entity to serve as the owner. That separate legal entity must execute the Agreement with the PHA. The separate legal entity must have the legal capacity to lease units and must be one of the following:

(i) A non-profit affiliate or instrumentality of the PHA;

(ii) A limited liability corporation;

(iii) A limited partnership;

(iv) A corporation; or

(v) Any other legally acceptable entity recognized under State law.

(2) The PHA signs the HUD-prescribed PHA-owned agreement certification covering a PHA-owned unit, instead of executing the Agreement for the PHA-owned unit. By signing the PHA-owned agreement certification, the PHA certifies that it will fulfill all the required program responsibilities of the private owner under the Agreement, and that it will also fulfill all of the program responsibilities required of the PHA for the PHA-owned unit.

(i) The PHA-owned agreement certification serves as the equivalent of the Agreement, and subjects the PHA, as owner, to all of the requirements of the Agreement contained in parts 982 and 983. Where the PHA has elected to use the PHA-owned agreement certification, all references to the Agreement throughout parts 982 and 983 must be interpreted to be references to the PHA-owned agreement certification.

(ii) The PHA may not use the PHA-owned agreement certification if the PHA-owned PBV project is owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability corporation or limited partnership controlled by the PHA).

■ 99. Delayed indefinitely, add § 983.157 to read as follows:

§ 983.157 Rehabilitated housing: option for development activity after HAP contract execution.

(a) *PHA discretion.* (1) The PHA may allow an owner of a rehabilitated housing project to conduct some or all of the development activity during the term of the HAP contract, as provided in this section. Under this option, the PHA and owner place all proposed PBV units under the HAP contract at the time

provided in paragraph (c) of this section and before the owner completes development activity. During the period of development activity, the PHA makes assistance payments to the owner for the contract units that are occupied and meet HQS.

(2) In its Administrative Plan, the PHA must explain the circumstances (if any) under which the PHA will enter a PBV HAP contract for rehabilitated housing that allows for development activity on contract units. The Administrative Plan may provide for execution of HAP contracts in accordance with this section prior to commencement of development activity, following commencement of development activity, or both. When the PHA uses the competitive selection method at § 983.51(b)(1), the PHA's policy must be disclosed in the request for proposals.

(b) *Projects that have commenced rehabilitation.* If the PHA allows for execution of a HAP contract following commencement of development activity, the following requirements apply to the development activity that occurs before HAP contract execution:

(1) For rehabilitation undertaken under an Agreement, the development activity must have complied with the Agreement executed pursuant to § 983.154, including completion of any work items and completion and acceptance of any units which were to be completed under the Agreement under §§ 983.155 and 983.156; or

(2) For rehabilitation undertaken without an Agreement pursuant to § 983.154(f):

(i) The owner of the project must be able to document its compliance with all applicable requirements of § 983.153 from the date of proposal submission (for housing subject to competitive selection) or from the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection); and

(ii) For housing subject to competitive selection, the PHA must confirm prior to the proposal selection date that the owner has complied with all applicable requirements of § 983.153 from the date of proposal submission. For housing excepted from competitive selection, the PHA must confirm prior to executing the HAP contract that the owner has complied with all applicable requirements of § 983.153 from the date of the PHA's board resolution approving the project-basing of assistance at the project.

(c) *Timing of HAP contract execution.* The PHA may execute the HAP contract for a project covered by this section after all of the following have occurred:

(1) The applicable requirement of § 983.56(d) (environmental review) has been met;

(2) If applicable, the subsidy layering review has been completed, in accordance with § 983.153(b)(2);

(3) If applicable, the PHA has determined that development activity that has commenced met the requirements of paragraph (b) of this section;

(4) The PHA has conducted an inspection (see § 983.103(b)(2)) of all units that the owner proposes to make available for occupancy by an assisted family at the beginning of the HAP contract term and the PHA has determined that at least one of those proposed contract units, including items and components within the primary and secondary means of egress, common features, and systems equipment as described by 24 CFR 5.703(a)(2), fully complies with HQS. The PHA may make the determination of compliance with HQS regardless of whether the HQS-compliant unit is expected to undergo rehabilitation. The owner may make repairs to correct HQS deficiencies identified during the PHA inspection as part of the development activity that occurs prior to HAP contract execution (see paragraph (b) of this section) to make the unit available for occupancy at the beginning of the HAP contract term. The PHA must establish in its Administrative Plan the amount of time that may elapse between the inspection and the execution of the HAP contract; and

(5) Occupants (if any) of proposed PBV units that were not inspected pursuant to paragraph (c)(4) of this section or that do not fully comply with HQS have moved and such units are vacant. These units must be identified as unavailable for occupancy in accordance with paragraph (e)(5)(ii) of this section. Any inspected unit that does not fully comply with HQS must undergo development activity, followed by inspection under § 983.156(a), prior to being designated for occupancy under paragraph (f)(1)(ii) of this section.

(6) Occupants (if any) who do not accept PBV assistance have moved and such units are vacant.

(7) The PHA may decline to place proposed PBV units that do not meet the criteria in paragraphs (c)(5) or (6) of this section on the HAP contract in order to execute the HAP contract before the units have been vacated. The PHA may add the units to the HAP contract once the units are vacant in accordance with § 983.207, except that the inspection requirement of § 983.207 does not apply if the unit will initially be categorized as unavailable for occupancy as provided in paragraph (e)(5)(ii) of this section.

(d) *HAP contract requirements.* The PHA and owner must execute the HAP contract (see § 983.204(c)) with a rider to the HAP contract that will govern development activity occurring during the term of the HAP contract. The contents of the HAP contract apply and are supplemented by the additional terms and conditions provided in the rider during the period the rider is in effect. When executing the HAP contract and rider, the PHA and owner complete the information in the HAP contract as provided in § 983.203 in addition to the information in the rider as provided in paragraph (e) of this section. The rider must be in the form required by HUD (see 24 CFR 982.162(b)). In the rider, the owner agrees to develop the contract units to comply with HQS, and the PHA agrees that, upon timely completion of such development activity in accordance with the terms of the rider, the rider will terminate and the HAP contract will remain in effect. The PHA determination that development activity has been completed and the rider may be terminated is made when all work has been completed in accordance with the applicable requirements at § 983.155 and all contract units fully comply with HQS, as provided in § 983.156(b)(3).

(e) *Contents of HAP contract rider.* At a minimum, the rider must describe the following features of the housing to be rehabilitated and assisted under the PBV program and development activity to be performed:

(1) A description of any required work item necessary to comply with the accessibility requirements of § 983.153(e);

(2) A description of any required work item if the requirement at § 983.153(f) to install broadband infrastructure applies;

(3) A description of the work to be performed under the rider, including the rehabilitation work write-up and, where determined necessary by the PHA, specifications and plans;

(4) Any requirements the PHA elects to establish in addition to HQS for design, architecture, or quality. The PHA must specify the conditions under which it will require additional housing quality requirements in the Administrative Plan.

(5) The development status of each specific contract unit. Specifically:

(i) The rider must list each unit that is available for occupancy by an assisted family at the time the unit is placed on the HAP contract. Each contract unit that fully complies with HQS in accordance with the PHA determination

under paragraph (c)(4) of this section and that the owner will make available for occupancy by an assisted family must be initially categorized as available for occupancy. For each unit that is available for occupancy, the rider must specify whether the owner will undertake development activity in the unit after it is occupied by an assisted family. The owner may initiate the development activity in the unit while it is occupied, subject to paragraph (g)(6) of this section, or when it becomes vacant, which may change the status of the unit for purposes of this paragraph. The owner must promptly notify the PHA of any change in the status of each unit throughout the period of development activity, in the form and manner required by the PHA's Administrative Plan;

(ii) The rider must list each unit that is unavailable for occupancy at the time the unit is placed on the HAP contract. Each contract unit that has not been inspected in accordance with paragraph (c)(4) of this section or that has been inspected and did not fully comply with HQS must be initially categorized as unavailable for occupancy. The owner must promptly notify the PHA of any change in the status of each unit throughout the period of development activity, in the form and manner required by the PHA's Administrative Plan; and

(6) The deadline for completion of the work to be performed under the rider, which must be no more than five years from the date the HAP contract is effective (the five-year maximum includes any extensions granted by the PHA).

(f) *Contract and rider amendment.* In general, the PHA and owner may agree to amend the contents of the rider described in paragraph (e) of this section by executing an addendum to the rider, so long as such amendments are consistent with all requirements of this part 983. However, the following requirements apply:

(1) In the case of additions or substitutions of units, the provisions of § 983.207 apply, except:

(i) The PHA and owner must also amend the rider to update the information described in paragraph (e)(5) of this section;

(ii) The units to be added must not undergo repairs or renovation prior to amending the PBV HAP contract to add the unit; and

(iii) Addition of a unit is prohibited while the rider is in effect if such addition will increase the number of contract units from eight or fewer units to nine or more units.

(2) The PHA and owner may only execute an addendum amending the items in paragraphs (e)(1)–(4) of this section affecting a unit prior to the PHA accepting the completed unit.

(g) *Occupancy of units during rehabilitation period.* The following requirements apply with respect to contract units that are available for occupancy at the time that the HAP contract is executed and during the period of development activity covered by the rider in accordance with paragraph (d) of this section:

(1) The PHA must select families as provided in § 983.251 for PBV assistance in a contract unit that is available for occupancy. Upon PHA acceptance of a completed unit (see § 983.156(b)(3)) that is vacant, the PHA may either select a family from the waiting list for PBV assistance in the newly completed unit or offer to transfer a family assisted in a different contract unit to the newly completed unit as described in paragraph (g)(6)(iii) of this section.

(2) The PHA may refer a family for occupancy of a contract unit only if the unit fully complies with HQS as determined by the PHA inspection.

(3) The PHA must provide a notice to the family upon selection explaining:

(i) The expected nature and duration of the development activity at the project;

(ii) That if the family accepts the unit and the owner fails to complete the development activity in accordance with applicable requirements, the PHA may terminate the HAP contract, in which case the family will be issued a tenant-based voucher and may be able to remain in the project with tenant-based assistance (see § 983.206(b));

(iii) If development activity is expected to occur in the family's unit per paragraph (e)(5) of this section, that the family may be required to vacate the unit temporarily or with continued voucher assistance;

(iv) That the family may choose to decline the unit and remain on the waiting list; and

(v) If applicable, in the case of an eligible in-place family, that the family may choose not to accept PBV assistance in the unit.

(4) The PHA must conduct periodic and other inspections on occupied contract units in accordance with the requirements of § 983.103(e) and (f) and must vigorously enforce the owner's obligation to maintain contract units occupied by an assisted family in accordance with the requirements of § 983.208.

(5) The PHA makes payments to the owner for occupied units as provided in § 983.351.

(6) When an owner will undertake development activity in a unit currently occupied by an assisted family as provided in paragraph (e)(5) of this section, the requirements of this paragraph (g)(6) govern where the family will live during the rehabilitation. For purposes of this paragraph, all references to the HQS applicable to the unit include items and components within the primary and secondary means of egress, common features, and systems equipment as described by 24 CFR 5.703(a)(2).

(i) The owner must complete the development activity without the family vacating the unit if the PHA reasonably expects that the owner can complete the development activity in a manner that:

(A) Does not result in life-threatening deficiencies;

(B) Does not result in any other deficiencies under the HQS that are not corrected within 30 days; and

(C) Is mutually agreeable to the owner and the family;

(ii) If the conditions for in-place development activity in paragraph (g)(6)(i) of this section cannot be achieved, the owner must temporarily relocate the family to complete the development activity if:

(A) The PHA reasonably expects that the owner can complete the relocation and development activity within a single calendar month (beginning no sooner than the first day of a month and ending no later than the last day of the same month); and

(B) The family can be relocated to a location and in a manner mutually agreeable to the owner and the family; and

(iii) If the conditions for in-place development activity in paragraph (g)(6)(i) of this section and temporary relocation in paragraph (g)(6)(ii) of this section cannot be achieved, the following protocol for lease termination and relocation applies:

(A) If there are contract units within the project that are designated as available for occupancy and that are vacant or expected to become vacant at the time of the planned lease termination, the PHA must refer the family to the owner for occupancy of an appropriate-size contract unit. If the family accepts the offered unit, the owner must provide the family with a reasonable time to move to the offered unit, must pay the family's reasonable moving expenses, must execute a lease with the family for the offered unit to be effective at the time of the family's move, and must terminate the lease for

the family's original unit at the time of the family's move. The owner must terminate the family's lease if the family rejects the offered unit; however, the PHA must first offer the family a different unit or tenant-based assistance under paragraph (g)(6)(iii)(B) of this section if needed as a reasonable accommodation under Section 504, the Fair Housing Act, or the Americans with Disabilities Act (ADA), for a household member who is a person with disabilities. The PHA must consider other family requests for a different unit or tenant-based assistance under paragraph (g)(6)(iii)(B) of this section;

(B) If no other contract unit within the project is available for the family to lease during the period of development activity, the PHA must issue the family a tenant-based voucher. However, the PHA is not required to issue the family a voucher if the PHA has offered the family an alternative housing option (*e.g.,* an assisted unit in another PBV project), and the family chooses to accept the alternative housing option instead of the voucher. The PHA may also issue the family a tenant-based voucher to accommodate the family's need or request as provided in paragraph (g)(6)(iii)(A) of this section. The PHA must issue the voucher no fewer than 90 calendar days prior to the planned lease termination. If the family is eligible and willing to request a voucher to move in accordance with § 983.261, the PHA must issue the family the voucher to move under that section. If the family is not eligible or is unwilling to request a voucher to move under § 983.261, the PHA must remove the family's unit from the PBV HAP contract and issue the family its voucher to move with tenant-based assistance and subsequently add a unit back to the PBV HAP contract at the earlier of the time that the PHA has an authorized voucher unit available or the time that the unit is ready for occupancy. The PHA must extend the voucher term until the family either leases a unit with the tenant-based voucher or accepts a contract unit, whichever occurs first;

(C) If the family moves from the project in order for the owner to undertake development activity in the family's unit, the PHA must offer the family the option to return to the project with PBV assistance, if the family is eligible for PBV assistance, following completion of development activity at the project. The PHA, or owner in the case of an owner-maintained waiting list, must place the family on the PBV waiting list with an absolute selection preference for occupancy in the project; and

(D) If the family moves from the project in order for the owner to undertake development activity in the family's unit, the PHA must not refer any family for occupancy of the unit until after rehabilitation of the unit and PHA acceptance of the completed unit (see § 983.156(b)(3)).

(h) *Owner breach.* The owner's failure to complete the development activity as provided in the rider is a breach of the HAP contract and may result in the termination of the HAP contract, in accordance with the following requirements:

(1) If the owner has not completed the development activity by the deadline specified in the rider, which includes any extensions granted by the PHA, (see paragraph (e)(6) of this section), the PHA may grant an additional period for compliance to allow the owner more time to complete the development activity. The granting of any such period must be consistent with the PHA's Administrative Plan and must not exceed 180 days. If the owner has not completed the development activity following the period for compliance, the PHA must terminate the contract. In addition to termination, the PHA may exercise any of its other rights or remedies under the HAP contract. At HUD's sole discretion, HUD may approve a PHA's request for an extension of the period for compliance beyond 180 days. In determining whether to approve the PHA request, HUD will consider appropriate factors, including any extenuating circumstances that contributed to the delay.

(2) The owner's failure to comply with the development requirements of § 983.153 constitutes a breach of the HAP contract (see § 983.206(c)(2)). In the event that the owner's failure constituted only a de minimis error in the owner's compliance with the development requirements of § 983.153, the PHA may decide to take an action other than termination of the HAP contract. In all other cases, the PHA must terminate the HAP contract, in addition to any other rights and remedies the PHA chooses to exercise under the HAP contract.

(i) *PHA-owned units.* For PHA-owned units, the independent entity must perform the inspections required under paragraphs (b)(1) and (g) of this section and make the determinations in paragraphs (g)(6)(i) and (g)(6)(ii)(A) when the owner will undertake development activity in a unit currently occupied by an assisted family, as applicable.

Subpart E—Housing Assistance Payments Contract

■ 100. Amend § 983.202 by revising paragraph (a) to read as follows:

§ 983.202 Purpose of HAP contract.

(a) *Requirement.* The PHA must enter into a HAP contract with the owner. Except as provided in this paragraph, a HAP contract shall cover a single project. If multiple projects exist, each project shall be covered by a separate HAP contract. However, a PHA and owner may agree to place multiple projects, each consisting of a single-family building, under one HAP contract. The HAP contract must be in such form as may be prescribed by HUD.

* * * * *

■ 101. Amend § 983.203 by:

■ a. Revising paragraphs (f) and (h);

■ b. In paragraph (i), removing the period and adding, in its place, adding ''; and''; and

■ b. Adding paragraph (j).

The revisions and addition read as follows:

§ 983.203 HAP contract information.

* * * * *

(f) Features provided to comply with program accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8, the Fair Housing Act, and the Americans with Disabilities Act, as applicable;

* * * * *

(h) The number of contract units under the increased program cap (as described in § 983.6(d)) or excepted from the project cap (as described in § 983.54(c)) which will be set aside for occupancy by families who qualify for such a unit;

* * * * *

(j) Whether the PHA has elected not to reduce rents below the initial rent to owner in accordance with 24 CFR 983.302(c)(2).

■ 102. Revise § 983.204 to read as follows:

§ 983.204 Execution of HAP Contract or PHA-owned Certification.

(a) *PHA inspection of housing.* Before execution of the HAP contract, the PHA must determine that applicable pre-HAP contract HQS requirements have been met in accordance with § 983.103(b) or (c) as applicable. The PHA may not execute the HAP contract for any contract unit that does not meet the pre-HAP contract HQS requirements, except as provided in paragraph (c).

(b) *Existing housing.* For existing housing, the HAP contract must be

executed and effective promptly after PHA selection of the owner proposal and PHA determination that the applicable pre-HAP contract HQS requirements have been met.

(c) *Newly constructed or rehabilitated housing.* For newly constructed or rehabilitated housing developed pursuant to § 983.152(a)(1) which will not undergo development activity after HAP contract execution per § 983.157, the HAP contract must be executed and effective promptly after the PHA determines that the housing was completed in accordance with the applicable requirements, HUD's HQS, and any additional design, architecture, or quality requirements specified by the PHA, in accordance with § 983.156(b)(1) or (c). For rehabilitated housing that will undergo development activity after HAP contract execution per § 983.157, the HAP contract must be executed and effective promptly after the requirements of § 983.157(c) are met (all proposed PBV units are added to the contract at this time, including units that do not comply with HQS or that will undergo development activity).

(d) *Effective date of the PBV HAP contract.* The effective date of the HAP contract must be on or after the date the HAP contract is executed. The HAP contract must be effective before the effective date of the first lease covering a contract unit occupied by an assisted family, and the PHA may not pay any housing assistance payment to the owner until the HAP contract is effective.

■ 103. Delayed indefinitely, amend § 983.204 by adding paragraph (e) to read as follows:

§ 983.204 Execution of HAP Contract or PHA-owned Certification.

* * * * *

(e) *PHA-owned units.* For PBV projects containing PHA-owned units that are not owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability company or limited partnership owned by the PHA), the PHA must choose one of the following options:

(1) Prior to execution of the HAP contract, the PHA must establish a separate legal entity to serve as the owner. That separate legal entity must execute the HAP contract with the PHA. The separate legal entity must have the legal capacity to lease units and must be one of the following:

(i) A non-profit affiliate or instrumentality of the PHA;

(ii) A limited liability corporation;

(iii) A limited partnership;

(iv) A corporation; or

(v) Any other legally acceptable entity recognized under State law.

(2) The PHA signs the HUD-prescribed PHA-owned certification covering a PHA-owned unit instead of executing the HAP contract for the PHA-owned unit. By signing the PHA-owned certification, the PHA certifies that it will fulfill all the required program responsibilities of the private owner under the PBV HAP contract, and that it will also fulfill all of the program responsibilities required of the PHA for the PHA-owned unit.

(i) The PHA-owned certification serves as the equivalent of the HAP contract, and subjects the PHA, as owner, to all of the requirements of the HAP contract contained in parts 982 and 983. Where the PHA has elected to use the PHA-owned certification, all references to the HAP contract throughout parts 982 and 983 must be interpreted to be references to the PHA-owned certification.

(ii) The PHA must obtain the services of an independent entity to perform the required PHA functions identified in § 983.57(b) before signing the PHA-owned certification.

(iii) The PHA may not use the PHA-owned certification if the PHA-owned PBV project is owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability corporation or limited partnership controlled by the PHA).

■ 104. Revise § 983.205 to read as follows:

§ 983.205 Term of HAP contract.

(a) *Initial term.* The PHA may enter into a HAP contract with an owner for an initial term of up to 20 years for each contract unit. The length of the term of the HAP contract for any contract unit may not be less than one year, nor more than 20 years.

(b) *Extension of term.* The PHA and owner may agree at any time before expiration of the HAP contract to execute one or more extensions of the HAP contract term. The following conditions apply:

(1) Each extension executed must have a term that does not exceed 20 years;

(2) At no time may the total remaining term of the HAP contract, with extensions, exceed 40 years;

(3) Before agreeing to an extension, the PHA must determine that the extension is appropriate to continue providing affordable housing for low-income families or to expand housing opportunities; and

(4) Each extension must be on the form and subject to the conditions prescribed by HUD at the time of the extension.

■ 105. Revise § 983.206 to read as follows:

§ 983.206 Contract termination or expiration and statutory notice requirements.

(a) *Nonextension by owner—notice requirements.* (1) Notices required in accordance with this section must be provided in the form prescribed by HUD.

(2) Not less than one year before termination of a PBV HAP contract, the owner must notify the PHA and assisted tenants of the termination.

(3) The term ''termination'' for applicability of this notice requirement means the expiration of the HAP contract, termination of the HAP contract by agreement of PHA and owner per paragraph (e) of this section, or an owner's refusal to renew the HAP contract.

(4) If an owner fails to provide the required notice, the owner must permit the tenants in assisted units to remain in their units for the required notice period with no increase in the tenant portion of their rent, and with no eviction as a result of an owner's inability to collect an increased tenant portion of rent.

(5) An owner and PHA may agree to extend the terminating contract for a period of time sufficient to provide tenants with the required notice, under such terms as HUD may require.

(b) *Termination or expiration without extension—required provision of tenant-based assistance.* Unless a termination or expiration without extension occurs due to a determination of insufficient funding pursuant to paragraph (c)(1) of this section or other extraordinary circumstances determined by HUD, the PHA shall issue each family occupying a contract unit a tenant-based voucher based on the termination or expiration of the contract no fewer than 60 calendar days prior to the planned termination or expiration of the PBV HAP contract. However, the PHA is not required to issue the family a voucher if the PHA has offered the family an alternative housing option (*e.g.,* an assisted unit in another PBV project), and the family chooses to accept the alternative housing option instead of the voucher. Such a family is not a new admission to the tenant-based program and shall not count toward the PHA's income-targeting requirements at 24 CFR 982.201(b)(2)(i). The voucher issued to the family is the voucher attached to its unit under the expiring or terminating PBV contract. Consequently, if the family vacates the

contract unit following the issuance of the tenant-based voucher and prior to the contract termination or expiration date, the PHA must remove the unit from the PBV HAP contract at the time the family vacates the unit. The PBV HAP contract must provide that, if the units continue to be used for rental housing upon termination or expiration without extension of a PBV HAP contract, each assisted family may elect to use its tenant-based assistance to remain in the same project, subject to the following:

(1) The unit must comply with HUD's HQS;

(2) The PHA must determine or have determined that the rent for the unit is reasonable;

(3) The family must pay its required share of the rent and the amount, if any, by which the unit rent (including the amount allowed for tenant-based utilities) exceeds the applicable payment standard (the limitation at 24 CFR 982.508 regarding maximum family share at initial occupancy shall not apply); and

(4) The owner may not refuse to initially lease a unit in the project to a family that elects to use their tenant-based assistance to remain in the same project, except where the owner will use the unit for a purpose other than a residential rental unit. The owner may not later terminate the tenancy of such a family, except for the following grounds:

(i) The grounds in 24 CFR 982.310 of this title, except paragraphs 24 CFR 982.310(d)(1)(iii) and (iv);

(ii) The owner's desire to use the unit for a purpose other than a residential rental unit; and

(iii) The owner's desire to renovate the unit, subject to the following:

(A) The owner must consider whether a reasonable alternative to terminating the lease exists. If a reasonable alternative exists, the owner must not terminate the lease. The owner must consider the following alternatives:

(*1*) Completing renovations without the family vacating the unit, if the renovations can be completed in a manner that does not result in life-threatening conditions, does not result in deficiencies under HQS that are not corrected within 30 days, and is mutually agreeable to the owner and the family; and

(*2*) Temporarily relocating the family to complete the renovations, if the relocation and renovations can be completed within a single calendar month (beginning no sooner than the first day of a month and ending no later than the last day of the same month) and the family can be relocated to a location and in a manner mutually agreeable to the owner and the family;

(B) If the owner terminates the lease for renovation, the owner must make every reasonable effort to make available and lease the family another unit within the project that meets the tenant-based voucher program requirements; and

(C) If no other unit within the project is available for the family to lease during the renovation period or the family chooses to move from the project during the renovation period, the owner must make every reasonable effort to make available and lease the family a unit within the project upon completion of renovations.

(c) *Termination by PHA.* (1) The HAP contract must provide that the PHA may terminate the contract for insufficient funding, subject to HUD requirements.

(i) Consistent with the policies in the PHA's Administrative Plan, the PHA has the option of terminating a PBV HAP contract based on "insufficient funding" only if:

(A) The PHA determines in accordance with HUD requirements that it lacks sufficient HAP funding (including HAP reserves) to continue to make housing assistance payments for all voucher units currently under a HAP contract;

(B) The PHA has taken cost-saving measures specified by HUD;

(C) The PHA notifies HUD of its determination and provides the information required by HUD; and

(D) HUD determines that the PHA lacks sufficient funding and notifies the PHA it may terminate HAP contracts as a result.

(2) If the PHA determines that the owner has breached the HAP contract, the PHA may exercise any of its rights or remedies under the HAP contract, including but not limited to contract termination. The provisions of § 983.208 apply for HAP contract breaches involving failure to comply with HQS. For any other contract termination due to breach, paragraph (b) of this section on provision of tenant-based assistance applies.

(d) *Termination by owner—reduction below initial rent.* If the amount of the rent to owner for any contract unit, as adjusted in accordance with § 983.302, is reduced below the amount of the initial rent to owner, the owner may terminate the HAP contract, upon notice to the PHA no fewer than 90 calendar days prior to the planned termination, and families must be provided tenant-based assistance and may elect to remain in the project in accordance with paragraph (b) of this section. The owner is not required to provide the one-year notice of the termination of the HAP contract to the family and the PHA, as described in paragraph (a) of this section, when terminating the HAP contract due to rent reduction below the initial rent to owner.

(e) *Termination by agreement of PHA and owner.* The PHA and owner may agree to terminate the HAP contract prior to the end of the term. The owner's notice in paragraph (a) of this section is required prior to termination, and the families must be provided tenant-based assistance and may elect to remain in the project in accordance with paragraph (b) of this section.

■ 106. Revise § 983.207 to read as follows:

§ 983.207 HAP contract amendments (to add or substitute contract units).

(a) *Amendment to substitute contract units.* At the discretion of the PHA, the PHA and owner may execute an amendment to the HAP contract to substitute a different unit with the same number of bedrooms in the same project for a previously covered contract unit. Prior to such substitution, the PHA must inspect the proposed substitute unit (the unit must comply with HQS to be substituted) and must determine the reasonable rent for such unit (the rent to owner must be reasonable for the unit to be substituted). The proposed substituted unit may be vacant or, subject to the requirements of paragraph (c) of this section, it may be occupied. The proposed substituted unit may undergo repairs or renovation prior to amending the PBV HAP contract to substitute the unit, as provided in paragraph (d) of this section. The proposed substituted unit must have existed at the time described in paragraph (e) of this section.

(b) *Amendment to add contract units.* At the discretion of the PHA, and provided that the total number of units in a project that will receive PBV assistance will not exceed the limitations in § 983.6 or § 983.54, the PHA and owner may execute an amendment to the HAP contract to add PBV units in the same project to the contract, without a new proposal selection. Prior to such addition, the PHA must inspect the proposed added unit (the unit must comply with HQS to be added) and must determine the reasonable rent for such unit (the rent to owner must be reasonable for the unit to be added).

(1) Added units that qualify for an exclusion from the program cap (as described in § 983.59) or an exception to or exclusion from the project cap (as described in § 983.54(c) and § 983.59, respectively) will not count toward such cap(s).

(2) The anniversary and expiration dates of the HAP contract for the additional units must be the same as the anniversary and expiration dates of the HAP contract term for the PBV units originally placed under HAP contract.

(3) The added unit may be vacant or, subject to the requirements of paragraph (c) of this section, it may be occupied.

(4) The unit may undergo repairs or renovation prior to amending the PBV HAP contract to add the unit, as provided in paragraph (d) of this section.

(5) The added unit must have existed at the time described in paragraph (e) of this section.

(c) *Substituting or adding occupied units.* The PHA may place occupied units on the HAP contract under paragraphs (a) or (b) of this section, subject to the following:

(1) The family occupying the unit must be eligible for assistance per §§ 983.53(a)(3) and 983.251(a);

(2) The unit must be appropriate for the size of the family occupying the unit under the PHA's subsidy standards;

(3) The family must be selected from the waiting list in accordance with the applicable selection policies; and

(4) The unit may be occupied by a family who was assisted with a tenant-based voucher immediately prior to the unit being placed on the PBV HAP contract. The tenant-based HAP contract for the unit must terminate before the unit may be placed under the PBV HAP contract. The family occupying the unit is not a new admission to the voucher program. The option described in this paragraph (c)(4) is subject to the following conditions:

(i) If the family is in the initial term of the tenant-based lease, the family agreed to mutually terminate the tenant-based lease with the owner and enter into a PBV lease.

(ii) If the initial term of the tenant-based lease has passed or the end of that term coincides with the time at which the unit will be placed on the PBV HAP contract, upon the owner's decision not to renew the tenant-based lease or to terminate the tenant-based lease in accordance with 24 CFR 982.308 or 982.310, respectively, the family agreed to relinquish the tenant-based voucher and enter into a PBV lease.

(d) *Substituting or adding units that underwent repairs or renovation.* A unit that is not under a HAP contract but is in a project with other units that are under a HAP contract may undergo repairs or renovation prior to amending the PBV HAP contract to add or substitute the unit, except in the case of a contract subject to a rider under the rehabilitated housing option for development activity after HAP contract execution in accordance with § 983.157. If such repairs or renovation constitute substantial improvement as defined in § 983.3, then:

(1) The substantial improvement must not proceed prior to the first two years of the effective date of the HAP contract, except in extraordinary circumstances (*e.g.,* the units were damaged by fire, natural disaster, etc.).

(2) The substantial improvement is subject to the Federal equal employment opportunity requirements of Executive Orders 11246 as amended (3 CFR, 1964–1965 Comp., p. 339), 11625 (3 CFR, 1971–1975 Comp., p. 616), 12432 (3 CFR, 1983 Comp., p. 198), and 12138 (3 CFR, 1977 Comp., p. 393).

(3) As applicable, the design and construction requirements of the Fair Housing Act and implementing regulations at 24 CFR 100.205; the accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8, including 8.22 and 8.23; and Title II of the Americans with Disabilities Act (42 U.S.C. 12131–12134) and implementing regulations at 28 CFR part 35, including §§ 35.150 and 35.151, apply to substantial improvement.

(4) Any substantial improvement that constitutes substantial rehabilitation as defined by 24 CFR 5.100 of a building with more than four rental units and where the proposal or project selection date or the start of the substantial improvement while under a HAP contract is after January 19, 2017, must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(i) The location of the substantial rehabilitation makes installation of broadband infrastructure infeasible;

(ii) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(iii) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

(5) An owner or project principal who is on the U.S. General Services Administration list of parties excluded from Federal procurement and non-procurement programs, or who is debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424, may not participate in substantial improvement. The HAP contract must include a certification by the owner that the owner and other project principals (including the officers and principal members, shareholders, investors, and other parties having a substantial interest in the project) are not on such list and are not debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424.

(6) An owner must disclose any possible conflict of interest that would be a violation of the HAP contract or HUD regulations, in accordance with § 982.161 of this title.

(7) The requirements for additional assistance after HAP contract at § 983.11(d) apply.

(8) Section 983.155, Completion of work, applies.

(9) Paragraphs (a), (b)(4), and (d) of § 983.156, PHA acceptance of completed units, apply.

(e) *Restriction on substituting or adding newly built units.* Units may only be added to the HAP contract or substituted for a previously covered contract unit if one of the following conditions applies:

(1) The units to be added or substituted existed at the time of HAP contract execution;

(2) In the case of a project completed in stages, the units to be added or substituted existed at the time of PHA acceptance of the last completed unit(s) per § 983.156(c); or

(3) A unit, office space, or common area within the interior of a building containing contract units existed at the time described in paragraph (e)(1) or (2) of this section, as applicable, and is reconfigured without impacting the building envelope, subject to paragraph (d) of this section, into one or more units to be added or substituted.

(f) *Administrative Plan requirement.* The PHA must describe in the Administrative Plan the circumstances under which it will add or substitute contract units, and how those circumstances support the goals of the PBV program.

(g) *Staged completion of contract units.* Even if contract units are placed under the HAP contract in stages commencing on different dates, there is a single annual anniversary for all contract units under the HAP contract. The annual anniversary for all contract units is the annual anniversary date for the first contract units placed under the HAP contract. The expiration of the HAP contract for all the contract units completed in stages must be concurrent with the end of the HAP contract term for the units originally placed under HAP contract.

(h) *Amendment to merge or bifurcate HAP contracts.* HUD may establish a

process allowing the PHA and owner to agree to merge two or more HAP contracts for PBV assistance on the same project, or to bifurcate a HAP contract, by **Federal Register** notice subject to public comment.

■ 107. Revise and republish § 983.208 to read as follows:

§ 983.208 Condition of contract units.

(a) Owner maintenance and operation. (1) The owner must maintain and operate the contract units and premises in accordance with the HQS, including performance of ordinary and extraordinary maintenance.

(2) The owner must provide all the services, maintenance, equipment, and utilities specified in the HAP contract with the PHA and in the lease with each assisted family.

(3) At the discretion of the PHA, the HAP contract may also require continuing owner compliance during the HAP contract term with additional housing quality requirements specified by the PHA (in addition to, but not in place of, compliance with HUD's HQS). Such additional requirements may be designed to assure continued compliance with any design, architecture, or quality requirement specified by the PHA (§ 983.204(c)). The PHA must specify the conditions under which it will require additional housing quality requirements in the Administrative Plan.

(b) *Enforcement of HQS.* (1) The PHA must vigorously enforce the owner's obligation to maintain contract units in accordance with HUD's HQS. If the owner fails to maintain the dwelling unit in accordance with HQS, the PHA must take enforcement action in accordance with this section.

(2) The unit is in noncompliance with HQS if:

(i) The PHA or other inspector authorized by the State or local government determines the unit has HQS deficiencies based upon an inspection;

(ii) The agency or inspector notifies the owner in writing of the unit HQS deficiencies; and

(iii) The unit HQS deficiencies are not remedied within the following timeframes:

(A) For life-threatening deficiencies, the owner must correct the deficiency within 24 hours of notification.

(B) For other deficiencies, the owner must correct the deficiency within 30 calendar days of notification (or any reasonable PHA-approved extension).

(3) In the case of an HQS deficiency that the PHA determines is caused by the tenant, any member of the household, or any guest or other person under the tenant's control, other than any damage resulting from ordinary use, the PHA may waive the owner's responsibility to remedy the violation. Housing assistance payments to the owner may not be withheld or abated if the owner responsibility has been waived. However, the PHA may terminate assistance to a family because of an HQS breach beyond damage resulting from ordinary use caused by any member of the household or any guest or other person under the tenant's control, which may result in removing the unit from the HAP contract.

(4) In the case of an HQS deficiency that is caused by fire, natural disaster, or similar extraordinary circumstances, the PHA may permit the owner to undertake substantial improvement in accordance with § 983.212. However, so long as the contract unit with deficiencies is occupied, the PHA must withhold or abate housing assistance payments and remove units from or terminate the HAP contract as described in this section.

(5) In the case of a project that is undergoing development activity after HAP contract execution per § 983.157, the remedies of paragraph (d) of this section do not apply to units designated as unavailable for occupancy during the period of development activity in accordance with the rider. However, in the case of any contract unit with deficiencies that is occupied, the PHA must withhold or abate housing assistance payments and remove units from or terminate the HAP contract as described in this section.

(c) *Family obligation.* (1) The family may be held responsible for a breach of the HQS that is caused by any of the following:

(i) The family fails to pay for any utilities that the owner is not required to pay for, but which are to be paid by the tenant;

(ii) The family fails to provide and maintain any appliances that the owner is not required to provide, but which are to be provided by the tenant; or

(iii) Any member of the household or guest damages the dwelling unit or premises (damages beyond ordinary wear and tear).

(2) If the PHA has waived the owner's responsibility to remedy the violation in accordance with paragraph (b)(3) of this section, the following applies:

(i) If the HQS breach caused by the family is life-threatening, the family must take all steps permissible under the lease and State and local law to ensure the deficiency is corrected within 24 hours of notification.

(ii) For other family-caused deficiencies, the family must take all steps permissible under the lease and State and local law to ensure the deficiency is corrected within 30 calendar days of notification (or any PHA-approved extension).

(3) If the family has caused a breach of the HQS, the PHA must take prompt and vigorous action to enforce the family obligations. The PHA may terminate assistance for the family in accordance with 24 CFR 982.552.

(d) *PHA remedies.* These remedies apply when HQS deficiencies are identified as the result of an inspection other than a pre-selection, initial, or turnover inspection. (See § 983.103 generally, and see § 983.103(c) in particular for PHA enforcement actions related to the initial HQS inspection for existing housing). The PHA must identify in its Administrative Plan the conditions under which it will withhold HAP and the conditions under which it will abate HAP or terminate the HAP contract for units other than the unit with HQS deficiencies.

(1) A PHA may withhold HAP for an individual unit that has HQS deficiencies once the PHA has notified the owner in writing of the deficiencies. If the unit is brought into compliance during the applicable cure period (within 24 hours from notification for life-threatening deficiencies and within 30 days from notification (or other reasonable period established by the PHA for non-life-threatening deficiencies), the PHA:

(i) Must resume assistance payments; and

(ii) Must provide assistance payments to cover the time period for which the assistance payments were withheld.

(2)(i) The PHA must abate the HAP, including amounts that had been withheld, for the PBV unit with deficiencies if the owner fails to make the repairs within the applicable cure period (within 24 hours from notification for life-threatening deficiencies and within 30 days from notification (or other reasonable period established by the PHA) for non-life-threatening deficiencies).

(ii) The PHA may choose to abate payments for all units covered by the HAP contract due to a contract unit's noncompliance with the HQS, even if some of the contract units continue to meet HQS.

(iii) If a PHA abates the HAP for a unit, the PHA must notify the family and the owner that it is abating payments and that if the unit with deficiencies does not meet HQS within 60 days after the determination of noncompliance (or a reasonable longer period established by the PHA), the PHA will either terminate the HAP

contract or remove the unit with deficiencies from the HAP contract, and any family residing in a unit that does not comply with HQS will have to move if the family wishes to receive continued assistance.

(3) An owner may not terminate the tenancy of any family due to the withholding or abatement of assistance. During the period that assistance is abated, the family may terminate the tenancy by notifying the owner. The PHA must promptly issue the family a tenant-based voucher to move.

(4) If the owner makes the repairs and the unit complies with HQS within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must recommence payments to the owner if the unit is still occupied by an assisted family. The PHA does not make any payments for the unit to the owner for the period of time that the payments were abated.

(5) If the owner fails to make the repairs within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must either remove the unit from the HAP contract or terminate the HAP contract in its entirety. The PHA must issue the family whose unit will be removed or all families residing in contract units, if the PHA is terminating the HAP contract, a tenant-based voucher to move at least 30 days prior to the removal of the unit from the HAP contract or termination of the HAP contract. A family may elect to remain in the project in accordance with § 983.206(b) if the project contains a unit that meets the requirements of that section, with priority given to families who will remain in the same unit if there are insufficient units available to accommodate all families that wish to remain.

(6)(i) The PHA must give any family residing in a unit that is either removed from the HAP contract or for which the HAP contract is terminated under this paragraph (d) due to a failure to correct HQS deficiencies at least 90 days or a longer period as the PHA determines is reasonably necessary following the termination of the HAP contract or removal of the unit from the HAP contract to lease a unit with tenant-based assistance.

(ii) If the family is unable to lease a new unit within the period provided by the PHA under paragraph (d)(6)(i) of this section and the PHA owns or operates public housing, the PHA must offer, and, if accepted, provide the family a selection preference for an appropriate-size public housing unit that first becomes available for occupancy after the time period expires.

(iii) PHAs may assist families relocating under this paragraph (d) in finding a new unit, including using up to 2 months of the withheld and abated assistance payments for costs directly associated with relocating to a new unit, including security deposits, temporary housing costs, or other reasonable moving costs as determined by the PHA based on their locality. PHAs must assist families with disabilities in locating available accessible units in accordance with 24 CFR 8.28(a)(3). If the PHA uses the withheld and abated assistance payments to assist with the family's relocation costs, the PHA must provide security deposit assistance to the family as necessary. If the family receives security deposit assistance from the PHA for the new unit, the PHA may require the family to remit the security deposit returned by the owner of the new unit at such time that the lease is terminated, up to the amount of the security deposit assistance provided by the PHA for that unit. The PHA must include in its Administrative Plan the policies it will implement for this provision.

(e) *Maintenance and replacement—Owner's standard practice.* Maintenance and replacement (including redecoration) must be in accordance with the standard practice for the building concerned as established by the owner.

(f) *Applicability.* This section is applicable to HAP contracts executed on or after or extended on or after June 6, 2024. For purposes of this paragraph, a HAP contract is extended the earlier of the effective date of the next extension period or the date the PHA and owner agree to the next extension. For all other HAP contracts, § 983.208 as in effect on June 5, 2024 remains applicable. However, the PHA and owner may agree to apply this section to a HAP contract executed before June 6, 2024 prior to extension.

■ 108. Amend § 983.210 by revising paragraphs (a), (c), (d) and (e), and removing paragraph (j), to read as follows:

§ 983.210 Owner certification.

* * * * *

(a) The owner is maintaining the premises and all contract units in accordance with HUD's HQS under the requirements of this part 983.

* * * * *

(c) Each contract unit for which the owner is receiving housing assistance payments is leased to an eligible family referred by the PHA or selected from the owner-maintained waiting list in accordance with § 983.251, and the lease is in accordance with the HAP contract and HUD requirements.

(d) To the best of the owner's knowledge, the members of the family reside in each contract unit for which the owner is receiving housing assistance payments, and the unit is the family's only residence, except as provided in §§ 983.157(g)(6)(ii) and 983.212(a)(3)(ii).

(e) The owner (including a principal or other interested party) is not the spouse, parent, child, grandparent, grandchild, sister, or brother of any member of a family residing in a contract unit unless needed as a reasonable accommodation under Section 504, the Fair Housing Act, or the Americans with Disabilities Act (ADA), for a household member who is a person with disabilities.

* * * * *

■ 109. Revise § 983.211 to read as follows:

§ 983.211 Removal of unit from HAP contract based on a family's increased income.

(a) *Removal of a unit based on a family's increased income.* Units occupied by families whose income has increased during their tenancy resulting in the total tenant payment equaling the gross rent shall be removed from the HAP contract 180 days following the last housing assistance payment on behalf of the family.

(b) *Reinstatement or substitution of HAP contracts.* If the project is fully assisted, a PHA may reinstate the unit removed under *paragraph (a)* of this section to the HAP contract after the ineligible family vacates the property. If the project is partially assisted, a PHA may substitute a different unit for the unit removed under *paragraph (a)* of this section to the HAP contract when the first eligible substitute becomes available. A reinstatement or substitution of units under the HAP contract, in accordance with this paragraph, must be permissible under § 983.207(b) or (a), respectively.

(c) *Additional requirements.* The anniversary and expirations dates of the reinstated or substituted unit must be the same as all other units under the HAP contract (*i.e.,* the annual anniversary and expiration dates for the first contract units placed under the HAP contract). Families must be selected in accordance with program requirements under § 983.251 of this part.

■ 110. Add § 983.212 to subpart E to read as follows:

§ 983.212 Substantial improvement to units under a HAP contract.

(a) *Substantial improvement to units under a HAP contract.* The owner may undertake substantial improvement on a unit currently under a HAP contract, except a contract subject to a rider under the rehabilitated housing option for development activity after HAP contract execution in accordance with § 983.157, if approved to do so by the PHA. The owner may request PHA approval no earlier than the effective date of the HAP contract. The following conditions apply:

(1) The PHA may approve the substantial improvement only if one of the following conditions apply:

(i) The unit has been damaged by fire or natural disaster, or other extraordinary circumstances exist which require a unit previously compliant with HQS to urgently undergo substantial improvement. For this purpose, ''extraordinary circumstances'' are unforeseen events that are not the fault of the owner. The PHA may provide approval for substantial improvement resulting from the damage or extraordinary circumstances described in this paragraph (a)(1)(i) after the owner submits the request.

(ii) The owner requests to engage in substantial improvement that will commence following the first two years of the effective date of the HAP contract. The PHA may provide approval for substantial improvement occurring as described in this paragraph (a)(1)(ii) after the owner submits the request, but no earlier than twenty-one months after the effective date of the HAP contract.

(2) The owner's request must include a description of the substantial improvement proposed to be undertaken and the length of time, if any, the owner anticipates that the unit, including items and components within the primary and secondary means of egress, common features, and systems equipment as described by 24 CFR 5.703(a)(2), will not meet HQS. The PHA must not approve as substantial improvement, under this section, an owner's request to demolish a building containing contract units and newly construct replacement units (see requirements for contract termination at § 983.206 and requirements for newly constructed housing in this part 983).

(3) If the unit is occupied and will not meet HQS during any part of the period of the substantial improvement, the owner's request must include a description of the owner's plan to house the family during the period the unit will not meet HQS. The PHA must not approve the substantial improvement unless the owner's plan complies with one of the following requirements:

(i) The owner must complete the substantial improvement without the family vacating the unit if the PHA reasonably expects that the owner can complete the substantial improvement in a manner that:

(A) Does not result in life-threatening deficiencies;

(B) Does not result in any other deficiencies under the HQS that are not corrected within 30 days; and

(C) Is mutually agreeable to the owner and the family;

(ii) If the conditions for in-place substantial improvement in paragraph (a)(3)(i) of this section cannot be achieved, the owner must temporarily relocate the family to complete the substantial improvement if:

(A) The PHA reasonably expects that the owner can complete the relocation and substantial improvement within a single calendar month (beginning no sooner than the first day of a month and ending no later than the last day of the same month); and

(B) The family can be relocated to a location and in a manner mutually agreeable to the owner and the family; and

(iii) If the conditions for in-place substantial improvement in paragraph (a)(3)(i) of this section and temporary relocation in paragraph (a)(3)(ii) of this section cannot be achieved, the following protocol for lease termination and relocation applies:

(A) If there are contract units within the project will meet HQS during the period of substantial improvement and that are vacant or expected to become vacant at the time of the planned lease termination, the PHA must refer the family to the owner for occupancy of an appropriate-size contract unit. If the family accepts the offered unit, the owner must provide the family with a reasonable time to move to the offered unit, must pay the family's reasonable moving expenses, must execute a lease with the family for the offered unit to be effective at the time of the family's move, and must terminate the lease for the family's original unit at the time of the family's move. The owner must terminate the family's lease if the family rejects the offered unit; however, the PHA must first offer the family a different unit or tenant-based assistance under paragraph (a)(3)(iii)(B) of this section if needed as a reasonable accommodation under Section 504, the Fair Housing Act, or the Americans with Disabilities Act (ADA), for a household member who is a person with disabilities. The PHA must consider other family requests for a different unit or tenant-based assistance under paragraph (a)(3)(iii)(B) of this section;

(B) If no other contract unit within the project is available for the family to lease during the period of substantial improvement, the PHA must issue the family a tenant-based voucher. However, the PHA is not required to issue the family a voucher if the PHA has offered the family an alternative housing option (*e.g.,* an assisted unit in another PBV project), and the family chooses to accept the alternative housing option instead of the voucher. The PHA may also issue the family a tenant-based voucher to accommodate the family's need or request as provided in paragraph (a)(3)(iii)(A) of this section. The PHA must issue the voucher no fewer than 90 calendar days prior to the planned lease termination in the case of substantial improvement pursuant to paragraph (a)(1)(ii) of this section. The PHA must issue the voucher as soon as practicable in the case of substantial improvement pursuant to paragraph (a)(1)(i) of this section. If the family is eligible and willing to request a voucher to move in accordance with § 983.261, the PHA must issue the family the voucher to move under that section. If the family is not eligible or is unwilling to request a voucher to move under § 983.261, the PHA must remove the family's unit from the PBV HAP contract and issue the family its voucher to move with tenant-based assistance and subsequently add a unit back to the PBV HAP contract at such time that the unit is ready for occupancy. The PHA must extend the voucher term until the family either leases a unit with the tenant-based voucher or accepts a contract unit, whichever occurs first; and

(C) If the family moves from the project during the period of substantial improvement, the PHA must offer the family the option to return to the project with PBV assistance, if the family is eligible for PBV assistance, following completion of substantial improvement at the project. The PHA, or owner in the case of an absolute selection preference for occupancy in the project.

(4) The PHA must abate housing assistance payments for a unit beginning at the time the unit has any deficiency under HUD's HQS during the period of substantial improvement. The timing for the PHA to begin withholding and abatement specified in § 983.208(d) does not apply to deficiencies occurring during the period of substantial improvement. When all deficiencies in the unit are corrected, the PHA must recommence payments to the owner if the unit is still occupied by an assisted family, subject to paragraphs (a)(5) and

(b)(1) of this section. Additionally, the PHA must not pay vacancy payments during the period of substantial improvement.

(5) The terms of the PHA approval must be recorded in an addendum to the HAP contract. The PHA may choose to temporarily remove vacant units from the PBV HAP contract during the time the units will not meet HQS during the substantial improvement. If the PHA temporarily removes a unit, the PHA reinstates the unit in accordance with § 983.207(b). Owner failure to complete the substantial improvement as approved shall be a breach of the HAP contract and the PHA may exercise any of its rights or remedies under the HAP contract, including but not limited to contract termination pursuant to § 983.206(c)(2).

(b) *Applicable requirements.* (1) Substantial improvement undertaken on units that are currently under a HAP contract is subject to the Federal equal employment opportunity requirements of Executive Orders 11246 as amended (3 CFR, 1964–1965 Comp., p. 339), 11625 (3 CFR, 1971–1975 Comp., p. 616), 12432 (3 CFR, 1983 Comp., p. 198), and 12138 (3 CFR, 1977 Comp., p. 393).

(2) As applicable, the design and construction requirements of the Fair Housing Act and implementing regulations at 24 CFR 100.205; the accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8, including 8.22 and 8.23; and Title II of the Americans with Disabilities Act (42 U.S.C. 12131–12134) and implementing regulations at 28 CFR part 35, including §§ 35.150 and 35.151, apply to substantial improvement undertaken on units that are currently under a HAP contract.

(3) Any substantial improvement undertaken on units that are currently under a HAP contract that constitutes substantial rehabilitation as defined by 24 CFR 5.100 of a building with more than four rental units and where the proposal or project selection date or the start of the substantial improvement while under a HAP contract is after January 19, 2017, must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(i) The location of the substantial rehabilitation makes installation of broadband infrastructure infeasible;

(ii) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(iii) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

(4) An owner or project principal who is on the U.S. General Services Administration list of parties excluded from Federal procurement and non-procurement programs, or who is debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424, may not participate in substantial improvement undertaken on units subject to a HAP contract. The HAP contract must include a certification by the owner that the owner and other project principals (including the officers and principal members, shareholders, investors, and other parties having a substantial interest in the project) are not on such list and are not debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424.

(5) An owner must disclose any possible conflict of interest that would be a violation of the HAP contract or HUD regulations, in accordance with § 982.161 of this title.

(6) The requirements for additional assistance after HAP contract at § 983.11(d) apply to substantial improvement undertaken on units that are currently under a HAP contract.

(7) Section 983.155, Completion of work, applies to substantial improvement undertaken on units that are currently under a HAP contract.

(8) Section 983.156(a), Inspection of units, and (d), PHA-owned units, apply to substantial improvement undertaken on units that are currently under a HAP contract.

(c) *PHA-owned units.* For PHA-owned units, the independent entity must determine whether to approve the PHA proposal to undertake substantial improvement as provided in paragraph (a) of this section, including making the determinations in paragraphs (a)(3)(i) and (a)(3)(ii)(A) when the owner will undertake substantial improvement in a unit currently occupied by an assisted family, as applicable (see § 983.57(b)(4)). The independent entity must approve the proposal if:

(1) The proposed substantial improvement meets one of the conditions of paragraph (a)(1) of this section;

(2) The description of the substantial improvement does not include plans to demolish a building containing contract units and newly construct replacement units; and

(3) The plan to house each family during the period that family's unit will not meet HQS complies with the requirements of paragraph (a)(3).

Subpart F—Occupancy

■ 111. Revise and republish § 983.251 to read as follows:

§ 983.251 How participants are selected.

(a) Who may receive PBV assistance? (1) The PHA may select families who are participants in the PHA's tenant-based voucher program and families who have applied for admission to the voucher program.

(2) Except for voucher participants (determined eligible at original admission to the voucher program), the PHA may only select families determined eligible for admission at commencement of PBV assistance, using information received and verified by the PHA within a period of 60 days before commencement of PBV assistance. For all families, the PHA must determine the total tenant payment for the family is less than the gross rent, such that the unit will be eligible for a monthly HAP.

(3) The protections for victims of domestic violence, dating violence, sexual assault, or stalking in 24 CFR part 5, subpart L, apply to admission to the project-based program.

(4) A PHA may not approve a tenancy if the owner (including a principal or other interested party) of a unit is the parent, child, grandparent, grandchild, sister, or brother of any member of the family, unless the PHA determines that approving the unit would provide reasonable accommodation under Section 504, the Fair Housing Act, or the Americans with Disabilities Act (ADA), for a household member who is a person with disabilities.

(b) *Protection of in-place families.* (1) To minimize displacement of in-place families, if an in-place family is determined to be eligible prior to placement of the family's unit on the HAP contract, the in-place family must be placed on the PBV waiting list (if the family is not already on the list) and given an absolute selection preference. If the PHA's waiting list for PBV assistance is not a project-specific waiting list, the PHA must refer the family to the applicable project owner for an appropriate-size PBV unit in the specific project.

(2) If the in-place family is a tenant-based voucher participant, program eligibility is not re-determined. However, the PHA must determine that the total tenant payment for the family is less than the gross rent for the unit, such that the unit will be eligible for a

monthly HAP, and the PHA may deny or terminate assistance for the grounds specified in 24 CFR 982.552 and 982.553.

(3)(i) During the initial term of the lease under the tenant-based tenancy, an in-place tenant-based voucher family may agree, but is not required, to mutually terminate the lease with the owner and enter into a lease and tenancy under the PBV program. If the family chooses to continue the tenant-based assisted tenancy, the unit may not be added to the PBV HAP contract. The owner may not terminate the lease for other good cause during the initial term unless the owner is terminating the tenancy because of something the family did or failed to do in accordance with 24 CFR 982.310(d)(2). The owner is expressly prohibited from terminating the tenancy during the initial term of the lease based on the family's failure to accept the offer of a new lease or revision, or for a business or economic reason.

(ii) If, after the initial term, the owner chooses not to renew the lease or terminates the lease for other good cause (as defined in 24 CFR 982.310(d)) to end the tenant-based assisted tenancy, the family would be required to move with continued tenant-based assistance or relinquish the tenant-based voucher and enter into a new lease to receive PBV assistance in order to remain in the unit.

(4) Admission of in-place families is not subject to income-targeting under 24 CFR 982.201(b)(2)(i).

(c) *Selection from waiting list.* (1) Applicants who will occupy PBV units must be selected from the waiting list for the PBV program.

(2) The PHA must identify in the Administrative Plan which of the following options it will use to structure the waiting list for the PBV program:

(i) The PHA may use a separate, central, waiting list comprised of more than one, or all, PBV projects;

(ii) The PHA may use the same waiting list for both tenant-based assistance and some or all PBV projects; or

(iii) The PHA may use separate waiting lists for PBV units in individual projects or buildings (or for sets of such units). This option may be used in combination with the option in paragraph (c)(2)(i) or (ii) of this section. The PHA must specify the name of the PBV project in the Administrative Plan. The PHA may permit the owner to maintain such waiting lists (see paragraph (c)(7) of this section for more information).

(3) For any of the options under paragraph (c)(2) of this section, the PHA may establish in its Administrative Plan any preferences for occupancy of particular units including the name of the project(s) and the specific preferences that are to be used by project. Criteria for occupancy of units (*e.g.,* elderly families) may also be established; however, selection of families must be done through an admissions preference.

(4) The PHA may merge the waiting list for PBV assistance with the PHA waiting list for admission to another assisted housing program.

(5) Where applicable, the PHA may place families referred by the PBV owner on its PBV waiting list.

(6) If the PHA chooses to use a separate waiting list for admission to PBV units under paragraphs (c)(2)(i) and (iii) of this section, the PHA must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for PBV assistance (including owner-maintained PBV waiting lists).

(7) PHAs using separate waiting lists for individual projects or buildings, as described in paragraph (c)(2)(iii) of this section, may establish in their Administrative Plan that owners will maintain such waiting lists. PHAs may choose to use owner-maintained PBV waiting lists for specific owners or projects. PHAs may permit an owner to maintain a single waiting list across multiple projects owned by the owner. Under an owner-maintained waiting list, the owner is responsible for carrying out responsibilities including, but not limited to, processing changes in applicant information, removing an applicant's name from the waiting list, opening and closing the waiting list. PHAs must identify in their Administrative Plans the name of the project(s), the oversight procedures the PHA will use to ensure owner-maintained waiting lists are administered properly and in accordance with program requirements, and the approval process of an owner's waiting list policy (including any preferences). Where a PHA allows for owner-maintained waiting lists, all the following apply:

(i) The owner must develop and submit a written owner waiting list policy to the PHA for approval. The owner waiting list policy must include policies and procedures concerning waiting list management and selection of applicants from the project's waiting list, including any admission preferences, procedures for removing applicant names from the waiting list, and procedures for closing and reopening the waiting list. The owner must receive approval from the PHA of its owner waiting list policy in accordance with the process established in the PHA's Administrative Plan. The owner's waiting list policy must be incorporated in the PHA's Administrative Plan.

(ii) The owner must receive approval from the PHA for any preferences that will be applicable to the project. The PHA will approve such preferences as part of its approval of the owner's waiting list policy. Each project may have a different set of preferences. Preferences must be consistent with the PHA Plan and listed in the owner's waiting list policy.

(iii) The owner is responsible for opening and closing the waiting list, including providing public notice when the owner opens the waiting list in accordance with 24 CFR 982.206. If the owner-maintained waiting list is open and additional applicants are needed to fill vacant units, the owner must give public notice in accordance with the requirements of 24 CFR 982.206 and the owner waiting list policy.

(iv) The applicant may apply directly at the project, or the applicant may request that the PHA refer the applicant to the owner for placement on the project's waiting list. The PHA must disclose to the applicant all the PBV projects available to the applicant, including the projects' contact information and other basic information about the project.

(v) Applicants already on the PHA's waiting list must be permitted to place their names on the project's waiting lists.

(vi) At the discretion of the PHA, the owner may make preliminary eligibility determinations for purposes of placing the family on the waiting list, and preference eligibility determinations. The PHA may choose to make this determination rather than delegating it to the owner.

(vii) If the PHA delegated the preliminary eligibility and preference determinations to the owner, the owner is responsible for notifying the family of the owner's determination not to place the applicant on the waiting list and a determination that the family is not eligible for a preference. In such a case, the owner is responsible to provide the notice at 24 CFR 982.554(a) of this title. The PHA is then responsible for conducting the informal review.

(viii) Once an owner selects the family from the waiting list, the owner refers the family to the PHA who then determines the family's final program eligibility. The owner may not offer a unit to the family until the PHA determines that the family is eligible for the program.

(ix) All HCV waiting list administration requirements that apply to the PBV program (24 CFR part 982, subpart E, other than 24 CFR 982.201(e), 982.202(b)(2), and 982.204(d)) apply to owner-maintained waiting lists.

(x) The PHA is responsible for oversight of owner-maintained waiting lists to ensure that they are administered properly and in accordance with program requirements, including but not limited to nondiscrimination and equal opportunity requirements under the authorities cited at 24 CFR 5.105(a). The owner is responsible for maintaining complete and accurate records as described in 24 CFR 982.158. The owner must give the PHA, HUD, and the Comptroller General full and free access to its offices and records concerning waiting list management, as described in 24 CFR 982.158(c). HUD may undertake investigation to determine whether the PHA or owner is in violation of authorities and, if unable to reach a voluntary resolution to correct the violation, take an enforcement action against either the owner or the PHA, or both.

(8) Not less than 75 percent of the families admitted to a PHA's tenant-based and project-based voucher programs during the PHA fiscal year from the PHA waiting list shall be extremely low-income families. The income-targeting requirements at 24 CFR 982.201(b)(2) apply to the total of admissions to the PHA's project-based voucher program and tenant-based voucher program during the PHA fiscal year from the PHA waiting list (including owner-maintained PBV waiting lists) for such programs.

(9) Families who require particular accessibility features for persons with disabilities must be selected first to occupy PBV units with such accessibility features (see 24 CFR 8.26, 8.27, and 100.202). Also see § 983.260. The PHA shall have some mechanism for referring to accessible PBV units a family that includes a person with a mobility or sensory impairment.

(d) *Preference for services offered.* In selecting families, PHAs (or owners in the case of owner-maintained waiting lists) may give preference to families who qualify for voluntary services, including disability-specific services, offered at a particular project, consistent with the PHA Plan and Administrative Plan.

(1) The prohibition on granting preferences to persons with a specific disability at 24 CFR 982.207(b)(3) continues to apply.

(2) Families must not be required to accept the particular services offered at the project nor shall families be required to provide their own equivalent services if they decline the project's services.

(3) In advertising the project, the owner may advertise the project as offering services for a particular type of disability; however, the preference must be provided to all applicants who qualify for the voluntary services offered in conjunction with the assisted units.

(e) *Offer of PBV assistance or owner's rejection.* (1) If a family refuses the PHA's offer of PBV assistance or the owner rejects a family for admission to the owner's PBV units, the family's position on the PHA waiting list for tenant-based assistance is not affected regardless of the type of PBV waiting list used by the PHA.

(2) The impact (of a family's rejection of the offer or the owner's rejection of the family) on a family's position on the PBV waiting list will be determined as follows:

(i) If a central PBV waiting list is used, the PHA's Administrative Plan must address the number of offers a family may reject without good cause before the family is removed from the PBV waiting list and whether the owner's rejection will impact the family's place on the PBV waiting list.

(ii) If a project-specific PBV waiting list is used, the family's name is removed from the project's waiting list connected to the family's rejection of the offer without good cause or the owner's rejection of the family. The family's position on any other project-specific PBV waiting list is not affected.

(iii) The PHA must define ''good cause'' for purposes of paragraphs (e)(2)(i) and (ii) of this section in its Administrative Plan. The PHA's definition of good cause must include, at minimum, that:

(A) The family determines the unit is not accessible to a household member with a disability or otherwise does not meet the member's disability-related needs;

(B) The unit has HQS deficiencies;

(C) The family is unable to accept the offer due to circumstances beyond the family's control (such as hospitalization, temporary economic hardship, or natural disaster); and

(D) The family determines the unit presents a health or safety risk to a household member who is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, as provided in part 5, subpart L of this title.

(3) None of the following actions may be taken against an applicant solely because the applicant has applied for, received, or refused an offer of PBV assistance:

(i) Refuse to list the applicant on the PHA waiting list for tenant-based assistance or any other available PBV waiting list. However, the PHA (or owner in the case of owner-maintained waiting lists) is not required to open a closed waiting list to place the family on that waiting list.

(ii) Deny any admission preference for which the applicant is currently qualified.

(iii) Change the applicant's place on the waiting list based on preference, date, and time of application, or other factors affecting selection from the waiting list.

(iv) Remove the applicant from the waiting list for tenant-based voucher assistance.

■ 112. Revise and republish § 983.252 to read as follows:

§ 983.252 PHA information for accepted family.

(a) *Oral briefing.* When a family accepts an offer of PBV assistance, the PHA must give the family an oral briefing.

(1) The briefing must include information on the following subjects:

(i) A description of how the program works;

(ii) Family and owner responsibilities; and

(iii) Family right to move.

(2) The PHA must take appropriate steps to ensure effective communication in accordance with 24 CFR 8.6 and 28 CFR part 35, subpart E, and must provide information on the reasonable accommodation process.

(b) *Information packet.* The PHA must give the family a packet that includes information on the following subjects:

(1) How the PHA determines the total tenant payment for a family;

(2) Family obligations under the program; and

(3) Information on Federal, State, and local equal opportunity laws, the contact information for the Section 504 coordinator, a copy of the housing discrimination complaint form, and information on how to request a reasonable accommodation or modification under Section 504, the Fair Housing Act, and the Americans with Disabilities Act;

(4) PHA subsidy standards, including when the PHA will consider granting exceptions to the standards as allowed by 24 CFR 982.402(b)(8), and when exceptions are required as a reasonable accommodation for a person with disabilities under Section 504, the Fair Housing Act, or the Americans with Disabilities Act; and

(5) Family right to move.

(c) *Statement of family responsibility.* The PHA and family must sign the statement of family responsibility.

(d) *Providing information for persons with limited English proficiency.* The PHA must take reasonable steps to ensure meaningful access by persons with limited English proficiency in accordance with obligations and procedures contained in Title VI of the Civil Rights Act of 1964, and HUD's implementing regulation at 24 CFR part 1., Executive Order 13166, and HUD's *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (72 FR 2732) or successor authority.

■ 113. Amend § 983.253 by revising paragraphs (a)(1) and (3) to read as follows:

§ 983.253 Leasing of contract units.

(a) * * *

(1) During the term of the HAP contract, the owner must lease contract units only to eligible families selected from the waiting list for the PBV program in accordance with § 983.251 of this part.

* * * * *

(3) An owner must promptly notify in writing any rejected applicant of the grounds for any rejection. The owner must provide a copy of such rejection notice to the PHA.

* * * * *

■ 114. Revise § 983.254 to read as follows:

§ 983.254 Vacancies.

(a) *Filling vacant units.* (1) The PHA and the owner must make reasonable good-faith efforts to minimize the likelihood and length of any vacancy in a contract unit. However, contract units in a rehabilitated housing project undergoing development activity after HAP contract execution that are not available for occupancy in accordance with § 983.157(e)(5) are not subject to this requirement.

(i) If an owner-maintained waiting list is used, in accordance with § 983.251, the owner must promptly notify the PHA of any vacancy or expected vacancy in a contract unit and refer the family to the PHA for final eligibility determination. The PHA must make every reasonable effort to make such final eligibility determination within 30 calendar days.

(ii) If a PHA-maintained waiting list is used, in accordance with § 983.251, the owner must promptly notify the PHA of any vacancy or expected vacancy in a contract unit, and the PHA must, after receiving the owner notice, make every reasonable effort to promptly refer a sufficient number of families for the owner to fill such vacancies within 30 calendar days.

(2) The owner must lease vacant contract units only to families determined eligible by the PHA.

(b) *Reducing number of contract units.* If any contract units have been vacant for a period of 120 days or more since owner notice of vacancy, as required in paragraph (a) of this section, and notwithstanding the reasonable good-faith efforts of the PHA and the owner to fill such vacancies, the PHA may give notice to the owner amending the HAP contract to reduce the number of contract units by subtracting the number of contract units (by number of bedrooms) that have been vacant for such period.

■ 115. Amend § 983.255 by revising paragraphs (a)(2) and (c)(4) to read as follows:

§ 983.255 Tenant screening.

(a) * * *

(2) The PHA must conduct tenant screening of applicants in accordance with policies stated in the PHA Administrative Plan.

(c) * * *

(4) The PHA policy must be stated in the Administrative Plan and provide that the PHA will give the same types of information to all owners.

* * * * *

■ 116. Revise § 983.257 to read as follows:

§ 983.257 Owner termination of tenancy and eviction.

24 CFR 982.310 of this title applies with the exception that 24 CFR 982.310(d)(1)(iii) and (iv) does not apply to the PBV program. (In the PBV program, ''good cause'' does not include a business or economic reason or desire to use the unit for an individual, family, or non-residential rental purpose.) In addition, the owner may terminate the tenancy in accordance with the requirements related to lease terminations for development activity on units under a HAP contract as provided in § 983.157(g)(6)(iii) and for substantial improvement to units under a HAP contract as provided in § 983.212(a)(3)(iii). 24 CFR 5.858 through 5.861 on eviction for drug and alcohol abuse and 24 CFR part 5, subpart L (Protection for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking) apply to the PBV program.

■ 117. Amend § 983.259 by:

■ a. Adding a heading to paragraph (a);

■ b. Revising paragraph (b); and

■ c. Adding headings to paragraphs (c) through (e).

The additions and revisions read as follows:

§ 983.259 Security deposit: Amounts owed by tenant.

(a) *Security deposit permitted.* * * *

(b) *Amount of security deposit.* The PHA must prohibit the owner from charging assisted tenants security deposits in excess of private market practice, or in excess of amounts charged by the owner to unassisted tenants.

(c) *Use of security deposit.* * * *

(d) *Security deposit reimbursement to owner.* * * *

(e) *Insufficiency of security deposit.* * * *

■ 118. Revise § 983.260 to read as follows:

§ 983.260 Overcrowded, under-occupied, and accessible units.

(a) *Family occupancy of wrong-size or accessible unit.* (1) The PHA subsidy standards determine the appropriate unit size for the family size and composition.

(2) If the PHA determines that a family is occupying a wrong-size unit, or a unit with accessibility features that the family does not require and the unit is needed by a family that requires the accessibility features (see 24 CFR 8.27), the PHA must:

(i) Within 30 days from the PHA's determination, notify the family and the owner of this determination; and

(ii) Within 60 days from the PHA's determination, offer the family continued housing assistance, pursuant to paragraph (b) of this section.

(b) *PHA offer of continued assistance.* (1) The PHA policy on continued housing assistance must be stated in the Administrative Plan and may be in the form of:

(i) PBV assistance in an appropriate-size unit (in the same project or in another project);

(ii) Other project-based housing assistance (*e.g.,* by occupancy of a public housing unit);

(iii) Tenant-based rental assistance under the voucher program; or

(iv) Other comparable tenant-based rental assistance.

(2) If no continued housing assistance as described in paragraph (b)(1) of this section is available, the PHA must remove the wrong-size or accessible unit from the HAP contract to make voucher assistance available to issue the family a tenant-based voucher. Section 983.206(b) does not apply to families issued a tenant-based voucher under the

circumstance described in this paragraph (b)(2).

(c) *PHA termination of housing assistance payments.* (1) If the PHA offers the family the opportunity to receive tenant-based rental assistance under the voucher program:

(i) The PHA must terminate the housing assistance payments for a wrong-sized or accessible unit at the earlier of the expiration of the term of the family's voucher (including any extension granted by the PHA) or the date upon which the family vacates the unit.

(ii) If the family does not move out of the wrong-sized unit or accessible unit by the expiration date of the term of the family's voucher, the PHA must remove the unit from the HAP contract.

(2) If the PHA offers the family another form of continued housing assistance (other than tenant-based rental assistance under the voucher program), in accordance with paragraph (b)(1) of this section, the PHA must terminate the housing assistance payments for the wrong-sized or accessible unit and remove the unit from the HAP contract when:

(i) In the case of an offer by the PHA of PBV assistance or other project-based housing assistance in an appropriate-size unit, the family does not accept the offer and does not move out of the PBV unit within a reasonable time as determined by the PHA, not to exceed 90 days. The family may request and the PHA may grant one extension not to exceed up to an additional 90 days to accommodate the family's efforts to locate affordable, safe, and geographically proximate replacement housing.

(ii) In the case of an offer by the PHA of PBV assistance or other project-based housing assistance in an appropriate size unit, the family accepts the offer but does not move out of the PBV unit within a reasonable time as determined by the PHA, not to exceed 90 days.

(iii) In the case of an offer by the PHA of other comparable tenant-based rental assistance, the family either accepts or does not accept the offer but does not move out of the PBV unit within a reasonable time as determined by the PHA, not to exceed 90 days. The family may request and the PHA may grant one extension not to exceed up to an additional 90 days to accommodate the family's efforts to locate, affordable, safe, and geographically proximate replacement housing.

(d) *Reinstatement.* The PHA may reinstate a unit removed under paragraph (b)(2), (c)(1)(ii), or (c)(2) of this section to the HAP contract after the family vacates the property, in accordance with § 983.207(b).

■ 119. Revise § 983.261 to read as follows:

§ 983.261 Family right to move.

(a) *Termination of assisted lease after one year.* The family may terminate the assisted lease at any time after one year of PBV assistance. The family must give the owner advance written notice of intent to vacate (with a copy to the PHA) in accordance with the lease.

(b) *Continued assistance.* If the family has elected to terminate the lease in accordance with paragraph (a) of this section, the PHA must offer the family the opportunity for continued tenant-based rental assistance. The PHA must specify in the Administrative Plan whether it will offer families assistance under the voucher program or other comparable tenant-based rental assistance. If voucher assistance is offered to the family and the search term expires, the PHA must issue the voucher to the next eligible family.

(c) *Contacting the PHA.* Before providing notice to terminate the lease under *paragraph (a)* of this section, a family must contact the PHA to request a voucher or comparable tenant-based rental assistance if the family wishes to move with continued assistance. If a voucher or other comparable tenant-based rental assistance is not immediately available to the family upon the family's request to the PHA, the PHA must give the family priority to receive the next available opportunity for continued tenant-based rental assistance. The PHA must describe in its Administrative Plan its policies and procedures for how the family must contact the PHA and how the PHA documents families waiting for continued tenant-based rental assistance.

(d) *Termination of assisted lease before one year.* If the family terminates the assisted lease before one year of PBV assistance, the family relinquishes the opportunity for continued tenant-based assistance under this section.

(e) *Notice exclusion.* When the family or a member of the family is or has been the victim of domestic violence, dating violence, sexual assault, or stalking, as provided in 24 CFR part 5, subpart L, and the move is needed to protect the health or safety of the family or family member, the family is not required to give the owner advance written notice or contact the PHA under paragraph (a) and (c), respectively, of this section before moving from the unit. Additionally, when any family member has been the victim of a sexual assault that occurred on the premises during the 90-calendar-day period preceding the family's request to move, the family is not required to give the owner advance written notice or contact the PHA under paragraph (a) and (c), respectively, of this section before moving from the unit. A PHA may not terminate the assistance of a family due to a move occurring under the circumstances in this paragraph (e) and must offer the family the opportunity for continued tenant-based assistance if the family had received at least one year of PBV assistance prior to moving.

(f) *Emergency Transfer Plans.* In the case of a move due to domestic violence, dating violence, sexual assault, or stalking, as provided in 24 CFR part 5, subpart L, PHAs must describe policies for facilitating emergency transfers for families with PBV assistance in their Emergency Transfer Plan, consistent with the requirements in 24 CFR 5.2005(e), including when the victim has received PBV assistance for less than one year and is not eligible for continued assistance under § 983.261(b).

(g) *Family break-up.* If a family break-up results from an occurrence of domestic violence, dating violence, sexual assault, or stalking as provided in 24 CFR part 5, subpart L (Protection for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking), the PHA must ensure that the victim retains assistance in accordance with 24 CFR 982.315(a)(2).

■ 120. Revise § 983.262 to read as follows:

§ 983.262 Occupancy of units under the increased program cap and project cap excepted units.

(a) *General.* Pursuant to § 983.6(a), a PHA may commit project-based assistance to no more than 20 percent of its authorized voucher units at the time of commitment. There are certain units eligible for an increased program cap as described in § 983.6(d). Pursuant to § 983.54(a), the PHA may not select a proposal to provide PBV assistance or place units under an Agreement or a HAP contract in excess of the project cap. There are certain exceptions to the project cap as described in § 983.54(c). This section provides more detail on the occupancy requirements of both the excepted units from the project cap under § 983.54(c)(2) and units under the increased program cap under § 983.6(d).

(b) *Requirements applicable to both excepted units and units under an increased program cap.* (1) The unit must be occupied by a family who meets the applicable exception.

(2) The family must be selected from the waiting list for the PBV program

through an admissions preference (see § 983.251).

(3) Once the family vacates the unit, the unit must be made available to and occupied by a family that meets the applicable exception.

(4) The PHA must specify in its Administrative Plan which of the options below the PHA will take if a unit is no longer qualified for its excepted status or the increased program cap:

(i) Substitute the unit for another unit if it is possible to do so in accordance with § 983.207(a), so that the overall number of excepted units or units under the increased program cap in the project is not reduced. A PHA may, in conjunction with such substitution, add the original unit to the HAP contract if it is possible to do so in accordance with § 983.207(b), including that such addition does not cause the PHA to exceed the program cap or become non-compliant with the project cap.

(ii) Remove the unit from the PBV HAP contract. In conjunction with the removal, the PHA may provide the family with tenant-based assistance, if the family is eligible for tenant-based assistance. The family and the owner may agree to use the tenant-based voucher in the unit; otherwise, the family must move from the unit with the tenant-based voucher. If the family later vacates the unit, the PHA may add the unit to the PBV HAP contract in accordance with § 983.207.

(iii) Change the unit's status under the project cap or program cap, as applicable, provided that the change does not cause the PHA to exceed the program cap or become non-compliant with the project cap.

(c) *Requirements for units under the increased program cap*—(1) *Homeless family.* A unit qualifies under the increased program cap at § 983.6(d)(1)(i) if the family meets the definition of homeless under Section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302), included in 24 CFR 578.3, at the time the family first occupies the unit.

(2) *Veteran family.* A unit qualifies under the increased program cap at § 983.6(d)(1)(ii) if the family is comprised of or includes a veteran (a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom) at the time the family first occupies the unit.

(3) *Supportive housing for persons with disabilities or elderly persons.* The following applies to the increased program cap category at § 983.6(d)(1)(iii):

(i) A disabled or elderly member of the family must be eligible for one or more of the supportive services at the time the family first occupies the unit. The member of the family may choose not to participate in the services.

(ii) The PHA must state in its Administrative Plan whether it will allow a family that initially qualified for supportive housing for persons with disabilities or elderly persons to continue to reside in a unit, where through circumstances beyond the control of the family (*e.g.,* death of the elderly family member or family member with a disability or long term or permanent hospitalization or nursing care), the elderly family member or family member with a disability no longer resides in the unit. In this case, the unit may continue to count under the increased program cap category for as long as the family resides in that unit. However, the requirements of § 983.260, concerning wrong-sized units, apply. If the PHA chooses not to exercise this discretion, the unit no longer counts under the increased program cap category and, if the family is not required to move from the unit as a result of § 983.260, the PHA may use one of the options described in paragraph (b)(4) of this section.

(4) *Units for Family Unification Program (FUP) youth.* See paragraph (e) of this section for requirements relating to the increased program cap category at § 983.6(d)(2).

(d) *Requirements for project cap excepted units*—(1) *Elderly family.* A unit under the project cap exception category at § 983.54(c)(2)(i) must be occupied by an elderly family, as defined in 24 CFR 5.403. The PHA must state in its Administrative Plan whether it will allow a family that initially qualified for occupancy of an excepted unit based on elderly family status to continue to reside in a unit, where through circumstances beyond the control of the family (*e.g.,* death of the elderly family member or long term or permanent hospitalization or nursing care), the elderly family member no longer resides in the unit. In this case, the unit may continue to count as an excepted unit for as long as the family resides in that unit. However, the requirements of § 983.260, concerning wrong-sized units, apply. If the PHA chooses not to exercise this discretion, the unit is no longer considered excepted and, if the family is not required to move from the unit as a result of § 983.260, the PHA may use one of the options described in paragraph (b)(4) of this section.

(2) *Disabled family.* The same provisions of paragraph (d)(1) of this section apply to units previously excepted based on disabled family status under a HAP contract in effect prior to April 18, 2017.

(3) *Supportive services.* The following applies under the project cap exception category at § 983.54(c)(2)(iii):

(i) A unit is excepted if any member of the family is eligible for one or more of the supportive services even if the family chooses not to participate in the services.

(ii) If any member of the family chooses to participate and successfully completes the supportive services, the unit continues to be excepted for as long as any member of the family resides in the unit, even if the members that continue to reside in the unit are ineligible during tenancy for all available supportive services.

(iii) The unit loses its excepted status only if the entire family becomes ineligible during the tenancy for all supportive services available to the family. This provision does not apply where any member of the family has successfully completed the supportive services under paragraph (c)(2) of this section.

(iv) A family cannot be terminated from the program or evicted from the unit because they become ineligible for all supportive services during the tenancy.

(4) *Units for FUP youth.* See paragraph (e) of this section for requirements relating to the increased project cap exception category at § 983.54(c)(2)(ii).

(e) *Requirements for units for FUP youth under the increased program cap and project cap exception.* The following applies under the project cap exception category at § 983.54(c)(2)(ii) and the increased program cap category at § 983.6(d)(2):

(1) A unit is excepted from the project cap or qualifies under the increased program cap, as applicable, if the unit is occupied by an eligible youth receiving FUP assistance.

(2) The youth must vacate the unit once the FUP assistance has expired. The unit loses its excepted status or no longer qualifies under the increased program cap, as applicable, if the youth does not move from the unit upon the expiration of the FUP assistance.

Subpart G—Rent to Owner

■ 121. Amend § 983.301 by revising paragraphs (b)(1), (c)(2)(i), (f), and (g) to read as follows:

§ 983.301 Determining the rent to owner.

* * * * *

(b) * * *

(1) An amount determined by the PHA in accordance with the Administrative Plan not to exceed 110 percent of the applicable fair market rent (or the amount of any applicable exception payment standard) for the unit bedroom size minus any utility allowance;

(c) * * *

(2) * * *

(i) An amount determined by the PHA in accordance with the Administrative Plan, not to exceed the tax credit rent minus any utility allowance;

* * * * *

(f) *Use of FMRs and utility allowance schedule in determining the amount of rent to owner.* (1) When determining the initial rent to owner, the PHA shall use the most recently published FMR in effect and the utility allowance schedule in effect at execution of the HAP contract. At its discretion, the PHA may use the amounts in effect at any time during the 30-day period immediately before the beginning date of the HAP contract.

(2) When redetermining the rent to owner, the PHA shall use the most recently published FMR and the PHA utility allowance schedule in effect at the time of redetermination. At its discretion, the PHA may use the amounts in effect at any time during the 30-day period immediately before the redetermination date.

(3)(i) For PBV projects that are not located in a designated SAFMR area under 24 CFR 888.113(c)(1), or for PBV projects not located in a ZIP code where the PHA has opted in under 24 CFR 888.113(c)(3), any exception payment standard amount approved under 24 CFR 982.503(d)(2)–(4) applies for purposes of paragraphs (b)(1) and (c)(1)(iv) of this section. HUD will not approve a different payment standard amount for use in the PBV program.

(ii) For PBV projects that are located in a designated SAFMR area under 24 CFR 888.113(c)(1), or for PBV projects located in a ZIP code where the PHA has opted in under 24 CFR 888.113(c)(3), an exception payment standard amount approved under 24 CFR 982.503(d)(3)–(4) will apply for purposes of paragraphs (b)(1) and (c)(1)(iv) of this section only if the PHA has adopted a policy applying SAFMRs to its PBV program and met all other requirements in accordance with 24 CFR 888.113(h).

(4) HUD may establish a process allowing PHAs to adopt project-specific utility allowances by notification in the **Federal Register** subject to public comment. Absent the establishment of such a project-specific utility allowance, the PHA's utility allowance schedule as determined under 24 CFR 982.517(b)(2)(i) or (ii) applies to both the tenant-based and PBV programs.

(5) The PHA must continue to use the applicable utility allowance schedule for the purpose of determining the initial rent to owner and redetermining the rent to owner for contract units, as outlined in this 24 CFR 983.301, regardless of whether the PHA approves a higher utility allowance as a reasonable accommodation for a person with disabilities living in a contract unit (see 24 CFR 982.517(e)).

(g) *PHA-owned units.* For PHA-owned PBV units, the initial rent to owner and the annual redetermination of rent at the annual anniversary of the HAP contract must be determined by the independent entity approved by HUD in accordance with § 983.57. The PHA must use the rent to owner established by the independent entity.

■ 122. Revise § 983.302 to read as follows:

§ 983.302 Redetermination of rent to owner.

(a) *Requirement to redetermine the rent to owner.* The PHA must redetermine the rent to owner:

(1) When there is a 10 percent decrease in the published FMR;

(2) Upon the owner's request consistent with requirements established in the PHA's Administrative Plan. The Administrative Plan must specify any advance notice the owner must give the PHA and the form the request must take; or

(3) At the time of the automatic adjustment by an operating cost adjustment factor (OCAF) in accordance with paragraph (b)(3).

(b) *Rent increase.* (1) An owner may receive an increase in the rent to owner during the term of a HAP contract. Any such increase will go into effect at the annual anniversary of the HAP contract. (Provisions for special adjustments of contract rent pursuant to 42 U.S.C. 1437f(c)(2)(B) do not apply to the voucher program.)

(2) A rent increase may occur through automatic adjustment by an operating cost adjustment factor (OCAF) or as the result of an owner request for such an increase. A rent increase as the result of an owner request must be determined by the PHA pursuant to § 983.301(b) or (c), as applicable. A rent increase through an adjustment by an OCAF is likewise subject to § 983.301(b) or (c), as applicable, except there is no rent request by the owner to take into account since the PHA redetermines the rent automatically under that option.

(3) By agreement of the parties, the HAP contract may provide for rent adjustments using an operating cost adjustment factor (OCAF) established by the Secretary pursuant to Section 524(c) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 at each annual anniversary of the HAP contract. OCAFs are established by the Secretary and published annually in the **Federal Register**. The provisions in the following paragraphs apply to a contract that provides for rent adjustments using an OCAF:

(i) The contract may require an additional increase up to an amount determined by the PHA pursuant to § 983.301(b) or (c), as applicable, if requested by the owner in writing, periodically during the term of the contract.

(ii) The contract shall require an additional increase up to an amount determined by the PHA pursuant to § 983.301(b) or (c), as applicable, at the point of contract extension, if requested by the owner in writing.

(4) If the HAP contract does not provide for automatic adjustment by an OCAF, then an owner who wishes to receive an increase in the rent to owner must request such an increase at the annual anniversary of the HAP contract by written notice to the PHA.

(5) The PHA must establish the length of the required notice period for any rent increase that requires a written request from the owner. The written request must be submitted as required by the PHA (*e.g.,* to a particular mailing address or email address).

(6) The PHA may not approve and the owner may not receive any increase of rent to owner until and unless the owner has complied with all requirements of the HAP contract, including compliance with the HQS (except that HQS compliance is not required for purposes of this provision for units undergoing development activity that complies with § 983.157 or substantial improvement that complies with § 983.212). The owner may not receive any retroactive increase of rent for any period of noncompliance.

(c) *Rent decrease.* (1) If the HAP contract provides for rent adjustments by an OCAF and there is a decrease in the fair market rent, tax credit rent, or reasonable rent that requires a decrease to the rent to owner (see paragraph (b)(2)), the rent to owner must be decreased. If the HAP contract does not provide for adjustment by an OCAF and there is a decrease in the rent to owner, as established in accordance with § 983.301, the rent to owner must be decreased, regardless of whether the owner requests a rent adjustment.

(2) At any time during the term of the HAP contract, the PHA may elect within the HAP contract to not reduce rents below the initial rent to owner. Where a PHA makes such an election, the rent to owner shall not be reduced below the initial rent to owner, except:

(i) To correct errors in calculations in accordance with HUD requirements;

(ii) If additional housing assistance has been combined with PBV assistance after the execution of the initial HAP contract and a rent decrease is required pursuant to § 983.153(b); or

(iii) If a decrease in rent to owner is required based on changes in the allocation of responsibility for utilities between the owner and the tenant.

(d) *Notice of change in rent to owner.* Whenever there is a change in rent to owner, the PHA must provide written notice to the owner specifying the amount of the new rent to owner (as determined in accordance with §§ 983.301 and 983.302). The PHA notice of the rent change in rent to owner constitutes an amendment of the rent to owner specified in the HAP contract.

(e) *Contract year and annual anniversary of the HAP contract.* (1) The contract year is the period of 12 calendar months preceding each annual anniversary of the HAP contract during the HAP contract term. The initial contract year is calculated from the first day of the first calendar month of the HAP contract term.

(2) The annual anniversary of the HAP contract is the first day of the first calendar month after the end of the preceding contract year. The adjusted rent to owner amount applies for the period of 12 calendar months from the annual anniversary of the HAP contract.

(3) The annual anniversary of the HAP contract for contract units completed in stages must follow § 983.207(g).

■ 123. Amend § 983.303 by:

■ a. Removing from paragraph (a) the citation to ''§ 983.302(e)(2)'' and adding, in its place, a citation to ''§ 983.302(c)(2)'';

■ b. Revising paragraph (b)(3);

■ c. Redesignating paragraph (b)(4) as paragraph (b)(5) and adding a new paragraph (b)(4);

■ d. Adding paragraph (c)(3); and

■ e. Revising paragraph (f).

The revisions and additions read as follows:

§ 983.303 Reasonable rent.

* * * * *

(b) * * *

(3) Whenever the HAP contract is amended to add a contract unit or substitute a different contract unit in the same building or project;

(4) Whenever the PHA accepts a completed unit after development activity that is conducted after HAP contract execution (see § 983.156(b)(3)); and

* * * * *

(c) * * *

(3) The reasonable rent determination must be based on the condition of the assisted unit at the time of the determination and not on anticipated future unit conditions.

* * * * *

(f) *Determining reasonable rent for PHA-owned units.* (1) For PHA-owned units, the amount of the reasonable rent must be determined by an independent entity in accordance with § 983.57, rather than by the PHA. The reasonable rent must be determined in accordance with this section.

(2) The independent entity must furnish a copy of the independent entity determination of reasonable rent for PHA-owned units to the PHA.

Subpart H—Payment to Owner

■ 124. Amend § 983.352 by adding a sentence to the end of paragraph (b)(1) to read as follows:

§ 983.352 Vacancy payment.

* * * * *

(b) * * *

(1) * * * The PHA must include in its Administrative Plan the PHA's policy on the conditions under which it will allow vacancy payments in a HAP contract, the duration of the payments, amount of vacancy payments it will make to an owner, and the required form and manner of requests for vacancy payments, in accordance with paragraph (b)(4) of this section.

* * * * *

■ 125. Amend § 983.353 by revising paragraph (d)(2) to read as follows:

§ 983.353 Tenant rent; payment to owner.

* * * * *

(d) * * *

(2) The PHA must describe in its Administrative Plan its policies on paying the utility reimbursement directly to the family or directly to the utility supplier.

* * * * *

PART 985—SECTION 8 MANAGEMENT ASSESSMENT PROGRAM (SEMAP)

■ 126. The authority for part 985 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 127. Amend § 985.3 by:

■ a. Revising the second paragraph of the undesignated introductory text and the parenthetical at the end of paragraph (b)(1);

■ b. In paragraph (b)(3)(i)(B), removing the reference to ''§ 982.507 of this chapter'' and adding, in its place, a reference to ''§§ 982.507 and 983.303 of this chapter, as applicable'';

■ c. Revising paragraph (c)(3)(i)(A);

■ d. In paragraph (e)(3)(i), removing the citation to ''§ 983.2'' and adding, in its place, a citation to ''§ 985.2''; and

■ e. Revising paragraphs (i)(1), (i)(3), (k)(1), (k)(2), and (l), the heading of paragraph (m), and paragraphs (m)(1), (m)(3), (p)(1), and (p)(3)(i)(B).

The revisions read as follows:

§ 985.3 Indicators, HUD verification methods and ratings.

* * * * *

A PHA that expends less than its Federal award expenditure threshold in 2 CFR Subpart F, and whose Section 8 programs are not audited by an independent auditor (IA), will not be rated under the SEMAP indicators in paragraphs (a) through (g) of this section for which the annual IA audit report is a HUD verification method.

* * * * *

(b) * * *

(1) * * * (24 CFR 982.4, 24 CFR 982.54(d)(15), 982.158(f)(7), 982.507, and 983.303)

* * * * *

(c) * * *

(3) * * *

(i) * * *

(A) The PHA obtains third party verification, as appropriate, of reported family annual income, the value of assets, expenses related to deductions from annual income, and other factors that affect the determination of adjusted income, and uses the verified information in determining adjusted income, and/or documents tenant files to show why third party verification was not available;

* * * * *

(i) * * *

(1) This indicator shows whether the PHA has adopted payment standard schedule(s) in accordance with § 982.503.

* * * * *

(3) Rating:

(i) The PHA's voucher program payment standard schedule contains payment standards set in accordance with 24 CFR 982.503. 5 points.

(ii) The PHA's voucher program payment standard schedule contains payment standards that were not set in accordance with § 982.503. 0 points.

* * * * *

(k) * * *

(1) This indicator shows whether the PHA correctly calculates the family's

share of the rent to owner in the rental voucher program. (24 CFR part 982, subpart K).

(2) HUD verification method: MTCS report—Shows percent of tenant rent and family's share of the rent to owner calculations that are incorrect based on data sent to HUD by the PHA on Forms HUD–50058. The MTCS data used for verification cover only voucher program tenancies, and do not include rent calculation discrepancies for manufactured home owner rentals of manufactured home spaces for proration of assistance under the noncitizen rule.

* * * * *

(l) *Initial unit inspections.* (1) This indicator shows whether newly leased units pass HQS inspection within the time period required. This includes both initial and turnover inspections for the PBV program. (24 CFR 982.305 and 983.103(b) through (d)).

(2) HUD verification method: MTCS report—Shows percent of newly leased units where the beginning date of the assistance contract is before the date the unit passed the initial unit inspection or, if the PHA employed the PHA initial inspection option for non-life-threatening deficiencies or alternative inspections, the timing requirements for the applicable PHA initial inspection option.

(3) Rating:

(i) 98 to 100 percent of newly leased units passed HQS inspection within the time period required. 5 points.

(ii) Fewer than 98 percent of newly leased units passed HQS inspection within the time period required. 0 points.

(m) *Periodic HQS inspections.* (1) This indicator shows whether the PHA has met its periodic inspection requirement for its units under contract (24 CFR 982.405 and 983.103(e)).

* * * * *

(3) Rating:

(i) Fewer than 5 percent of periodic HQS inspections of units under contract are more than 2 months overdue. 10 points.

(ii) 5 to 10 percent of all periodic HQS inspections of units under contract are more than 2 months overdue. 5 points.

(iii) More than 10 percent of all periodic HQS inspections of units under contract are more than 2 months overdue. 0 points.

* * * * *

(p) * * *

(1) This indicator shows whether voucher holders were successful in leasing units with voucher assistance. This indicator applies only to PHAs that established success rate payment standard amounts in accordance with § 982.503(f) prior to June 6, 2024.

* * * * *

(3) * * *

(i) * * *

(B) The proportion of families issued rental vouchers that became participants in the program during the six month period utilized to determine eligibility for success rate payment standards under § 982.503(f) plus 5 percentage points; and

* * * * *

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

■ 128. The authority for part 985 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.;* 42 U.S.C. 3535(d).

§ 1000.302 [AMENDED]

■ 129. In § 1000.302, amend the definition of ''Section 8 unit'' by removing the words ''certificates, vouchers,'' and adding, in their place, the word ''vouchers''.

Damon Smith,

General Counsel.

[FR Doc. 2024–08601 Filed 5–6–24; 8:45 am]

BILLING CODE 4210–67–P

FEDERAL REGISTER

Vol. 89 Tuesday,
No. 89 May 7, 2024

Part III

Federal Trade Commission

16 CFR Parts 910 and 912
Non-Compete Clause Rule; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 910 and 912

RIN 3084–AB74

Non-Compete Clause Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Trade Commission Act (''FTC Act''), the Federal Trade Commission (''Commission'') is issuing the Non-Compete Clause Rule (''the final rule''). The final rule provides that it is an unfair method of competition for persons to, among other things, enter into non-compete clauses (''non-competes'') with workers on or after the final rule's effective date. With respect to existing non-competes—*i.e.,* non-competes entered into before the effective date—the final rule adopts a different approach for senior executives than for other workers. For senior executives, existing non-competes can remain in force, while existing non-competes with other workers are not enforceable after the effective date.

DATES: The final rule is effective September 4, 2024.

FOR FURTHER INFORMATION CONTACT: Benjamin Cady or Karuna Patel, Office of Policy Planning, 202–326–2939 (Cady), 202–326–2510 (Patel), Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop CC–6316, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. Summary of the Final Rule's Provisions

The Commission proposed the Non-Compete Clause Rule on January 19, 2023 pursuant to sections 5 and 6(g) of the FTC Act.[1] Based on the Commission's expertise and after careful review and consideration of the entire rulemaking record—including empirical research on how non-competes affect competition and over 26,000 public comments—the Commission adopts this final rule addressing non-competes.

The final rule provides that it is an unfair method of competition—and therefore a violation of section 5—for employers to, *inter alia,* enter into non-compete clauses with workers on or after the final rule's effective date.[2] The Commission thus adopts a comprehensive ban on new non-competes with all workers.

With respect to existing non-competes, *i.e.,* non-competes entered into before the final rule's effective date, the Commission adopts a different approach for senior executives[3] than for other workers. Existing non-competes with senior executives can remain in force; the final rule does not cover such agreements.[4] The final rule allows existing non-competes with senior executives to remain in force because this subset of workers is less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers subject to existing non-competes and because commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives. For workers who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date.[5] Employers must provide such workers with existing non-competes notice that they are no longer enforceable.[6] To facilitate compliance and minimize burden, the final rule includes model language that satisfies this notice requirement.[7]

The final rule contains separate provisions defining unfair methods of competition for the two subcategories of workers. Specifically, the final rule provides that, with respect to a worker other than a senior executive, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a non-compete clause; or to represent that the worker is subject to a non-compete clause.[8] The Commission describes the basis for its finding that these practices are unfair methods of competition in Parts IV.B.1 through IV.B.3.

The final rule provides that, with respect to a senior executive, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a non-compete clause entered into after the effective date; or to represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.[9] The Commission describes the basis for its finding that these practices are unfair methods of competition in Part IV.C.2.

The final rule defines ''non-compete clause'' as ''a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.''[10] The final rule further provides that, for purposes of the final rule, ''term or condition of employment'' includes, but is not limited to, a contractual term or workplace policy, whether written or oral.[11] The final rule further defines ''employment'' as ''work for a person.''[12]

The final rule defines ''worker'' as ''a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person.''[13] The definition further states that the term ''worker'' includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.[14]

The final rule does not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity.[15] In addition, the final rule does not apply where a cause of action related to a non-compete accrued prior to the effective date.[16] The final rule further provides that it is not an unfair method of competition to enforce or attempt to enforce a non-compete or to make representations about a non-compete where a person has a good-faith basis to believe that the final rule is inapplicable.[17]

The final rule does not limit or affect enforcement of State laws that restrict non-competes where the State laws do not conflict with the final rule, but it preempts State laws that conflict with the final rule.[18] Furthermore, the final

[1] Non-Compete Clause Rule, NPRM, 88 FR 3482 (Jan. 19, 2023) (hereinafter ''NPRM'').

[2] § 910.2(a)(1)(i) and § 910.2(a)(2)(i).

[3] *See* § 910.1 (defining ''senior executive'').

[4] *See* Part IV.C.3.

[5] § 910.2(a)(1)(ii).

[6] § 910.2(b)(1).

[7] § 910.2(b)(4).

[8] § 910.2(a)(1).

[9] § 910.2(a)(2).

[10] § 910.1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] § 910.3(a).

[16] § 910.3(b).

[17] § 910.3(c); *see also* Part V.C.

[18] § 910.4.

rule includes a severability clause clarifying the Commission's intent that, if a reviewing court were to hold any part of any provision or application of the final rule invalid or unenforceable—including, for example, an aspect of the terms or conditions defined as non-competes, one or more of the particular restrictions on non-competes, or the standards for or application to one or more category of workers—the remainder of the final rule shall remain in effect.[19] The final rule has an effective date of September 4, 2024.[20]

B. Context for the Rulemaking

1. Growing Concerns Regarding the Harmful Effects of Non-Competes

The purpose of this rulemaking is to address conduct that harms fair competition. Concern about non-competes dates back centuries, and the evidence of harms has increased substantially in recent years. However, the existing case-by-case and State-by-State approaches to non-competes have proven insufficient to address the tendency of non-competes to harm competitive conditions in labor, product, and service markets.

The ability of employers [21] to enforce non-competes has always been restricted, based on public policy concerns that courts have recognized for centuries. For example, in *Mitchel* v. *Reynolds* (1711), an English case that provided the foundation for American common law on non-competes,[22] the court noted that workers were vulnerable to exploitation through non-competes and that non-competes threatened a worker's ability to practice a trade and earn a living.[23] These concerns have persisted. Today, non-competes between employers and workers are generally subject to greater scrutiny under State common law than other employment terms ''because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood.'' [24] For these reasons, State courts often characterize non-competes as ''disfavored.'' [25]

Furthermore, as ''contract[s] . . . in restraint of trade,'' [26] non-competes have always been subject to our nation's antitrust laws.[27] As early as 1911, in the formative antitrust case of *United States* v. *American Tobacco Co.,* the Supreme Court held that several tobacco companies violated both section 1 and section 2 of the Sherman Act because of the ''constantly recurring'' use of non-competes, among other practices.[28]

Concerns about non-competes have increased substantially in recent years in light of empirical research showing that they tend to harm competitive conditions in labor, product, and service markets. Changes in State laws governing non-competes [29] in recent decades have allowed researchers to better isolate the effects of non-competes, giving rise to a body of empirical research documenting these harms. This research has shown that the use of non-competes by employers tends to negatively affect competition in labor markets, suppressing earnings for workers across the labor force—including even workers not subject to non-competes.[30] This research has also shown that non-competes tend to negatively affect competition in product and service markets, suppressing new business formation and innovation.[31]

Alongside this large body of empirical work, news reports revealed that employers subject even middle-income and low-wage workers to non-competes on a widespread basis.[32] Workers came forward to recount how—by blocking them from taking a better job or starting their own business, and subjecting them to threats and litigation from their employers—non-competes derailed their careers, destroyed their finances, and upended their lives.[33]

Yet despite the mounting empirical and qualitative evidence confirming these harms and the efforts of many States to ban them, non-competes remain prevalent in the U.S. economy. Based on the available evidence, the Commission estimates that approximately one in five American workers—or approximately 30 million workers—is subject to a non-compete.[34] The evidence also indicates that employers frequently use non-competes even when they are unenforceable under State law.[35] This suggests that employers may believe workers are unaware of their legal rights; that employers may be seeking to take advantage of workers' lack of knowledge of their legal rights; or that workers are unable to enforce their rights through case-by-case litigation.[36] In addition, the ability of States to regulate non-competes effectively is constrained by employers' use of choice-of-law provisions, significant variation in how courts apply choice-of-law rules in disputes over non-competes, and the increasingly interstate nature of work. As the public comments attest, this patchwork of laws and legal uncertainty has become extremely burdensome for both employers and workers.[37]

As concern about the harmful effects of non-competes increased, the Commission began exploring the potential for Federal rulemaking on non-competes. In 2018 and 2019, the Commission held several hearings on twenty-first century competition and consumer protection issues, including ''the use of non-competition agreements

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[19] § 910.5.

[20] § 910.6.

[21] For ease of reference, the Commission uses the term ''employer'' in this Supplementary Information to refer to a person for whom a worker works. The text of part 910 does not use the term ''employer.''

[22] Harlan Blake, *Employee Agreements Not to Compete,* 73 Harv. L. Rev. 625, 629–31 (1960).

[23] The *Mitchel* court expressed concern that non-competes threaten ''the loss of [the worker's] livelihood, and the subsistence of his family.'' *Mitchel* v. *Reynolds,* 1 P. Wms. 181, 190 (Q.B. 1711). The court likewise emphasized ''the great abuses these voluntary restraints'' are subject to—for example, ''from masters, who are apt to give their apprentices much vexation'' by using ''many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.'' *Id.*

[24] Restatement (Second) of Contracts sec. 188, cmt. g (1981).

[25] *See, e.g., Navarre Chevrolet, Inc.* v. *Begnaud,* 205 So. 3d 973, 975 (La. Ct. App. 3d 2016); *Eastman Kodak Co.* v. *Carmosino,* 77 A.D.3d 1434, 1435 (N.Y. App. Div. 4th 2010); *Access Organics, Inc.* v. *Hernandez,* 175 P.3d 899, 904 (Mont. 2008); *Bybee* v. *Isaac,* 178 P.3d 616, 621 (Idaho 2008); *Softchoice, Inc.* v. *Schmidt,* 763 NW2d 660, 666 (Minn. Ct. App. 2009).

[26] 15 U.S.C. 1.

[27] *See, e.g., Newburger, Loeb & Co., Inc.* v. *Gross,* 563 F.2d 1057, 1082 (2d Cir. 1977) (''Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired. Moreover, employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry.'') (internal citation omitted).

[28] 221 U.S. 106, 181–83 (1911).

[29] *See* NPRM at 3494 (describing recent legislative activity at the State level).

[30] *See* Parts IV.B.3.a and IV.C.2.c.ii.

[31] *See* Parts IV.B.3.b and IV.C.2.c.i.

[32] *See, e.g.,* Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements,* HuffPost, Oct. 13, 2014, *https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180;* Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes,* The Verge, Mar. 26, 2015, *https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts.*

[33] *See, e.g.,* Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In,* N.Y. Times, May 13, 2017, *https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html;* Lauren Weber, *The Noncompete Clause Gets a Closer Look,* Wall St. J., Jul. 21, 2021, *https://www.wsj.com/articles/the-noncompete-clause-gets-a-closer-look-11626872430.*

[34] *See* Part I.B.2. As described therein, this is likely a conservative estimate.

[35] *See* Part IV.B.2.b.i.

[36] *See id.*

[37] *See* Part IX.C.2.

and the conditions under which their use may be inconsistent with the antitrust laws.'' [38] In January 2020, the Commission held a public workshop on non-competes. The speakers and panelists who participated in the workshop—and the hundreds of public comments the Commission received in response to the workshop—addressed a wide range of issues, including statutory and judicial treatment of non-competes; the economic literature regarding the effects of non-competes; and whether the Commission should initiate a Federal rulemaking on non-competes.[39] The Commission also sought public comment on non-competes as part of an August 2021 solicitation for public comment on contract terms that may harm competition and a December 2021 public workshop on competition in labor markets.[40] The Commission has also addressed non-competes in connection with its merger review work.[41]

In 2021, the Commission initiated investigations into the use of non-competes. In 2023, the Commission secured final consent orders settling charges that certain firms engaged in an unfair method of competition in violation of section 5 because their use of non-competes tended to impede rivals' access to the restricted employees' labor, harming workers, consumers, and competitive conditions.[42]

The Commission also secured a final consent order settling charges that another firm violated section 5 by using non-competes with its employees.[43] The Commission's complaint alleged the firm's imposition of non-competes took advantage of the unequal bargaining power between the firm and its employees, including low-wage security guard employees, and thus reduced workers' job mobility; limited competition for workers' services; and ultimately deprived workers of higher wages and more favorable working conditions.[44]

Based on the feedback obtained from years of extensive public outreach and fact-gathering, in January 2023, the Commission published a notice of proposed rulemaking (NPRM) concerning non-competes.[45] The proposed rule would have categorically banned employers from using non-competes with all workers and required rescission of all existing non-competes.[46]

In response to the NPRM, the Commission received over 26,000 public comments.[47] The comments reflected a diverse cross-section of the U.S. The Commission received comments from employers and workers in a wide range of industries and from every State; [48] from small, medium, and large businesses; and from workers with wide-ranging income levels.[49] The Commission also received comments from representatives of different industries through trade and professional groups as well as from academics and researchers. Federal, State, and local governmental representatives also submitted public comments.

Among these comments, over 25,000 expressed support for the Commission's proposal to categorically ban non-competes. Among the public commenters were thousands of workers who described how non-competes prevented them from taking a better job or starting a competing business, as well as numerous small businesses who struggled to hire talented workers. Commenters stated that non-competes have suppressed their wages, harmed working conditions, negatively affected their quality of life, reduced the quality of the product or service their company provided, prevented their business from growing and thriving, and created a climate of fear that deters competitive activity. The following examples are illustrative of the comments the Commission received: [50]

- I currently work in sales for an asphalt company in Michigan. The company had me sign a two year non-compete agreement to not work for any other asphalt company within 50 miles if I decide to resign. After two years with the company I have been disheartened at how poorly customers are being treated and how often product quality is sub-par. I would love to start my own business because I see this as an opportunity to provide a better service at a lower cost. However, the non-compete agreement stands in the way even though there are no trade secrets and too many customers in this market.[51]
- [I] signed a non-compete clause for power-washing out of duress. My boss said that if I didn't sign before the end of the week, not to come in the next week. . . . I'd like to start my own business but I would have to find another job and wait 5 years. All I know is power-washing and these business owners all want me to sign a non-compete clause. It's one big circle of wealthy business owners keeping the little man down. Essentially, non-compete clauses limit an employee's opportunity to excel in whatever skill or trade they're familiar with. In the land of the free, we should be free to start a business not limited by greedy business owners.[52]
- In October 2020, I started working as a bartender at a company called [REDACTED] for $10 an hour. On my first day, I

[38] Hearings on Competition and Consumer Protection in the 21st Century, Notice, 83 FR 38307, 38309 (Aug. 6, 2018).

[39] FTC, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), *https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues.*

[40] FTC, *Solicitation for Public Comments on Contract Terms that May Harm Competition* (Aug 5, 2021), *https://www.regulations.gov/document/FTC-2021-0036-0022;* FTC, *Making Competition Work: Promoting Competition in Labor Markets* (Dec. 6–7, 2021), *https://www.regulations.gov/docket/FTC-2021-0057/comments.*

[41] *See* NPRM at 3498–99.

[42] FTC, Press Release, *FTC Approves Final Orders Requiring Two Glass Container Manufacturers to Drop Noncompete Restrictions That They Imposed on Workers* (Feb. 23, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-approves-final-orders-requiring-two-glass-container-manufacturers-drop-noncompete-restrictions;* FTC, Press Release, *FTC Approves Final Order Requiring Anchor Glass Container Corp. to Drop Noncompete Restrictions That It Imposed on Workers* (June 2, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-approves-final-order-requiring-anchor-glass-container-corp-drop-noncompete-restrictions-it.*

[43] FTC, Press Release, *FTC Approves Final Order Requiring Michigan-Based Security Companies to Drop Noncompete Restrictions That They Imposed on Workers* (Mar. 8, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions.*

[44] FTC, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re Prudential Sec., Inc. et al.* at 1 (Jan. 4, 2023).

[45] NPRM, *supra* note 1.

[46] *Id.* at 3482–83.

[47] The public comments are available online. *See Regulations.gov,* Non-Compete Clause Rule (NPRM), FTC–2023–0007, *https://www.regulations.gov/docket/FTC-2023-0007/comments.* The Commission cannot quantify the number of individuals or entities represented by the comments. The number of comments undercounts the number of individuals or entities represented by the comments because many comments, including comments from different types of organizations, jointly represent the opinions or interests of many.

[48] This reflects information provided by commenters. Commenters self-identify their State and are not required to include geographic information.

[49] Though most commenters identifying as workers did not provide information regarding their income or compensation levels, many provided information about their particular jobs or industries from which the Commission was able to infer a broad range of income levels based on occupational data from the Bureau of Labor Statistics (''BLS''). BLS wage data for each year can be found at Occupational Employment and Wage Statistics, *Tables Created by BLS, https://www.bls.gov/oes/tables.htm* (hereinafter ''BLS Occupational Employment and Wage Statistics''). The Commission used data from the May 2022 National XLS table, generally for private ownership.

[50] To be clear, the Commission does not rely on any particular individual comment submission for its findings, but rather provides here (and throughout this final rule) examples of comments that were illustrative of themes that spanned many comments. The Commission's findings are based on consideration of the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition.

[51] Individual commenter, FTC–2023–0007–2215. Comment excerpts have been cleaned up for grammar, spelling, and punctuation.

[52] Individual commenter, FTC–2023–0007–12689.

unknowingly signed a 2-year non-compete, slipped between other paperwork while my boss rushed me, and downplayed its importance. . . . At [REDACTED], I was sexually harassed and emotionally abused. I needed money, so I searched for a new job while remaining at [REDACTED] for one year. I was eventually offered a bartending job at a family-owned bar with better wages, conditions, and opportunities. Upon resigning, I was threatened with a non-compete I didn't know existed. Still, I couldn't take it anymore, so believing it was an unenforceable scare tactic, I took the new job, thinking our legal system wouldn't allow a massive company with over 20 locations to sue a young entry-level worker with no degree. In December 2021, I was sued for $30,000 in ''considerable and irreparable damages'' for violating the non-compete. . . .[53]

- I am a physician in a rural underserved area of Appalachia. . . . ''[N]on-compete'' clauses have become ubiquitous in the healthcare industry. With hospital systems merging, providers with aggressive non compete clauses must abandon the community that they serve if they chose to leave their employer. . . . Healthcare providers feel trapped in their current employment situation, leading to significant burnout that can shorten their career longevity. Many are forced to retire early or take a prolonged pause in their career when they have no other recourse to combat their employer.[54]
- I am a practicing physician who signed an employment contract containing a noncompete agreement in 2012, entering into this agreement with an organization that no longer exists. My original employer merged with, and was made subsidiary to, a new organization that is run under religious principles in conflict with my own. . . . I would have never signed such an agreement with my new employer, yet I am bound to this organization under threat of legal coercion. To be clear, the forced compromise of my religious principles does direct harm to me. My only recourse to this coercion is to give up medical practice anywhere covered by my current medical license, which is injurious to the patients in my care, and to myself.[55]
- I am the owner of a small-midsize freight brokerage, and non-competes of large brokerages have time and time again constrained talent from my business. Countless employees of [a] mega brokerage . . . have left and applied for our company and we must turn them away. These are skilled brokers that are serving the market and their clients well due to THEIR skillsets. . . . These non-competes affect not just me but the clients they work with as these skilled brokers are forced out of the entire logistics market for an entire year and possibly a lifetime when they pick up a new career in a different field because of these aggressive non-competes. . . .[56]
- I was laid off from my company in 2008 due to the economy, not to any fault of my own. However, when I was offered a job at another company, my former company threatened them and my offer was rescinded. I was unable to find gainful employment for months, despite opportunities in my field, and had to utilize unemployment when I otherwise would not have needed it. To find work, I ultimately had to switch fields, start part time somewhere, and just continue to work my way up. All of this because I was laid off to no fault of my own.[57]
- I was terminated by a large hospital organization suddenly with a thriving, full Pediatric practice. . . . My lawyer and I believe the non-compete does not apply in my circumstances and that the noncompete is overly broad, restrictive and harmful to the public (my patients). I started seeing my patients mostly gratuitously in their homes so they would not go without the care they wanted and needed . . . The judge awarded the order and I was told I cannot talk to patients on the phone, text patients, zoom visits or provide any pediatric care within my non-compete area. Patients are angry and panicked. I'm worried every day about my patients and how I can continue to care for them. . . . Patients have a right to choose and keep their doctor. The trust built between a patient and his doctor is crucial to keeping a patient healthy. It's not a relationship that can or should be replaced. . . . Patients should always come first and that is not happening.[58]
- When I first graduated veterinary school I signed a noncompete clause that was for 7 years. I tried to negotiate it to a more reasonable time period but the employer wouldn't budge. There weren't many job openings for new graduates at the time and I had student loans to pay back so I signed it. . . . I moved back home to a small town and took a job that required a 10-radial-mile, 2-year noncompete (this is currently considered ''reasonable/standard'' in my industry). Unfortunately since it's a rural area the 10 miles blocked me out of the locations of all other veterinary clinics in the county and I had to commute an hour each way to work in the next metropolitan area. This put a lot of stress on my family since I have young children. Some days I didn't even get to see them when they were awake.[59]
- I work for a large electronic health records company . . . that is known for hiring staff right out of college, myself included. I was impressed with their starting salary and well-advertised benefits, so I was quick to accept their offer. After accepting their offer, I was surprised to receive a contract outlining a strict non-compete agreement . . . I feel disappointed that this information was not made apparent to me prior to my acceptance of the position, and now I feel stuck in a job that I've quickly discovered is not a good long-term fit for me. I am certain that many other recent graduates often find themselves in a similar position—they accept shiny offers from a workplace, not knowing whether the company and position will be the right fit for them, and find themselves trapped by such contracts as mine.[60]
- Non competes are awful. I am being sued right now for going into business on my own in Boston, Massachusetts, by my former employer who says I signed a non-compete in 2003, 20 years ago. . . . I am fighting them in court. Hopefully I will prevail. . . . [The] corporation I worked for is a billion-dollar corporation. And they just keep trying scare tactics to make me back down. They went as far as trying to get a preliminary injunction ordered against me. And the judge refused but I still have to spend $1,000 an hour to defend myself.[61]
- I have been working in the field of multi-media in the DC/Baltimore region since the early 2000s. . . . I was 26 when I first became employed, and at that time a requirement was that I sign a non-compete agreement. . . . This means I can't be an entrepreneur- which kills any opportunities for me to grow something of my own- which could potentially provide jobs for others in the future. So what this non-compete does is basically enables businesses to be small monopolies. I could literally have a new lease on my career if non competes were abolished. As of now, when I think of working someplace else I have to consider changing careers altogether.[62]
- A former employer had me sign a non-compete when I started employment at an internship in college. It was a part-time position of 20 hours of work as an electrical engineer, while I finished university. After university, I worked for this employer another 4 years full time, but then found a better job in another state. It was not a competitor, but a customer of my former employer. My former employer waited till the day after my 4-week notice to tell me that I had signed a non-compete agreement and that it [barred] me from working for any competitor, customer or any potential customer up to 5 years after leaving the company with no geographic limitations. This was effectively the entire semi-conductor industry and put my entire career at risk.[63]
- Non-competes serve little more purpose than to codify and entrench inefficiencies. I have seen this firsthand in the context of a sophisticated management consulting environment where company owners provided ever less support in terms of contributing to projects or even to sales of new business while still feeling secure through agreements that substantially limited anyone from working in the relevant industry for two years on a global basis after leaving. . . . The reality is that there are innumerable retention mechanisms (such as good working conditions, compensation, culture, management, growth trajectory and/or strategy) that can contribute to loyal employees without the need for non-competes.[64]

The Commission has undertaken careful review of the public comments

[53] Individual commenter, FTC–2023–0007–8852.

[54] Individual commenter, FTC–2023–0007–0026.

[55] Individual commenter, FTC–2023–0007–9671.

[56] Individual commenter, FTC–2023–0007–6142.

[57] Individual commenter, FTC–2023–0007–15497.

[58] Individual commenter, FTC–2023–0007–14956.

[59] Individual commenter, FTC–2023–0007–0922.

[60] Individual commenter, FTC–2023–0007–10729.

[61] Individual commenter, FTC–2023–0007–10871.

[62] Individual commenter, FTC–2023–0007–10968.

[63] Individual commenter, FTC–2023–0007–16347.

[64] Individual commenter, FTC–2023–0007–3963.

and the entirety of the rulemaking record. Based on this record and the Commission's experience and expertise in competition matters, the Commission issues this final rule pursuant to its authority under sections 5 and 6(g) of the FTC Act.

2. Prevalence of Non-Competes

Based on its own data analysis, studies published by economists, and the comment record, the Commission finds that non-competes are in widespread use throughout the economy and pervasive across industries and demographic groups, albeit with some differences in the magnitude of the prevalence based on industries and demographics. The Commission estimates that approximately one in five American workers—or approximately 30 million workers—is subject to a non-compete.[65]

As described in Part II.F, the inquiry as to whether conduct is an unfair method of competition under section 5 focuses on the nature and tendency of the conduct, not whether or to what degree the conduct caused actual harm.[66] Although a finding that non-competes are prevalent is not necessary to support the Commission's determination that the use of non-competes by employers is an unfair method of competition, the Commission finds that non-competes are prevalent and in widespread use throughout the economy, which is why researchers have observed such significant negative actual effects from non-competes on competitive conditions in labor markets and markets for products and services.[67]

A 2014 survey of workers finds that 18% of respondents work under a non-compete and 38% of respondents have worked under one at some point in their lives.[68] This study has the broadest and likely the most representative coverage of the U.S. labor force among the prevalence studies discussed here.[69] This study reports robust results contradicting the prior assumptions of some that non-competes were, in most cases, bespoke agreements with sophisticated and highly-paid workers. It finds that, among workers without a bachelor's degree, 14% of respondents reported working under a non-compete at the time surveyed and 35% reported having worked under one at some point in their lives.[70] For workers earning less than $40,000 per year, 13% of respondents were working under a non-compete and 33% worked under one at some point in their lives.[71] Furthermore, this survey finds that 53% of workers covered by non-competes are hourly workers.[72] The survey suggests that a large share of workers subject to non-competes are relatively low-earning workers. In addition, a survey from the Federal Reserve Board of Governors found that 11.4% of workers have non-competes, including workers with relatively low earnings and low levels of education. The survey finds some degree of geographic heterogeneity, though it finds that large numbers of workers in all regions of the country have non-competes (including 7.0% of workers in States which broadly do not enforce non-competes).[73]

Furthermore, a survey of workers conducted in 2017 estimates that 24.2% of workers are subject to a non-compete.[74] This survey also finds that non-competes are often used together with other restrictive employment agreements, including non-disclosure agreements (''NDAs'') and non-recruitment and non-solicitation agreements.[75] A methodological limitation of this survey is that it is a convenience sample of individuals who visited *Payscale.com* during the time period of the survey and is therefore unlikely to be fully representative of the U.S. working population. While weighting based on demographics helps, it does not fully mitigate this concern.

Additionally, a 2017 survey of business establishments with 50 or more employees estimates that 49% of such establishments use non-competes for at least some of their employees, and 32% of such establishments use non-competes for all of their employees.[76]

Other estimates of non-compete use cover subsets of the U.S. labor force. One 2022 study is based on National Longitudinal Survey of Youth (NLSY) data.[77] The NLSY is an often-used labor survey conducted by the Bureau of Labor Statistics (''BLS'') that consists of a nationally representative sample of 8,984 men and women born from 1980–84 and living in the U.S. at the time of the initial survey in 1997; it is a subset of the workforce by age of worker.[78] The 2022 study using NLSY data reports prevalence of non-competes to be 18%, in line with the number estimated based on the 2014 survey of workers directed solely at calculating the prevalence of non-competes.[79]

Non-competes are pervasive across occupations. For example, a survey of independent hair salon owners finds that 30% of hair stylists worked under a non-compete in 2015.[80] A survey of electrical and electronic engineers finds that 43% of respondents signed a non-compete.[81] A different study finds that 45% of physicians worked under a non-compete in 2007.[82] One study published in 2021 finds that 62% of CEOs worked under a non-compete between 1992 and 2014.[83] Another, published in 2023, supports that finding and reflects an upward trend in the use of non-competes among executives—specifically, the proportion of executives working under a non-compete rose from ''57% in the early 1990s to 67% in the mid-2010s.'' [84] The 2014 survey reports industry-specific rates ranging from 9% in the Agriculture and Hunting category to 32% in the

[65] This is likely a conservative estimate. Surveys of workers likely underreport the share of workers subject to non-competes, since many workers may not know they are subject to a non-compete. *See, e.g.,* Alexander J.S. Colvin & Heidi Shierholz, Econ. Policy Inst., *Noncompete Agreements,* Report (Dec. 10, 2019) at 3.

[66] *See infra* note 288 and accompanying text.

[67] *See* Parts IV.A through IV.C (describing this evidence).

[68] Evan P. Starr, J.J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the US Labor Force,* 64 J. L. & Econ. 53, 53 (2021).

[69] The final survey sample of 11,505 responses represented individuals from nearly every demographic in the labor force. *Id.* at 58.

[70] *Id.* at 63.

[71] *Id.*

[72] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements,* 68 Mgmt. Sci. 143, 144 (2022) (analyzing data from the Starr, Prescott, & Bishara survey).

[73] Tyler Boesch, Jacob Lockwood, Ryan Nunn, & Mike Zabek, *New Data on Non-Compete Contracts and What They Mean for Workers* (2023), *https://www.minneapolisfed.org/article/2023/new-data-on-non-compete-contracts-and-what-they-mean-for-workers.*

[74] Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Jan. 18, 2024), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403.*

[75] *Id.* at 11 (reporting that if a worker has a non-compete, there is a 70%–75% chance that all three restrictive covenants are present).

[76] Colvin & Shierholz, *supra* note 65 at 1.

[77] Donna S. Rothstein & Evan Starr, *Noncompete Agreements, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997,* June 2022 Mthly. Lab. Rev. (2022).

[78] BLS, *NLSY97 Data Overview, https://www.bls.gov/nls/nlsy97.htm.*

[79] Rothstein & Starr, *supra* note 77 at 1.

[80] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?,* 57 J. Hum. Res. 689, 700 (2022).

[81] Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals,* 76 a.m. Socio. Rev. 695, 702 (2011). Calculated as 92.60% who signed a non-compete of the 46.80% who were asked to sign a non-compete.

[82] Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians,* 55 J. Hum. Res. 1025, 1042 (2020).

[83] Omesh Kini, Ryan Williams, & Sirui Yin, *CEO Noncompete Agreements, Job Risk, and Compensation,* 34 Rev. Fin. Stud. 4701, 4707 (2021).

[84] Liyan Shi, *Optimal Regulation of Noncompete Contracts,* 91 Econometrica 425, 447 (2023).

Information category.[85] The Balasubramaian et al. survey reports industry-specific rates ranging from 12% in the Arts, Entertainment, and Recreation category to 30% in the Professional, Scientific, and Technical category.[86] The same survey also reports occupation-specific rates ranging from 8% in the Community and Social Services category to 32% in the Computer and Mathematical category.[87]

In addition, commenters presented survey data on the prevalence of non-competes in various occupations and industries. The Commission does not rely on these surveys to support its finding that non-competes are in widespread use throughout the economy. Because the Commission lacked access to a detailed description of the methodology for these surveys (unlike for the surveys described previously), the Commission cannot evaluate how credible their research designs are. However, they generally confirm the Commission's finding that non-competes are in widespread use throughout the economy and pervasive across industries and demographic groups.

For example, commenters reported that 33% of practitioners in the applied behavioral analysis field reported being subject to a non-compete,[88] along with 68% of cardiologists,[89] 42% of colorectal surgeons,[90] 72% of members of the American Association of Hip and Knee Surgeons,[91] and 31% of wireless telecommunications retail workers.[92] Other commenters cited a 2019 study finding that 29% of businesses where the average wage is below $13 per hour use non-competes for all their workers.[93]

Several trade organizations included information in their comments about the percentage of their members that use non-competes for at least some of their workers, based on surveys of their membership. For the National Association of Wholesaler-Distributors, this figure was 80%; [94] for the Independent Lubricant Manufacturing Association, 69%; [95] for the Michigan Chamber of Commerce, 73%; [96] for the Gas and Welding Distributors Association, 80%; [97] and for the National Association of Manufacturers, 70%.[98] One industry organization said its survey found that 57% of respondents require workers earning over $150,000 to sign non-competes.[99] A survey by the Authors Guild finds that 19.2% of respondents reported that non-competes prevented them from publishing a similar or competing book.[100] The HR Policy Association stated that 75% of respondents indicated they use non-competes for less than 10% of their workers, and nearly one third indicated they use non-competes for less than 1% of their workers.[101] The association stated that its survey covered 3 million workers and argued that its survey finding less usage of non-competes was more representative than studies cited in the NPRM.[102] However, the commenter did not provide the data underlying its claims. The Retail Industry Leaders Association stated that a recent survey of its members indicated that, among members that use non-competes, the majority do so with less than 1% of their workforce and an additional quarter use non-competes with less than 10% of their workforce.[103] Additionally, a commenter referenced a survey of small business owners finding that 48% use non-competes for their own business.[104]

Several commenters misrepresented the Commission's finding related to prevalence as based on ''a single study from 2021'' (Starr, Prescott, and Bishara, 2021), which relied on survey data from 2014. The Commission's finding is not based on a single study. The NLSY study reaches similar conclusions about the prevalence of non-competes across the economy,[105] and the occupation-specific studies indicate that non-competes are pervasive in various occupations.[106] Furthermore, despite its methodological limitations, the data submitted by commenters generally comport with the estimates reported in the academic literature. One commenter stated the respondents to the Starr, Prescott, and Bishara survey were not necessarily representative of the population. The Commission believes that the weighting of the data sufficiently addresses this concern.

Another commenter argued that individuals may misunderstand contracts that they have signed, leading them to mistakenly believe they are bound by a non-compete. The Commission does not find this to be a plausible explanation for the high numbers of workers, businesses, and trade associations that report that non-competes are prevalent.

The Commission appreciates the additional estimates provided by commenters. The comments broadly corroborate the Commission's finding that non-competes are used across the workforce, with some heterogeneity in the magnitude of the prevalence. The

[85] Starr, Prescott, & Bishara, *supra* note 68 at 67.

[86] Balasubramanian et al., *supra* note 74 at 47.

[87] *Id.*

[88] Kristopher J. Brown, Stephen R. Flora, & Mary K. Brown, *Noncompete Clauses in Applied Behavior Analysis: A Prevalence and Practice Impact Survey,* 13 Behavioral Analysis Practice 924 (2020) (survey of 610 workers).

[89] Comment of Am. Coll. of Cardiology, FTC–2023–0007–18077, at 2. The comment did not provide a citation to the survey or the underlying data, including the number of respondents or the time period.

[90] William C. Cirocco. *Restrictive Covenants in Physician Contracts: An American Society of Colon and Rectal Surgeons' Survey,* 54 Diseases of the Colon and Rectum 482 (2011). The survey examined 157 colorectal surgeons who had completed their residency in the prior decade.

[91] Comment of Am. Ass'n of Hip and Knee Surgeons, FTC–2023–0007–21076, at 4. The comment said the internal poll was conducted in early 2023, but the comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[92] Comm. Workers of Am. and Nat'l Employment L. Project, *Broken Network: Workers Expose Harms of Wireless Telecom Carriers' Outsourcing to 'Authorized Retailers'* (Feb. 2023), *https://cwa-union.org/sites/default/files/2023-02/20230206_BrokenNetwork.pdf,* at 12. The survey had 204 respondents.

[93] Colvin & Shierholz, *supra* note 65 at 13.

[94] Comment of Nat'l Assoc. of Wholesaler-Distribs., FTC–2023–0007–19347, at 2. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[95] Comment of Indep. Lubricant Mfrs. Ass'n, FTC–2023–0007–19445, at 3. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[96] Calculated as 77%*95% (assuming that the 95% reported in their comment applies to the 77% who reported using restrictive covenants). Comment of Mich. Chamber of Com., FTC–2023–0007–20855. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[97] Comment of Gas and Welding Distribs. Ass'n, FTC–2023–0007–20934, at 2–3. The comment did not provide a citation to the survey or the underlying data. The comment said the survey took place after the NPRM was proposed and had 161 respondents.

[98] Comment of Nat'l Ass'n of Mfrs., FTC–2023–0007–20939, at 2 (citing Nat'l Ass'n of Mfrs., Noncompete Survey Data Report, *https://www.nam.org/wp-content/uploads/2023/03/Noncompete_Survey_Data_Report.pdf*). The survey had 150 respondents.

[99] Comment of Soc. for Hum. Res. Mgmt., FTC–2023–0007–20903, at 5 n.2. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[100] Comment of The Authors Guild, FTC–2023–0007–20854, at 7. The comment did not provide a citation to the survey or the underlying data, but said it had 630 respondents.

[101] Comment of HR Policy Ass'n, FTC–2023–0007–20998, at 8.

[102] *Id.*

[103] Comment of Retail Indus. Leaders Ass'n, FTC–2023–0007–20989, at 6. The comment did not provide a citation to the survey or the underlying data, including the number of respondents or the time period.

[104] Comment of Sm. Bus. Majority, FTC–2023–0007–21093 (citing Small Business Majority, Opinion Poll: Small Business Owners Support Banning Non-Compete Agreements (Apr. 13, 2013), *https://smallbusinessmajority.org/sites/default/files/research-reports/2023-non-compete-poll-report.pdf*).

[105] *See* Rothstein & Starr, *supra* note 77 and accompanying text.

[106] *See supra* notes 80–87 and accompanying text.

Commission finds that this heterogeneity is insufficient to warrant industry-specific exclusions from coverage under the final rule in part because employers' use of non-competes is prevalent across labor markets and for the reasons discussed in Part V.D regarding requests for exclusions.

II. Legal Authority

A. The History of the Commission and Section 5 of the FTC Act

The FTC Act was enacted in 1914.[107] Section 5 of that Act ''declared'' that ''unfair methods of competition in commerce'' are ''unlawful,'' and it ''empowered and directed'' the Commission ''to prevent'' entities subject to its jurisdiction from ''using'' such methods.[108] Congress removed certain enumerated industries, activities, or entities—such as banks [109]—from the Commission's jurisdiction but otherwise envisioned a Commission whose purview would cover commerce across the national economy.

The term '''unfair methods of competition' . . . was an expression new in the law'' when it first appeared in the FTC Act.[110] Congress purposely introduced this phrase to distinguish the Commission's authority from the definition of ''unfair competition'' at common law. Because the ''meaning which the common law had given to ['unfair competition'] was . . . too narrow,'' Congress adopted ''the broader and more flexible phrase 'unfair methods of competition.' '' [111] Using this new phrase also made clear that Congress designed section 5 to extend beyond the reach of other antitrust laws—most notably, the Sherman Act—whose text did not include the term ''unfair methods of competition.'' [112] In particular, Congress wanted the Commission to apply a standard that would reach conduct not captured by other antitrust laws and the rule of reason, which courts applied when interpreting the Sherman Act, making it ''impossible to predict with any certainty'' whether courts would condemn the many ''practices that seriously interfere with competition.'' [113] Allowing the Commission to prevent unfair methods of competition would also help the Commission achieve a core purpose of the Act: to stop ''trade restraints in their incipiency'' before they grew into violations of other antitrust laws.[114]

By design, the new phrase ''unfair methods of competition'' did ''not 'admit of precise definition.' '' [115] Congress intentionally gave the Commission flexibility to adapt to changing circumstances.[116] The Supreme Court has affirmed the more inclusive scope of section 5 on numerous occasions [117] and has affirmed the Commission's power under the Act to condemn coercive and otherwise unfair practices that have a tendency to stifle or impair competition.[118] Federal appellate courts have likewise consistently held that the Commission's authority under section 5 extends beyond ''the letter'' of other antitrust laws.[119]

Congress further expanded the Commission's jurisdiction over time. Congress extended the Commission's authority in 1938 by adding the further prohibition on ''unfair or deceptive acts or practices.'' [120] And in 1975, Congress amended the phrase ''in commerce'' in section 5 to ''in or affecting commerce,'' a change that was ''specifically designed to expand the Commission's jurisdiction . . . to make it coextensive with the constitutional power of Congress under the Commerce Clause.'' [121]

Congress gave careful thought to the structure of the FTC as an independent agency entrusted with this considerable responsibility. The Commission would consist of five members, no more than three of whom could be part of the same political party, who would serve for terms of seven years.[122] The Commission would draw on trained expert staff to develop the body of law regarding what constitutes unfair methods of competition (and, later, unfair and deceptive practices),[123] both through acting as ''a quasi judicial body'' [124] that determines whether conduct is an unfair method of competition in adjudications and through authority to promulgate legislative rules delineating conduct that constitutes an unfair method of competition. Recognizing that the Commission is an expert agency in making such determinations about anticompetitive conduct, courts reviewing Commission determinations as to what practices constitute an unfair method of competition have given the Commission's decisions ''great weight.'' [125]

The FTC Act today reflects a careful balance from Congress. Congress has directed the Commission to proceed

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[107] Federal Trade Commission Act of 1914, Public Law 63–203, 38 Stat. 717, 719 (hereinafter ''FTC Act of 1914'').

[108] FTC Act of 1914, 38 Stat. at 719. Section 5 is codified as amended at 15 U.S.C. 45. Congress later amended the term ''in commerce'' to ''in or affecting commerce.'' The Supreme Court has explained that this amended phrase makes section 5 of the FTC Act ''coextensive with the constitutional power of Congress under the Commerce Clause.'' *United States* v. *Am. Bldg. Maintenance Indus.,* 422 U.S. 271, 277 n.6 (1975). For simplicity, this statement of basis and purpose often refers to ''unfair methods of competition'' without the commerce requirement, but the Commission acknowledges that it has power to prevent only such methods that are in or affect commerce as that term is defined in the Act. *See* 15 U.S.C. 44.

[109] *See* 15 U.S.C. 45(a)(2).

[110] *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 532 (1935).

[111] *See FTC* v. *R. F. Keppel & Bro., Inc.,* 291 U.S. 304, 310–11 (1934); *see also Schechter Poultry,* 295 U.S. at 532.

[112] *See E.I. du Pont de Nemours* v. *FTC* (*Ethyl),* 729 F.2d 128, 136 (2d Cir. 1984) (''Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled.'').

[113] S. Rep. No. 62–1326, at 14 (1913) (hereinafter ''Cummins Report''). After analyzing a series of Supreme Court decisions interpreting the Sherman Act—*e.g., Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 60 (1911)—the Senate committee feared that the rule of reason meant that ''in each instance it [would be] for the court to determine whether the established restraint of trade is a due restraint or an undue restraint'' and that this made it ''imperative to enact additional legislation.'' Cummins Report at 11–12.

[114] *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 322 (1966); *see also FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 394–95 (1953).

[115] *R.F. Keppel & Bro.,* 291 U.S. at 312.

[116] *Id.* at 311 n.2.

[117] *See, e.g., id.* at 311; *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 532 (1935); *Brown Shoe Co.,* 384 U.S. at 320–22.

[118] *FTC* v. *Texaco,* 393 U.S. 223, 225–26 (1968) (citing *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 376 (1965)).

[119] *Spiegel, Inc.* v. *FTC,* 540 F.2d 287, 292 (7th Cir. 1976) (quoting *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244 (1972)); *cf., Chuck's Feed & Seed Co.* v. *Ralston Purina Co.,* 810 F.2d 1289, 1292–93 (4th Cir. 1987).

[120] Federal Trade Commission Act, Public Law 447, 75th Cong., 3d Sess. (March 21, 1938) c. 49; 52 Stat. 111 (1938).

[121] *United States* v. *Am. Bldg. Maintenance Indus.,* 422 U.S. 271, 277 n.6 (1975). As noted, the Commission's authority does not reach certain enumerated industries or activities—a list that has also grown over time. *See* 15 U.S.C. 45(a)(2); *see also* Part II.E.1. Some of these industries are statutorily prohibited from engaging in unfair or deceptive practices or unfair methods of competition under different laws overseen by other agencies. *See, e.g.,* 49 U.S.C. 41712(a) (allowing the Secretary of Transportation to ''decide whether an air carrier, foreign air carrier, or ticket agent'' has engaged in such conduct).

[122] 15 U.S.C. 41.

[123] *Id.* (anticipating that the Commission would ''build up a comprehensive body of information for the use and advantage of the Government and the business world''); *id.* at 11,092 (''[W]e want trained experts; we want precedents; we want a body of administrative law built up.'').

[124] *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 533 (1935).

[125] *FTC* v. *Cement Inst.,* 333 U.S. 683, 720 (1948); *Atl. Ref. Co.* v. *FTC,* 381 U.S. 357, 368 (1965); *FTC* v. *Texaco,* 393 U.S. 223, 226 (1968); *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920, 927 (2d. Cir. 1980) (quoting *Cement Inst.,* 333 U.S. at 720); *see also FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 396 (1953); *FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986).

against a broader range of anticompetitive conduct than other antitrust laws like the Sherman and Clayton Acts can reach. On the other hand, Congress has never established a private right of action under section 5,[126] nor has it authorized the Commission to recover civil penalties or other monetary relief from parties who engage in unfair methods of competition.[127] Instead, the Commission may either pursue an adjudication under section 5(b) or seek an injunction in Federal court under section 13(b) against a party that has engaged in an unfair method of competition.[128] As explained below, it may also promulgate rules prohibiting unfair methods of competition. The Commission cannot obtain civil penalties or other monetary relief against parties for using an unfair method of competition, although it can obtain civil penalties in court if a party is ordered to cease and desist from a violation and fails to do so.[129]

B. The Commission's Authority To Promulgate the Rule

Alongside section 5, Congress adopted section 6(g) of the Act, in which it authorized the Commission to ''make rules and regulations for the purpose of carrying out the provisions of'' the FTC Act, which include the Act's prohibition of unfair methods of competition.[130] The plain text of section 5 and section 6(g), taken together, empower the Commission to promulgate rules for the purpose of preventing unfair methods of competition. That includes legislative rules defining certain conduct as an unfair method of competition.

The Commission has exercised its authority under section 6(g) to promulgate legislative rules on many occasions stretching back more than half a century. Between 1963 and 1978,[131] the Commission relied on section 6(g) to promulgate the following rules: (1) a rule declaring it an unfair method of competition (''UMC'') and an unfair or deceptive act or practice (''UDAP'') to mislead consumers about the size of sleeping bags by representing that the ''cut size'' represents the finished size; [132] (2) a rule declaring it a UMC and UDAP to use the word ''automatic'' or similar words to describe household electric sewing machines; [133] (3) a rule declaring it a UMC and UDAP to misrepresent nonprismatic instruments as prismatic; [134] (4) a rule declaring it a UMC and UDAP to advertise or market dry cell batteries as ''leakproof;'' [135] (5) a rule declaring it a UMC and UDAP to misrepresent the ''cut size'' as the finished size of tablecloths and similar products; [136] (6) a rule declaring it a UMC and UDAP to misrepresent that belts are made of leather if they are made of other materials; [137] (7) a rule declaring it a UMC and UDAP to represent used lubricating oil as new; [138] (8) a rule declaring it a UDAP to fail to disclose certain health warnings in cigarette advertising and on cigarette packaging (''Cigarette Rule''); [139] (9) a rule declaring it a UMC and UDAP to fail to disclose certain features of light bulbs on packaging; [140] (10) a rule declaring it a UMC and UDAP to misrepresent the actual size of the viewable picture area on a TV; [141] (11) a rule declaring a presumption of a violation of section 2(d) and (e) of the amended Clayton Act for certain advertising and promotional practices in the men's and boy's clothing industry; [142] (12) a rule declaring it a UMC and UDAP to fail to make certain disclosures about the handling of glass fiber products and contact with certain products containing glass fiber; [143] (13) a rule declaring it a UMC and UDAP to make certain misrepresentations about transistors in radios; [144] (14) a rule declaring it a UDAP to fail to disclose certain effects about inhaling certain aerosol sprays; [145] (15) a rule declaring it a UMC and UDAP to misrepresent the length or size of extension ladders; [146] (16) a rule declaring it a UDAP to make certain misrepresentations, or fail to disclose certain information, about games of chance; [147] (17) a rule declaring it a UMC and UDAP to mail unsolicited credit cards; [148] (18) a rule declaring it a UMC and UDAP to fail to disclose the minimum octane number on gasoline pumps (''Octane Rule''); [149] (19) a rule declaring it a UMC and UDAP to sell finished articles of clothing without a permanent tag or label disclosing care and maintenance

[126] *See, e.g., Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986, 988–89 (D.C. Cir. 1973); *Liu* v. *Amerco,* 677 F.3d 489, 492 (1st Cir. 2012).

[127] Congress has authorized the FTC to seek civil monetary remedies against parties who engage in unfair or deceptive acts or practices under some circumstances. *See* 15 U.S.C. 45(m); 15 U.S.C. 57b.

[128] *See* 15 U.S.C. 45(b); 15 U.S.C. 53(b).

[129] *See* 15 U.S.C. 45(l).

[130] 15 U.S.C. 46(g).

[131] As explained in more detail later in this Part, Congress added section 18 to the FTC Act in 1975, and that section provides the process the Commission must go through to promulgate rules defining unfair or deceptive acts or practices. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93–637, 88 Stat. 2183 (Jan. 4, 1975) (hereinafter ''Magnuson-Moss Act''); 15 U.S.C. 57a. Congress provided, however, that ''[a]ny proposed rule under section 6(g) . . . with respect to which presentation of data, views, and arguments was substantially completed before'' section 18 was enacted ''may be promulgated in the same manner and with the same validity as such rule could have been promulgated had'' section 18 ''not been enacted.'' 88 Stat. 2198; 15 U.S.C. 57a note. This list therefore includes a handful of rules promulgated under section 6(g) but after 1975 because those rules were substantially completed before section 18's enactment.

[132] Advertising and Labeling as to Size of Sleeping Bags, 28 FR 10900 (Oct. 11, 1963), *repealed by* 60 FR 65528 (Dec. 20, 1995).

[133] Misuse of ''Automatic'' or Terms of Similar Import as Descriptive of Household Electric Sewing Machines, 30 FR 8900 (Jul. 15, 1965), *repealed by* 55 FR 23900 (June 13, 1990).

[134] Deception as to Nonprismatic and Partially Prismatic Instruments Being Prismatic Binoculars, 29 FR 7316 (Jun. 5, 1964), *repealed by* 60 FR 65529 (Dec. 20, 1995).

[135] Deceptive Use of ''Leakproof,'' ''Guaranteed Leakproof,'' etc., as Descriptive of Dry Cell Batteries, 29 FR 6535 (May 20, 1964), *repealed by* 62 FR 61225 (Nov. 17, 1997).

[136] Deceptive Advertising and Labeling as to Size of Tablecloths and Related Products, 29 FR 11261 (Aug. 5, 1964), *repealed by* 60 FR 65530 (Dec. 20, 1995).

[137] Misbranding and Deception as to Leather Content of Waist Belts, 29 FR 8166 (Jun. 27, 1964), *repealed by* 61 FR 25560 (May 22, 1996).

[138] Deceptive Advertising and Labeling of Previously Used Lubricating Oil, 29 FR 11650 (Aug. 14, 1964), *repealed by* 61 FR 55095 (Oct. 24, 1996).

[139] Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 FR 8324 (July 2, 1964), *repealed by* 30 FR 9485 (July 29, 1965). As explained in more detail herein, Congress superseded this rule with legislation.

[140] Incandescent Lamp (Light Bulb) Industry, 35 FR 11784 (Jul. 23, 1970), *repealed by* 61 FR 33308 (Jun. 27, 1996).

[141] Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 31 FR 3342 (Mar. 3, 1966), *repealed by* 83 FR 50484 (Oct. 9, 2018).

[142] Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 32 FR 15584 (Nov. 9, 1967), *repealed by* 59 FR 8527 (Feb. 23, 1994).

[143] Failure to Disclose that Skin Irritation May Result from Washing or Handling Glass Fiber Curtains and Draperies and Glass Fiber Curtain and Drapery Fabrics, 32 FR 11023 (Jul. 28, 1967), *repealed by* 60 FR 65532 (Dec. 20, 1995).

[144] Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers, 33 FR 8446 (Jun. 7, 1968), *repealed by* 55 FR 25090 (Jun. 20, 1990).

[145] Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cocktail Glasses, 34 FR 2417 (Feb. 20, 1969), *repealed by* 60 FR 66071 (Dec. 21, 1995).

[146] Deceptive Advertising and Labeling as to Length of Extension Ladders, 34 FR 929 (Jan. 22, 1969), *repealed by* 60 FR 65533 (Dec. 20, 1995).

[147] Games of Chance in the Food Retailing and Gasoline Industries, 34 FR 13302 (Aug. 16, 1969), *repealed by* 61 FR 68143 (Dec. 27, 1996).

[148] Unsolicited Mailing of Credit Cards, 35 FR 4614 (Mar. 17, 1970), *repealed by* 36 FR 45 (Jan. 5, 1971). This rule was rescinded in response to an amendment to the Truth in Lending Act that prohibited similar conduct. *See* Public Law 91–508, 84 Stat. 1126 (1970).

[149] Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 FR 23871 (Dec. 16, 1971), *repealed by* 43 FR 43022 (Sept. 22, 1978). This rule was superseded by the Petroleum Marketing Practices Act, Public Law 95–297, 92 Stat. 333 (June 19, 1978). A similar regulation was promulgated under that law at 16 CFR part 306.

instructions;[150] (20) a rule declaring a UMC and UDAP for a grocery store to offer products for sale at a stated price if those products will not be readily available to consumers (''Unavailability Rule'');[151] (21) a rule declaring it a UMC and UDAP for a seller to fail to make certain disclosures in connection with a negative option plan (''Negative Options Rule'');[152] (22) a rule declaring it a UDAP for door-to-door sellers to fail to furnish certain information to buyers;[153] (23) a rule declaring it a UMC and UDAP to fail to make certain disclosures about sound power amplification for home entertainment products;[154] (24) a rule declaring it a UDAP for sellers failing to include certain contract provisions preserving claims and defenses in consumer credit contracts (''Holder Rule'');[155] (25) a rule declaring it a UMC or UDAP to solicit mail order merchandise from a buyer unless the seller can ship the merchandise within 30 days (''Mail Order Rule'');[156] and (26) a rule declaring it a UDAP for a franchisor to fail to furnish a franchisee with certain information.[157]

Some of these rules attracted significant attention. For instance, the Commission began the rulemaking process to require warnings on cigarette packages just one week after the Surgeon General's ''landmark report'' that determined smoking is a health hazard,[158] and that rule was front-page news.[159] Following a lobbying campaign by the tobacco industry,[160] Congress supplanted the Commission's regulation with the Cigarette Labeling and Advertising Act but did not disturb the Commission's rulemaking authority.[161] The Unavailability Rule was likewise front-page news upon its release in 1971, and Congress left it intact.[162]

In *National Petroleum Refiners Association* v. *FTC* (''*Petroleum Refiners*''), the D.C. Circuit expressly upheld the Octane Rule as a proper exercise of the Commission's power under section 6(g) to make rules regulating both unfair methods of competition and unfair or deceptive acts or practices.[163] After construing ''the words of the statute creating the Commission and delineating its powers,'' the court held ''that under the terms of its governing statute . . . and under Section 6(g) . . . the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent.''[164] That interpretation was also ''reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies.''[165] The Seventh Circuit later agreed with the D.C. Circuit's decision and ''incorporate[d] [it] by reference'' when rejecting a challenge to the Mail Order Rule.[166]

Following such rulemakings and the D.C. Circuit's confirmation of the Commission's rulemaking power in *Petroleum Refiners,* Congress in 1975 enacted a new section 18 of the FTC Act. This new section introduced special procedures, beyond those required under the Administrative Procedure Act, for promulgating rules for unfair or deceptive acts or practices, and it eliminated the Commission's authority to issue such rules under section 6(g).[167] But Congress pointedly chose not to restrict the Commission's authority to promulgate rules regulating unfair methods of competition under section 6(g). That choice was deliberate. While considering this legislation, Congress knew that the Commission had promulgated rules regulating unfair methods of competition and that the D.C. Circuit in *Petroleum Refiners* had confirmed the Commission's authority to do so.[168] And Congress expressly considered—but rejected—an amendment to the FTC Act under which ''[t]he FTC would have been prohibited from prescribing rules with respect to unfair competitive practices.''[169]

Instead, the enacted section 18 confirmed the Commission's authority to make rules under section 6(g). The law expressly preserved ''any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.''[170] Congress also made clear that Section 18 ''shall not affect the validity of any rule which was promulgated under section 6(g).''[171] And it provided that ''[a]ny proposed rule under section 6(g)'' with certain components that were ''substantially completed before'' section 18's enactment ''may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.''[172] Among the substantially completed rules at the time was the Mail Order Rule, which proposed to define—and upon promulgation did define—certain conduct as both an unfair method of competition and an unfair or deceptive act or practice.[173] The 1975 legislation thus expressly permitted the Commission to promulgate a rule under section 6(g) that defined an unfair method of competition and evinces Congress's

[150] Care Labeling of Textile Wearing Apparel, 36 FR 23883 (Dec. 16, 1971).

[151] Retail Food Store Advertising and Marketing Practices, 36 FR 8777 (May 13, 1971).

[152] Use of Negative Option Plans by Sellers in Commerce, 38 FR 4896 (Feb. 22, 1973).

[153] Cooling-off Period for Door-to-Door Sales, 37 FR 22934 (Oct. 26, 1972).

[154] Power Output Claims for Amplifiers Used in Home Entertainment Products, 39 FR 15387 (May 3, 1974).

[155] Preservation of Consumers' Claims and Defenses, 40 FR 53506 (Nov. 18, 1975).

[156] Mail Order Merchandise, 40 FR 49492 (Oct. 22, 1975) (regulatory text), 40 FR 51582 (Nov. 5, 1975) (statement of basis and purpose). The Mail Order Rule has since been updated to become the Mail, internet, or Telephone Order Merchandise Rule, or MITOR. *See* 79 FR 55619 (Sept. 17, 2014). The updates to the rule were based on the Commission's authority to regulate unfair or deceptive acts or practices.

[157] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 FR 59614 (Dec. 21, 1978).

[158] Teresa Moran Schwartz & Alice Saker Hrdy, *FTC Rulemaking: Three Bold Initiatives and Their Legal Impact,* 2–3 (Sept. 22, 2004).

[159] *U.S. to Require Health Warning for Cigarettes,* N.Y. Times (June 25, 1964) at 1, 15 (tobacco industry indicating plans to immediately challenge the Commission's authority to issue the regulation), *https://www.nytimes.com/1964/06/25/archives/us-to-require-health-warning-for-cigarettes-trade-commission-orders.html.*

[160] Tobacco Inst., *Tobacco—A Vital U.S. Industry* (1965), *https://acsc.lib.udel.edu/exhibits/show/legislation/cigarette-labeling.*

[161] Public Law 89–92, 79 Stat. 282 (July 27, 1965); *see* 15 U.S.C. 1331 *et seq.*

[162] *FTC Bars Grocery Ads for Unavailable Specials,* N.Y. Times (May 13, 1971) at 1, *https://www.nytimes.com/1971/05/13/archives/f-t-c-bars-grocery-ads-for-unavailable-specials-bars-grocery;* 16 CFR 424.1 and 424.2. The rule was amended after its enactment in 1971 to add an exception and defenses but otherwise remains intact as promulgated. Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 FR 35456–08 (Aug. 28, 1989); *see also* Retail Food Store Advertising and Marketing Practices Rule, 79 FR 70053–01 (Nov. 25, 2014).

[163] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672 (D.C. Cir. 1973).

[164] *Nat'l Petroleum Refiners,* 482 F.2d at 674, 698; *see also Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 967 (D.C. Cir. 1985) (concluding, after extensive review of the legislative history related to the FTC's rulemaking authority originating in 1914 and extending through amendments to the FTC Act in 1980, that ''Congress has not at any time withdrawn the broad discretionary authority originally granted the Commission in 1914 to define unfair practices on a flexible, incremental basis.'').

[165] *Nat'l Petroleum Refiners,* 482 F.2d at 678.

[166] *United States* v. *JS & A Grp., Inc.,* 716 F.2d 451, 454 (7th Cir. 1983).

[167] Magnuson-Moss Act, 88 Stat. 2183; *see* 15 U.S.C. 57a.

[168] S. Rep. No. 93–151, at 32 (1973).

[169] H.R. Conf. Rep. No. 93–1606, at 30 (1974).

[170] 15 U.S.C. 57a(a)(2).

[171] Magnuson-Moss Act, 88 Stat. 2183.

[172] Magnuson-Moss Act, 88 Stat. 2183.

[173] *See* Undelivered Mail Order Merchandise and Services, 36 FR 19092 (Sept. 28, 1971) (initial NPRM); 39 FR 9201 (Mar. 8, 1974) (amended NPRM); 40 FR 49492 (Oct. 22, 1975) (final regulatory text).

intent to leave in place the Commission's authority to promulgate such rules under section 6(g). As the Seventh Circuit later put it, ''Congress . . . considered the controversy surrounding the Commission's substantive rulemaking power under Section 6(g) to have been settled by the *Octane Rating* case.'' [174]

Congress again confirmed the Commission's authority to promulgate rules regulating unfair methods of competition under section 6(g) when it enacted section 22 of the FTC Act as part of the Federal Trade Commission Improvements Act of 1980.[175] Section 22 imposes certain procedural requirements the Commission must follow when it promulgates any ''rule.'' Section 22(a) defines ''rule'' as ''any rule promulgated by the Commission under section 6 or section 18'' while *excluding* from that definition ''interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice.'' [176] Thus, by its terms, section 22(a) demonstrates the 1980 Congress's understanding that the Commission maintained authority to promulgate rules under section 6 that are not merely ''interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice.'' [177] Section 22 envisions rules that will have the force of law as legislative rules and defines ''rule'' based on whether it may ''have an annual effect on the national economy of $100,000,000 or more,'' ''cause a substantial change in the cost or price of goods or services,'' or ''have a significant impact upon'' persons and consumers.[178] Section 22(b) of the Act similarly contemplates authority to make legislative rules by imposing regulatory analysis obligations on any rules that the Commission promulgates under section 6.[179] The specific obligations in section 22(b), such as the requirement for the Commission to conduct a cost-benefit analysis, assume that section 6(g) authorizes substantive and economically significant rules.

Both the 1975 and 1980 amendments to the FTC Act thus indicate that Congress understood the Commission possessed rulemaking power under section 6(g) and chose to leave that authority in place.[180] As the Supreme Court has observed, ''[t]he long time failure of Congress to alter'' a statutory provision, like section 6(g) here, ''after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.'' [181] That is especially true when, as here, ''the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.'' [182] Were there any doubt that the 1914 Congress granted the Commission the authority to make rules under section 6(g) to prevent unfair methods of competition, the Congresses of 1975 and 1980 eliminated such doubt by ratifying the D.C. Circuit's decision holding that the Commission has such authority.

C. Comments and Responses Regarding the Commission's Legal Authority

The Commission received many comments supporting, discussing, or questioning its authority to promulgate the final rule. Numerous commenters supported that the Commission has such authority, including, among others, legal scholars and businesses.[183] In addition, hundreds of small businesses—hailing from 45 States and the District of Columbia—joined a comment by the Small Business Majority supporting the final rule.[184]

Commenters questioning the Commission's authority typically advanced one of three arguments. First, some commenters claimed the FTC Act does not grant the Commission authority to promulgate the rule. Second, some commenters contended that the validity of non-competes is a major question that Congress has not given the Commission the authority to address. And third, some commenters argued that Congress had impermissibly delegated to the Commission authority to promulgate nationwide rules governing methods of competition. A smaller number of comments asserted other, miscellaneous reasons the Commission allegedly lacked authority to promulgate the rule. The Commission has considered these comments and disagrees for the reasons explained below.

1. The Commission's Authority Under the FTC Act

The Commission received numerous comments claiming that it lacks authority under the FTC Act to promulgate rules prohibiting unfair methods of competition. The Commission disagrees. Congress expressly granted the Commission authority to promulgate such rules in the original FTC Act of 1914, Congress enacted legislation in 1975 expressly preserving that authority,[185] and it imposed requirements in 1980 that presumed that authority.

The Commission is not persuaded by commenters' arguments in opposition to its authority. For instance, some commenters argued that Congress's choice to exclude certain industries from the Commission's jurisdiction indicates that Congress did not intend to give the Commission power to pass rules that affect commerce across the national economy.[186] But Congress expressly ''empowered and directed'' the Commission to prevent unfair methods of competition throughout the economy,[187] in any activities ''in or affecting commerce,'' subject only to limited exceptions. The final rule will apply only to the extent that the Commission has jurisdiction under the FTC Act. The Act does not limit the Commission's authority to pursue, for example, industry-specific rulemaking. Where Congress wished to limit the scope of the Commission's authority over particular entities or activities, it did so expressly, demonstrating its intent to give the Commission broad enforcement authority over activities in or affecting commerce outside the scope of the enumerated exceptions.[188] That section 22 of the FTC Act requires the Commission to perform a regulatory analysis for amendments to rules based on, *inter alia,* ''their annual effect on the

[174] *United States* v. *JS & A Grp.,* 716 F.2d 451, 454 (7th Cir. 1983).

[175] Public Law 96–252, 94 Stat. 374 (1980).

[176] *Id.; see* 15 U.S.C. 57b–3(a)(1).

[177] 15 U.S.C. 57b–3(a)(1).

[178] *Id.*

[179] 15 U.S.C. 57b–3(b).

[180] Congress has also amended section 6 since the D.C. Circuit decided *Petroleum Refiners,* but it left section 6(g) untouched. *See* Public Law 109–455, 120 Stat. 3372 (2006).

[181] *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 488 (1940).

[182] *Id.* at 489.

[183] *See, e.g.,* Comment of Lev Menand et al., FTC–2023–0007–20871; Comment of Peter Shane et al., FTC–2023–0007–21024; Comment of Yelp, FTC–2023–0007–20974; Comment of Veeva Systems, FTC–2023–0007–18078.

[184] Comment of Sm. Bus. Majority, FTC–2023–0007–21022.

[185] Some commenters argued that the 1975 Magnuson-Moss Act, which created additional procedures the Commission must use to promulgate rules regulating unfair or deceptive acts or practices, implies that the Commission entirely lacks authority to promulgate rules regulating unfair methods of competition. The Commission disagrees with these comments and notes the effect of the 1975 legislation, which preserved the Commission's existing rulemaking authority.

[186] *E.g.,* Comment of Fed'n of Am. Hosps., FTC–2023–0007–21034.

[187] 15 U.S.C. 45(a)(2).

[188] 15 U.S.C. 45(a)(2), (3).

national economy'' confirms the same.[189]

Other commenters argued that the Commission is relying on vague or ancillary provisions for its authority and invoked the familiar refrain that Congress ''does not . . . hide elephants in mouseholes.'' [190] None of the provisions on which the Commission is relying are either vague or ancillary. As explained earlier, preventing unfair methods of competition is at the core of the Commission's mandate, the plain text of the Act gives the Commission rulemaking authority to carry out that mandate, and the Commission has exercised this rulemaking authority before.[191] The D.C. Circuit and Seventh Circuits have upheld that exercise of authority, and Congress preserved this authority in subsequent amendments to the Act following the D.C. Circuit's decision.[192]

Additional commenters cited select legislative history from the 1914 FTC Act to suggest the Commission lacks authority to promulgate rules regulating competition.[193] ''[T]here is no reason to resort to legislative history'' when, as here, the text of the statute speaks plainly.[194] Even if that were not the case, however, the legislative history does not unambiguously compel a different conclusion. Faced with similar arguments to those raised by commenters here, in *National Petroleum Refiners,* the D.C. Circuit conducted an exhaustive review of the 1914 FTC Act and concluded ''the legislative history of section 5 and Section 6(g) is ambiguous'' and ''certainly does not compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect[.]'' [195] As the D.C. Circuit explained, even individual statements by some Congresspeople that might suggest otherwise,[196] when properly contextualized, ''can be read to support substantive rule-making of the kind asserted by the'' Commission.[197]

Statements from the enactment of the 1975 Magnuson Moss Act, which added section 18 to the FTC Act, confirm the Commission's authority to promulgate rules under section 6(g). That legislative history reveals Congress in 1975 made a considered decision to reject an effort to overturn the D.C. Circuit's interpretation of the FTC Act and instead confirmed that section 6(g) authorizes the Commission to promulgate legislative rules concerning unfair methods of competition.[198] More importantly, these sorts of individual statements cannot trump the plain text of the Act that Congress passed,[199] which gave the Commission the authority ''to make rules and regulations for the purpose of carrying out the provisions'' of the FTC Act. Indeed, even if the legislative history were to be selectively read to cut against the Commission's authority, the Commission would still conclude that section 6(g) confers authority to promulgate this final rule because the plain text of the statute (including both the original 1914 Act and subsequent enacted amendments to the FTC Act) unambiguously confers that authority.

In short, neither the legislative history of the FTC Act, nor any of the other arguments commenters raised about the Commission's rulemaking authority overcome the plain meaning of the Act or Congress's ratification of the Commission's power to make rules preventing unfair methods of competition, as discussed in Part II.B.[200]

The Commission acknowledges that individual members of the Commission have, at times, disclaimed the Commission's authority to promulgate rules regulating unfair methods of competition.[201] The statement of an individual Commissioner does not reflect the views of or bind ''[t]he Commission itself,'' which has concluded—just as it did when it issued such rules in the past—that it does possess such authority.[202] In any event, the Commission has reviewed these statements, along with the many comments it received, and does not believe any of the arguments raised in support of that position overcome the plain meaning of the FTC Act provisions.

2. Major Questions Doctrine

Many commenters assert that the Commission lacks the authority to adopt the final rule based on the major questions doctrine. That doctrine, as the Supreme Court recently explained in *West Virginia* v. *EPA,* ''teaches that there are extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'' [203] In such cases, ''something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.'' [204] Having considered the factors that the Supreme Court has used to identify major questions, the Commission concludes that the final rule does not implicate the major questions doctrine. And even if that doctrine did apply, the Commission concludes that Congress provided clear authorization for the Commission to promulgate this rule.[205]

[189] 15 U.S.C. 57b–3 (outlining requirements of the Commission's rulemaking process for new rules and amendments); *see also* Part II.E (discussing the Commission's jurisdiction).

[190] *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001); *see, e.g.,* Comment of La. And 12 Other States, FTC–2023–0007–21094.

[191] *See* Part II.B (discussing the Commission's history of using section 6(g) to promulgate rules).

[192] *Id.*

[193] *E.g.,* Comment of Nat'l Ass'n of Mfrs., FTC–2023–0007–20939; Comment of La. And 12 Other States, FTC–2023–0007–21094.

[194] *United States* v. *Gonzales,* 520 U.S. 1, 6 (1997).

[195] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 686 (D.C. Cir. 1973).

[196] *Id.* at 704; *see also, e.g.,* Comment from La. and 12 Other States, FTC–2023–0007–21094 (identifying statements and failed bills that, the commenters say, show the Commission was not intended to possess rulemaking authority).

[197] *Nat'l Petroleum Refiners,* 482 F.2d at 709.

[198] For example, while the Senate was considering amendments to the FTC Act, Senator Hart read excerpts of *Nat'l Petroleum Refiners* into the record. *See* 120 Cong. Rec. 40712 (Dec. 18, 1974). These short excerpts included the court acknowledging that it was considering whether the Commission ''is empowered to promulgate substantive rules'' that would ''give greater specificity and clarity to the broad standard of illegality—'unfair methods of competition' . . .— which the agency is empowered to prevent.'' *Id.* (quoting *Nat'l Petroleum Refiners,* 482 F.2d at 673). Senator Hart then explained that the ''procedural requirements . . . respecting FTC rulemaking'' in the bill under consideration ''are limited to unfair or deceptive acts or practices rules.'' *Id.* ''These provisions and limitations,'' he explained, ''are not intended to affect the Commission's authority to prescribe and enforce rules respecting unfair methods of competition.'' *Id.* ''Rules respecting unfair methods of competition,'' Senator Hart said, ''should continue to be prescribed in accordance with'' the APA. *Id.; see also* Comment of Lev Menand et al., FTC–2023–0007–20871 at 3–6 (recounting legislative history that preceded the 1975 amendments to the FTC Act).

[199] *See Barnhart* v. *Sigmon Coal Co.,* 534 U.S. 438, 457 (2002) (''Floor statements from two Senators [who were sponsors of the bill] cannot amend the clear and unambiguous language of a statute.'').

[200] This includes arguments about the legislative intent, structure, or post-enactment history of the 1914 FTC Act.

[201] *See, e.g., Nat'l Petroleum Refiners,* 482 F.2d at 695–96 & n. 32, 38–39; NPRM at 3544 (dissenting statement of Commissioner Wilson).

[202] *Nat'l Petroleum Refiners,* 482 F.2d at 694; *see also* 16 CFR 4.14(c) (''Commission action'' requires ''the affirmative concurrence of a majority of the participating Commissioners'').

[203] *W. Va.* v. *EPA,* 597 U.S. 697, 721 (2022) (cleaned up).

[204] *Id.* at 723 (cleaned up).

[205] The Commission notes that some commenters either implicitly or explicitly focused on the Commission's rulemaking authority, as opposed to the Commission's authority to define non-competes as an unfair method of competition, as a major question. The Commission has already addressed

The agency authority underlying this final rule rests on firm historical footing. There is nothing novel about the Commission's assertion of authority to promulgate legislative rules under section 6(g).[206] As explained in Part II.B, the Commission has used this authority for more than 60 years to promulgate many rules defining unfair methods of competition and/or unfair or deceptive acts or practices.[207] The Commission's use of this power sometimes garnered significant attention, such as when it made national news by requiring cigarette warnings in the immediate wake of the Surgeon General's groundbreaking report on the health effects of smoking.[208] And the Commission's rulemaking authority was long ago ''addressed''—and affirmed—''by a court.'' [209] Moreover, after that high-profile rulemaking and judicial affirmation, Congress considered—and twice reaffirmed—the Commission's authority to issue legislative rules defining unfair methods of competition under section 6(g).[210] Indeed, even when Congress decided to displace the FTC's Cigarette Rule with legislation, it left the Commission's rulemaking authority in place.[211] Likewise, when Congress added procedural steps the Commission must take when promulgating rules concerning unfair or deceptive acts or practices, it expressly allowed the Commission to complete certain ongoing rulemakings, including one that relied on section 6(g) to define an unfair method of competition.[212] This is not a situation where Congress ''conspicuously and repeatedly'' declined to grant the agency the claimed power.[213]

Nor does the substance of the rule represent any departure from the Commission's past practices. Since its establishment in 1914, the Commission has had the authority to determine whether given practices constitute unfair methods of competition. Rather than trying to define all the many and varied practices that are unfair, Congress empowered the Commission to respond to changing market conditions and to bring specialized expertise to bear when making unfairness determinations.[214] As noted in Part I.B, the Commission has previously secured consent orders premised on the use of non-competes being an unfair method of competition,[215] and there is little question that the Commission has the authority to determine that non-competes are unfair methods of competition through adjudication.[216] Indeed, one commenter who asserted the rule would violate the major questions doctrine expressly agreed that the Commission could determine that a specific non-compete is an unfair method of competition through case-by-case adjudication.[217] The Commission is making the same kind of determination here through rulemaking rather than adjudication.[218] And because the rulemaking process allows all interested parties a chance to weigh in, this process ''may actually be fairer to parties than total reliance on case-by-case adjudication.'' [219] This is thus not a situation where the agency's action would fundamentally change the nature of the regulatory scheme. Determining whether a practice is an ''unfair method of competition'' under section 5 has been a core task of the Commission for more than a century—and, indeed, goes to the heart of its mandate.

Additionally, non-competes have already been the subject of FTC scrutiny and enforcement actions, so subjecting them to rulemaking is a more incremental—and thus less significant—step than it would be for an agency to wade into an area not currently subject to its enforcement authority. And the present rulemaking is consistent with both Congress's intent for the Commission and the Commission's prior practice. Congress ''empowered and directed'' the Commission ''to prevent persons, partnerships, or corporations'' within the Commission's jurisdiction ''from using unfair methods of competition in or affecting commerce.'' [220] Following that directive, the Commission has previously used its section 6(g) authority to promulgate rules that reach industries across the economy. For example, the Mail Order Rule placed restrictions on any sale conducted by mail,[221] and the Negative Option Rule requires certain disclosures for some negative option plans. These rules—promulgated nearly 50 or more years ago—applied across the industries within the FTC's jurisdiction, yet no court has held that they exceeded the Commission's authority.[222] Indeed, the Seventh Circuit upheld the Mail Order Rule as a valid exercise of that authority.[223]

Congress itself recognized that the Commission's authority will sometimes affect firms across the economy. Indeed, addressing unfair methods of competition and unfair and deceptive practices across industries (other than the industries, activities, or entities Congress expressly exempted) is the core of the Commission's mandate—and the Commission has long pursued that mandate through both rulemaking [224] and adjudication.[225] Congress imposed

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the source of its rulemaking authority, *see* Part II.B. But to be clear, the Commission concludes that neither its rulemaking authority under section 6(g) nor its authority to use that power to define non-competes as an unfair method of competition implicates the major questions doctrine, and that even assuming either did, Congress has provided express statutory authority for both.

[206] *W. Va.* v. *EPA,* 597 U.S. at 725.

[207] *See* Part II.B (discussing the Commission's history of promulgating rules under section 6(g)).

[208] *See* Part II.B (discussing Cigarette Rule and Holder Rule); *see also* ''U.S. to Require Health Warning for Cigarettes,'' N.Y. Times (June 25, 1964) at 1, 15 (tobacco industry indicating plans to immediately challenge the Commission's authority to issue the regulation).

[209] *W. Va.* v. *EPA,* 597 U.S. at 725; *see* Part II.B (discussing decisions from the D.C. Circuit and Seventh Circuit affirming the Commission's rulemaking power under section 6(g)).

[210] *See* Part II.B (discussing the history and content of sections 18 and 22 of the FTC Act).

[211] *See* Federal Cigarette Labeling and Advertising Act, Public Law 89–92, 79 Stat. 282 (July 27, 1965).

[212] 15 U.S.C. 57a(a)(2); *see* Part II.B (discussing the Mail Order Rule).

[213] *W. Va.* v. *EPA,* 597 U.S. at 724.

[214] *See, e.g., FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 311 n.2, 314 (1934).

[215] In those orders, the party agreed, *inter alia,* to cease and desist from enforcing or attempting to enforce existing non-competes and from entering into or attempting to enter into new ones, and also agreed to provide notice to affected employees that they are no longer subject to a non-compete. *See* Part I.B n.42–44 (citing recent Commission investigations and consent orders involving non-competes).

[216] To the extent that any commenters argued the Commission lacked authority over the entire subject matter of non-compete agreements, the Commission did not see any compelling explanation that an agreement not to compete falls outside the meaning of a ''method of competition.''

[217] Comment of Int'l Ctr. For L. & Econs., FTC–2023–0007–20753, at 75–76.

[218] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672 at 685 (D.C. Cir. 1973) (recognizing that the Commission may ''choose[ ]to elaborate'' section 5's ''comprehensive statutory standards through rule-making or through case-by-case adjudication'').

[219] *Id.* at 681; *see generally* Part IX.C.2 (discussing the value of rulemaking).

[220] 15 U.S.C. 45(a)(2).

[221] *Mail Order Merchandise,* 40 FR 49492 (Oct. 22, 1975); *see* 16 CFR part 435.

[222] *See* Part II.B (listing rules promulgated by the FTC exercising authority under sections 5 and 6(g)).

[223] *United States* v. *JS & A Grp.,* 716 F.2d 451, 454 (7th Cir. 1983).

[224] *See* Part II.B.

[225] The Commission's adjudicatory power, like its rulemaking power, stretches across the national economy. For instance, the Commission has found companies in a variety of industries participated in price-fixing conspiracies that violated section 5 and ordered them to cease and desist from such practices following an adjudication. *See, e.g., Eugene Dietzgen Co.* v. *FTC,* 142 F.2d 321 (7th Cir. 1944) (scientific instruments); *U.S. Maltsters Ass'n* v. *FTC,* 152 F.2d 161 (7th Cir. 1945) (malt manufacturers); *Keasbey & Mattison Co.* v. *FTC,* 159 F.2d 940 (6th Cir. 1947) (asbestos insulation); *Allied Paper Mills* v. *FTC,* 168 F.2d 600 (7th Cir. 1948) (book paper manufacturers); *Bond Crown & Cork. Co.* v. *FTC,* 176 F.2d 974 (4th Cir. 1949) (bottle cap manufacturers). Price-fixing is just one example. The Commission's adjudicatory power also supported a cease-and-desist order concerning a food manufacturer's resale practices more than 100 years ago. *FTC* v. *Beech-Nut Packing,* 257 U.S. 441 (1922). And it supported a cease-and-desist order

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certain requirements in section 22 on any amendment to a Commission rule promulgated under section 6 (or section 18) that would have certain substantial effects on the national economy, the price of goods or services, or regulated entities and consumers.[226] Congress thus anticipated—and intended—that the Commission's rulemaking power carried the potential to affect the economy in considerable ways, and Congress already considered and specified the necessary steps and checks to ensure the Commission's exercise of that power is appropriate. For all these reasons, the final rule does not involve a ''major question'' as the Supreme Court has used that term.

Even if the final rule does present a major question, the final rule passes muster because the FTC Act provides clear authorization for the Commission's action. In cases involving major questions, courts expect Congress to ''speak clearly'' if it wishes to assign the disputed power.[227] Congress did so when it ''declared unlawful'' in the FTC Act ''[u]nfair methods of competition'' and empowered the Commission ''to make rules and regulations for the purpose of carrying out the provisions of th[e] Act.'' [228] Congress ''[i]n large measure'' left ''the task of defining 'unfair methods of competition' . . . to the Commission.'' [229] That is precisely what the Commission has done here, for the reasons elaborated in Part IV. Finally, there is no doubt that the Commission has expertise in the field (competition) it is regulating here.[230] For these reasons, even if the final rule involves a major question, Congress has clearly delegated to the Commission the authority to address that question.

3. Non-Delegation Doctrine

Some commenters also objected that Congress violated the non-delegation doctrine by empowering the Commission to promulgate rules regulating unfair methods of competition. The Commission disagrees. The non-delegation doctrine provides that ''Congress generally cannot delegate its legislative power to another Branch.'' [231] But the Constitution does not ''prevent Congress from obtaining the assistance of its coordinate Branches.'' [232] ''So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'' [233] Applying this rule, the Supreme Court has ''over and over upheld even very broad delegations'' including those directing agencies ''to regulate in 'the public interest,' . . . to set 'fair and equitable' prices and 'just and reasonable' rates,'' and ''to issue whatever air quality standards are 'requisite to protect the public health.' '' [234] ''The Supreme Court has'' also ''explained that the general policy and boundaries of a delegation 'need not be tested in isolation' '' and ''[i]nstead, the statutory language may derive content from the 'purpose of the Act, its factual background and the statutory context in which they appear.' '' [235]

Here, Congress ''declared unlawful'' any ''unfair methods of competition in or affecting commerce'' and ''empowered and directed'' the Commission ''to prevent'' entities within its jurisdiction ''from using unfair methods of competition.'' [236] Congress also instructed the Commission to ''make rules and regulations for the purpose of carrying out the provisions'' of the FTC Act.[237] Congress's stated purpose and policy in section 5 provides the Commission with an intelligible principle to guide its section 6(g) rulemaking authority.[238]

Were there any doubt, the Supreme Court has laid it to rest in *A.L.A. Schechter Poultry Corp.* v. *United States.*[239] *Schechter Poultry* marked one of two occasions ''in this country's history'' that the Supreme Court ''found a delegation excessive,'' and ''in each case . . . Congress had failed to articulate *any* policy or standard to confine discretion.'' [240] The Court offered the FTC Act, however, as a counterexample of proper Congressional delegation. The Court recognized that the phrase ''unfair methods of competition'' in the FTC Act was ''an expression new in the law'' without ''precise definition,'' but that Congress had empowered the Commission to ''determine[ ] in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest'' whether a method of competition is unfair.[241] The FTC Act stood in contrast, the Court explained, to the National Industrial Recovery Act (''NIRA''), which the Court held included an unconstitutional delegation.[242]

The Commission recognizes that *Schechter Poultry* approved of the FTC Act's adjudicatory process for determining unfair methods of competition without commenting on the Act's rulemaking provision. But the ''unfair method of competition'' authority the Court approvingly cited in *Schechter Poultry* is the same intelligible principle the Commission is applying in this rulemaking. And just as the adjudication process provides for a ''formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review,'' [243] the APA rulemaking process provides for a public notice of proposed rulemaking, the opportunity to ''submi[t] . . . written data, views, or arguments,'' agency consideration of those comments, and judicial review.[244] If Congress may permissibly delegate the

within the past few years enjoining a pharmaceutical company from entering into reverse payment settlement schemes. *Impax Labs., Inc.* v. *FTC,* 994 F.3d 484 (5th Cir. 2021). In the century between, the Commission has found section 5 violations based on false advertising, monopoly maintenance, exclusive dealing, and more in diverse sectors throughout the country.

[226] 15 U.S.C. 57b–3; *see also* Part II.B.

[227] *W. Va.* v. *EPA,* 597 U.S. 697, 716, 723 (2002).

[228] FTC Act of 1914, 38 Stat. at 721–22; *see* 15 U.S.C. 45(a), 46(g); *see also* Part II.A (discussing the Commission's rulemaking authority).

[229] *FTC* v. *Texaco, Inc.,* 393 U.S. 223, 225 (1968).

[230] *Cf. W. Va.* v. *EPA,* 597 U.S. at 729 (noting the Court's view that the EPA had traditionally lacked the expertise needed to develop the rule at issue); *Ala. Ass'n of Realtors* v. *HHS,* 594 U.S. 758, at 764–65 (2021) (questioning the link between the Center for Disease Control and an eviction moratorium); *see also* Part II.A (discussing Congress's creation of the Commission as an expert body); Parts IV.B and IV.C (discussing the rationale for the rule and explaining the negative effects non-competes have on competition). The Commission also notes that through, *inter alia,* the roundtables and enforcement actions described in Part I.B, and through this rulemaking process, it has acquired expertise on non-competes specifically. The Commission further notes that non-competes are, inherently, a method of competition.

[231] *Mistretta* v. *United States,* 488 U.S. 361, 372 (1989).

[232] *Id.*

[233] *Id.* (alteration in original).

[234] *Gundy* v. *United States,* 139 S. Ct. 2116, 2121 (2019) (citing *Nat'l Broadcasting Co.* v. *United States,* 319 U.S. 190, 216 (1943); *N.Y. Cent. Secs. Corp.* v. *United States,* 287 U.S. 12, 24 (1932); *Yakus* v. *United States,* 321 U.S. 414, 422 (1944); *Fed. Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944); and *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001)).

[235] *TOMAC, Taxpayers of Mich. Against Casinos* v. *Norton,* 433 F.3d 852, 866 (D.C. Cir. 2006) (quoting *Am. Power & Light Co.* v. *SEC,* 329 U.S. 90, 104 (1946)).

[236] 15 U.S.C. 45(a)(1)–(2).

[237] 15 U.S.C. 46(g).

[238] As the D.C. Circuit noted in *Nat'l Petroleum Refiners Ass'n* v. *FTC,* ''the Supreme Court has ruled that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and law applying role laid out in Section 5.'' 482 F.2d 672, 677 (D.C. Cir. 1973) (citing *United States* v. *Morton Salt Co.,* 338 U.S. 632 (1950)).

[239] *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935).

[240] *Gundy,* 588 U.S. at 2129 (internal quotation omitted); *cf. also Panama Refin. Co.* v. *Ryan,* 293 U.S. 388 (1935) (finding impermissible delegation).

[241] *Schechter Poultry,* 295 U.S. at 532–33.

[242] *Id.* at 529–42.

[243] *Id.* at 533.

[244] 5 U.S.C. 553, 702.

authority to determine through adjudication whether a given practice is an unfair method of competition, it may also permit the Commission to do the same through rulemaking.[245]

For these reasons, the Commission concludes that its authority to promulgate rules regulating unfair methods of competition is not an impermissible delegation of legislative authority.

4. Other Challenges to the Commission's Authority

Finally, a handful of comments raised other, miscellaneous arguments contending that the Commission lacks authority to promulgate the rule. The Commission has reviewed and considered these comments and concludes they do not undercut the Commission's authority to promulgate the final rule.

The Commission received several comments about the Commerce Clause. That clause allows Congress ''to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.'' [246] Consistent with that clause, the FTC Act empowers the Commission to prevent unfair methods of competition ''in or affecting commerce,'' which the Act also defines consistently with the Constitution.[247] One commenter wrote to support the rule and emphasized that non-competes restrict the free flow of interstate commerce. Others argued that the proposed rule would violate the Commerce Clause by regulating local commerce. The Commission has considered these comments and concludes that it may promulgate the final rule consistent with the Commerce Clause. The final rule extends to the full extent of the FTC's jurisdiction, which in turn extends no further than the Commerce Clause permits. As the Supreme Court has explained, the phrase ''in or affecting commerce'' in section 5 of the FTC Act is ''coextensive with the constitutional power of Congress under the Commerce Clause.'' [248] In this final rule, the Commission finds the use of non-competes by employers substantially affects commerce as that term is defined in the FTC Act. The final rule is therefore a lawful exercise of Congress's delegated power.[249]

Relatedly, one commenter objected that the rule would violate the Tenth Amendment, which provides that ''[t]he 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.'' [250] But as just explained, the Constitution grants Congress the power to regulate interstate commerce, and pursuant to that power Congress granted the Commission authority to prevent unfair methods of competition in or affecting commerce. The Commission is not intruding on any power reserved to the States.

Some commenters objected that the rule infringes on the right to contract. One of these commenters acknowledged that the Constitution's Contracts Clause does not apply to the Federal government.[251] Regardless, even assuming the Constitution protects a right to contract that can be asserted against a Federal regulation, that right sounds in substantive due process, and the Commission must offer only a rational basis for the rule.[252] As relevant here, the final rule advances the Commission's congressional mandate to prevent unfair methods of competition and will promote competition and further innovation among its many benefits.[253] There is a rational relationship between regulating non-competes and these legitimate government purposes.

One commenter argued that the proposed rule was unconstitutionally vague. This commenter's objection focused on the proposed provision governing *de facto* non-competes. The Commission is not adopting that proposed language in the final rule. Instead, the Commission has clarified the scope of its definition of non-compete clause. Whether a specific clause falls within the scope of the final rule will necessarily depend on the precise language of the agreement at issue, but the text of the final rule provides regulated parties with sufficient notice of what the law demands to satisfy any due process vagueness concerns.

D. Compliance With the Administrative Procedure Act (''APA'')

Some commenters also contended that the Commission has not complied with the Administrative Procedure Act (''APA'').[254] At a high level, the APA requires prior public notice, an opportunity to comment, and consideration of those comments before an agency can promulgate a legislative rule.[255] The Commission has engaged in that process, which has led to this final rule and the accompanying explanation. Some comments failed to recognize the NPRM was a preliminary step that did not fossilize the Commission's consideration of arguments or weighing of evidence. Moreover, the APA ''limits causes of action under the APA to final agency action.'' [256] It is this final rule, not the NPRM, that constitutes final agency action. Before adopting this final rule, the Commission reviewed and considered all comments received. In many instances, the Commission has made changes relative to the proposed rule to address concerns that commenters raised. In all cases, however, the Commission has complied with the APA.

E. The Commission's Jurisdiction Under the FTC Act

The Commission's jurisdiction derives from the FTC Act. Employers that are outside the Commission's jurisdiction under the FTC Act are not subject to the final rule. The Commission clarifies in the definition of person in § 910.1, that the rule applies only to those within the Commission's jurisdiction. Some commenters sought a more detailed accounting of the

[245] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 685 (D.C. Cir. 1973); *cf. SEC* v. *Chenery Corp.,* 332 U.S. 194, 202–03 (1947) (''Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.'').

[246] U.S. Const. art. I, sec. 8, cl. 3.

[247] 15 U.S.C. 44, 45(a)(1).

[248] *United States* v. *Am. Bldg. Maintenance Indus.,* 422 U.S. 271, 277, n.6 (1975).

[249] *See Nat'l Fed'n of Indep. Bus.* v. *Sebelius,* 567 U.S. 519, 549 (2012) (''Congress's power'' under the Commerce Clause ''is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.''); *see also* Part I.B.2 (discussing prevalence of non-competes) and Part IX.C.2 (addressing the need for a nationwide regulation prohibiting non-competes).

[250] U.S. Const. amend. X.

[251] *See* U.S. Const. art. I, sec. 10, cl. 1.

[252] *See, e.g., L & H Sanitation, Inc.* v. *Lake City Sanitation, Inc.,* 769 F.2d 517, 522 (8th Cir. 1985).

[253] *See* Parts IV.B and IV.C, Part X.F.6.

[254] This includes, for example, a commenter who argued that the NPRM was not the product of reasoned decision-making, asserting that the Commission had failed to consider key aspects of the rule or misconstrued evidence; commenters who argued that the rule was arbitrary and capricious for failing to consider less restrictive alternatives; commenters who argued that the NPRM failed to consider State policy or that the Commission would be acting arbitrarily by not passing a uniform rule; and commenters who argued that the Commission had failed to consider reliance interests. The Commission has addressed the concerns underlying these comments in other parts of this statement of basis and purpose.

[255] 5 U.S.C. 553; *see also Elec. Priv. Info. Ctr.* v. *DHS,* 653 F.3d 1, 5 (D.C. Cir. 2011) (APA ''generally require[s] an agency to publish notice of a proposed rule in the **Federal Register** and to solicit and consider public comments upon its proposal.'').

[256] *Trudeau* v. *FTC,* 456 F.3d 178, 188–89 (D.C. Cir. 2006) (internal quotation marks omitted); *see* 5 U.S.C. 704.

Commission's jurisdiction under the FTC Act. The Commission addresses those comments in this section. Comments seeking an exclusion for entities within the Commission's jurisdiction are addressed in Parts V.D.3 and V.D.4.

1. Generally

Certain entities that would otherwise be subject to the final rule may fall outside the FTC's jurisdiction under the FTC Act. The FTC Act exempts certain entities or activities from the Commission's enforcement jurisdiction, which otherwise applies to ''persons, partnerships, or corporations.'' [257] For example, the Act exempts ''banks'' and ''persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act.'' [258] And the Act excludes from its definition of ''corporation'' any entity that is not ''organized to carry on business for its own profit or that of its members.'' [259] The NPRM explained that, where an employer is exempt from coverage under the FTC Act, the employer would not be subject to the rule.[260] The NPRM also explained State and local government entities—as well as some private entities—may not be subject to the rule when engaging in activity protected by the State action doctrine.[261] Some commenters stated that the Commission should restate, clarify, interpret, or limit the reach of its authority under the FTC Act in the rule.

In response, the Commission explains that the final rule extends to covered persons that are within the Commission's jurisdiction. The Commission does not believe restating or further specifying each jurisdictional limit in the final rule's text is necessary; the FTC Act defines the limits of the Commission's jurisdiction and those limits govern this rule. Moreover, the Commission cannot here provide guidance that applies to every fact and circumstance. Whether an entity falls under the Commission's jurisdiction can be a fact-specific determination. An attempt by the Commission to capture all potential interpretations of the laws governing exclusions from the FTC Act may create confusion rather than clarity. In response to commenters who asked the Commission to affirm that the final rule does not bind agencies that regulate firms outside the Commission's jurisdiction under the FTC Act, the Commission affirms that the Commission applies the final rule only to entities that are covered by the FTC Act.[262]

A State government agency commenter suggested that the Commission explicitly exempt State and local governments from the rule. The commenter pointed to conflicts-of-interest policies used by some State agencies to preclude former employees from working on related projects or jobs in the private sector, which the commenter stated do not implicate the policy concerns the FTC seeks to address in the rule. The commenter also noted the complexity of when the Commission's jurisdiction might extend to State and local governments. The Commission clarifies in the definition of ''person'' in § 910.1 that the final rule applies only to a legal entity within the Commission's jurisdiction. The Commission also explains in Part III.E that the definition of ''person'' is coextensive with the Commission's authority to issue civil investigative demands. Nothing in this rule changes the extent of the Commission's jurisdiction over State and local governments. The Commission declines to specify all circumstances under which a governmental entity or quasi-governmental entity would or would not be subject to the Commission's jurisdiction and, thus, this final rule. In any event, with respect to the government ethics policies referenced by the commenter, to the extent the commenter is referring to traditional ''cooling off'' policies that preclude former government employees from working on discrete, specific projects that fell within the scope of their former official governmental position to address ethical concerns, such policies would not meet the definition of ''non-compete clause'' in § 910.1 because they do not prohibit, penalize or function to prevent a worker from switching jobs or starting a new business.

2. Jurisdiction Over Entities Claiming Nonprofit Status Under the FTC Act or the Internal Revenue Code

Commenters from the healthcare industry argued that the Commission should restate, clarify, interpret, or limit the reach of its authority under the FTC Act specifically for the healthcare industry. They pointed to the prevalence of healthcare organizations registered under section 501(c) of the Internal Revenue Code claiming tax-exempt status as nonprofits. Commenters contended that these organizations are categorically outside the Commission's authority under the FTC Act. In fact, under existing law, these organizations are not categorically beyond the Commission's jurisdiction. To dispel this misunderstanding, the Commission summarizes the existing law pertaining to its jurisdiction over non-profits.

a. Comments Received

Business and trade industry commenters from the healthcare industry, including, for example, hospitals, physician practices, and surgery centers, focused on whether the Commission has jurisdiction over nonprofit organizations registered under section 501(c)(3) of the Internal Revenue Code in light of the FTC Act's definition of ''corporation.'' Section 501(c)(3) exempts from taxation certain religious, charitable, scientific, educational, and other corporations, ''no part of the net earnings of which inure[] to the benefit of any private shareholder or individual.'' [263] An entity is a ''corporation'' under the FTC Act only if it is ''organized to carry on business for its own profit or that of its members.'' [264] Several industry commenters argued the Commission does not have jurisdiction over entities that claim tax-exempt status as nonprofits because they are, by definition, not ''organized to carry on business for [their] own profit or that of [their] members.'' The Commission presumes that commenters self-identifying as or referring to ''nonprofits,'' ''not-for-profits,'' or other similar terms without further explanation are referencing entities claiming tax-exempt status under section 501(c)(3) or other provisions of the Internal Revenue Code. Some commenters contended that, to avoid confusion, the rule should state it does

[257] 15 U.S.C. 45(a)(2); *see also FTC* v. *AT&T Mobility LLC,* 883 F.3d 848, 853–56 (9th Cir. 2018) (*en banc*).

[258] 15 U.S.C. 45(a)(2).

[259] 15 U.S.C. 44.

[260] NPRM at 3510.

[261] *Id.* (citing *Parker* v. *Brown,* 317 U.S. 341, 350–51 (1943)).

[262] For example, a few community bank commenters expressed concern that because the Federal Deposit Insurance Corporation (''FDIC'') can enforce the FTC Act against banks, the rule could be applied by the FDIC to banks. The FTC Act is the Commission's organic statute, and interpretive authority of the FTC Act rests with the Commission. Whether other agencies enforce section 5 or apply the rule to entities under their own jurisdiction is a question for those agencies. At the same time, as discussed in this Part II.E.1, the Commission applies and enforces the rule only to the extent of its jurisdiction.

[263] 26 U.S.C. 501(c)(3). Other, less frequently invoked paragraphs of section 501(c) also identify corporations and organizations that qualify for tax-exempt status. The distinctions between these entities and those claiming tax-exempt status under 501(c)(3) are analyzed under the same standard.

[264] 15 U.S.C. 44.

not apply to entities claiming tax-exempt status as non-profits. At least one commenter stated that the Commission should clarify whether and how the rule would apply to healthcare entities claiming tax-exempt status as nonprofits and then reopen the comment period. One commenter sought clarification on how ownership interest in a for-profit entity or joint venture with a for-profit partner by an entity that claims tax-exempt status as a nonprofit would affect the rule's applicability.

b. The Final Rule

The final rule applies to the full scope of the Commission's jurisdiction. Many of the comments about nonprofits erroneously assume that the FTC's jurisdiction does not capture any entity claiming tax-exempt status as a nonprofit. Given these comments, the Commission summarizes Commission precedent and judicial decisions construing the scope of the Commission's jurisdiction as it relates to entities that claim tax-exempt status as nonprofits and to other entities that may or may not be organized to carry on business for their own profit or the profit of their members.

Congress empowered the Commission to ''prevent persons, partnerships, or corporations'' from engaging in unfair methods of competition.[265] To fall within the definition of ''corporation'' under the FTC Act, an entity must be ''organized to carry on business for its own profit or that of its members.'' [266] These FTC Act provisions, taken together, have been interpreted in Commission precedent [267] and judicial decisions [268] to mean that the Commission lacks jurisdiction to prevent section 5 violations by a corporation not organized to carry on business for its own profit or that of its members.

The Commission stresses, however, that both judicial decisions and Commission precedent recognize that not all entities claiming tax-exempt status as nonprofits fall outside the Commission's jurisdiction. As the Eighth Circuit has explained, ''Congress took pains in drafting § 4 [15 U.S.C. 44] to authorize the Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises.'' [269] The Commission applies a two-part test to determine whether a corporation is organized for profit and thus within the Commission's jurisdiction. As the Commission has explained, ''[t]he not-for profit jurisdictional exemption under Section 4 requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests.'' [270] Alternatively stated, the Commission looks to both ''the source of the income, *i.e.,* to whether the corporation is organized for and actually engaged in business for only charitable purposes, and to the destination of the income, *i.e.,* to whether either the corporation or its members derive a profit.'' [271] This test reflects the Eighth Circuit's analysis in *Community Blood Bank of Kansas City Area, Inc.* v. *FTC* and ''the analogous body of federal law which governs treatment of not-for-profit organizations under the Internal Revenue Code.'' [272] Under this test, a corporation's ''tax-exempt status is certainly one factor to be considered,'' but that status ''does not obviate the relevance of further inquiry into a [corporation's] operations and goals.'' [273]

Merely claiming tax-exempt status in tax filings is not dispositive. At the same time, if the Internal Revenue Service (''IRS'') concludes that an entity does not qualify for tax-exempt status, such a finding would be meaningful to the Commission's analysis of whether the same entity is a corporation under the FTC Act. Administrative proceedings and judicial decisions involving the Commission or the IRS [274] have identified numerous private benefits that, if offered, could render an entity a corporation organized for its own profit or that of its members under the FTC Act, bringing it within the Commission's jurisdiction. For instance, the Commission has exercised jurisdiction in a section 5 enforcement action over a physician-hospital organization because the organization engaged in business on behalf of for-profit physician members.[275] That organization, which consisted of over 100 private physicians and one non-profit hospital, claimed tax-exempt status as a nonprofit.[276] Similarly, the Commission has exercised jurisdiction over an independent physician association claiming tax-exempt status as a nonprofit. The association consisted of private, independent physicians and private, small group practices.[277] That association was organized for the pecuniary benefit of its for-profit members because it ''contract[ed] with payers, on behalf of its [for-profit] physician members, for the provision of physician services for a fee.'' [278] Under IRS precedent in the context of purportedly tax-exempt nonprofit hospitals and other related entities that partner with for-profit entities, where the purportedly nonprofit entity ''has ceded effective control'' to a for-profit partner, ''conferring impermissible private benefit,'' the entity loses tax-exempt status.[279] The IRS has also rejected claims of nonprofit tax-exempt status for entities that pay unreasonable compensation, including percentage-based compensation, to founders, board members, their families, or other insiders.[280]

These examples are illustrative. As has been the case for decades, under Commission precedent and judicial

[265] 15 U.S.C. 45(a)(2). The Commission focuses on coverage as ''corporations'' in this section.

[266] 15 U.S.C. 44.

[267] *In the Matter of Coll. Football Ass'n,* 117 F.T.C. 971, 992–999 (1990).

[268] *California Dental Ass'n* v. *FTC,* 526 U.S. 756, 766 (1999); *Cmty. Blood Bank of Kansas City Area, Inc.* v. *FTC,* 405 F.2d 1011, 1016 (8th Cir. 1969); *FTC* v. *Univ. Health, Inc.,* 938 F.2d 1206, 1214 (11th Cir. 1991).

[269] *Blood Bank,* 405 F.2d at 1018; *see also, e.g., FTC* v. *Nat'l Comm'n on Egg Nutrition,* 517 F.2d 485, 488 (7th Cir. 1975).

[270] *Coll. Football Ass'n,* 117 F.T.C. at 998.

[271] *Id.* at 994 (internal quotation and citation omitted).

[272] *Id.* at 994.

[273] *In the Matter of the Am. Med. Assoc.,* 94 F.T.C. 701, 1979 WL 199033, at *221 (FTC Oct. 12, 1979).

[274] The Commission offers examples of decisions from the IRS and Tax Court as examples that the Commission may deem persuasive. Although ''[r]ulings of the Internal Revenue Services are not binding upon the Commission,'' the Commission has recognized that ''a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded.'' *Am. Med. Assoc.,* 1979 WL 199033 at *221.

[275] *In the Matter of Preferred Health Servs., Inc.,* FTC No. 41–0099, 2005 WL 593181, at *1 (Mar. 2, 2005).

[276] *Id.* at *1.

[277] *In the Matter of Boulder Valley Individual Prac. Assoc.,* 149 F.T.C. 1147, 2010 WL 9434809, at *2 (Apr. 2, 2010).

[278] *Boulder Valley,* 2010 WL 9434809, at *2. The Commission has similarly exercised jurisdiction where an entity claiming nonprofit tax-exempt status provides pecuniary benefit to for-profit entities or individuals. *See, e.g., In the Matter of Mem'l Hermann Health Network Providers,* 137 F.T.C. 90, 92 (2004); *Preferred Health,* 2005 WL 593181, at *1–*2; *Advoc. Health Partners,* F.T.C. No. 31–0021, 2007 WL 643035, at *3–*4 (Feb. 7, 2007); *Conn. Chiropractic Ass'n,* F.T.C. No. 71–0074, 2008 WL 625339, at *2 (Mar. 5, 2008); *Am. Med. Ass'n* v. *FTC,* 638 F.2d 443 (2d Cir. 1980), aff'd, 455 U.S. 676 (1982).

[279] *Redlands Surgical Servs.* v. *Comm'r,* 242 F.3d 904, 904–05 (9th Cir. 2001); *see also St. David's Health Care Sys.* v. *United States,* 349 F.3d 232, 239 (5th Cir. 2003).

[280] *See Fam. Tr. of Mass., Inc.* v. *United States,* 892 F. Supp. 2d 149, 155–156 (D.D.C. 2012); I.R.S. G.C.M. 39,674 (Oct. 23, 1987); *Bubbling Well Church of Universal Love, Inc.* v. *Comm'r,* No. 5717–79X, 1980 WL 4453 (T.C. June 9, 1980) (''[E]xcessive payments made purportedly as compensation constitute benefit inurement in contravention of section 501(c)(3).'').

decisions construing the scope of the Commission's jurisdiction, any entity satisfying the two-prong test falls within the Commission's jurisdiction. Such entities would thus be bound by the final rule.[281]

F. The Legal Standard for Unfair Methods of Competition Under Section 5

In section 5 of the FTC Act, ''unfair methods of competition in or affecting commerce'' are ''declared unlawful.''[282] In enacting section 5, Congress intentionally did not mirror either the common law or the text or judicial interpretations of the Sherman Act, but instead adopted this new term.[283] As the Supreme Court has confirmed, this different term reflects a distinct standard.[284] Under section 5, the Commission assesses two elements: (1) whether the conduct is a method of competition, as opposed to a condition of the marketplace, and (2) whether it is unfair, meaning that it goes beyond competition on the merits. The latter inquiry has two components: (a) whether the conduct has indicia of unfairness and (b) whether the conduct tends to negatively affect competitive conditions. These two components are weighed according to a sliding scale.

Indicia of unfairness include the extent to which the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.[285] Indicia of unfairness may also be present if the conduct is otherwise restrictive or exclusionary, depending on the circumstances, such as the nature of the commercial setting and the current and potential future effects of the conduct.[286] Notably, section 5 does not limit indicia of unfairness to conduct that benefits one or more firms and necessarily disadvantages others. Instead, restrictive and exclusionary conduct may also be unlawful where it benefits specific firms while tending to negatively affect competitive conditions.[287]

The second prong, whether conduct tends to negatively affect competitive conditions, focuses on the nature and tendency of the conduct. It does not turn on whether the conduct directly caused actual harm in the specific instance at issue and therefore does not require a detailed economic analysis or current anticompetitive effects.[288] Instead, the inquiry examines whether the conduct has a tendency to negatively affect competitive conditions, including by raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing or excluding other market participants, reducing the likelihood of potential or nascent competition, reducing labor mobility, suppressing worker compensation or degrading working conditions for workers. These concerns may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct.[289] Section 5 does not require a separate showing of market power or market definition.[290] Nor does section 5 import the rule-of-reason analysis applied under other antitrust laws, including in some Sherman Act cases.[291]

The Commission weighs the two elements—indicia of unfairness and tendency to negatively affect competitive conditions—on a sliding scale. Where the indicia of unfairness are clear, conduct may be an unfair method of competition with only a limited showing of a tendency to negatively affect competitive conditions.[292] For example, conduct that is coercive and exploitative evinces facial unfairness and weighs heavily as clear indicia of unfairness.[293] Where indicia of unfairness are less clear, conduct may still violate section 5 where it tends to negatively affect

[281] The Commission cannot predict precisely how many entities claiming nonprofit tax-exempt status may be subject to the final rule. The Commission finds that the benefits of the final rule justify implementing it no matter how many nonprofit entities claiming tax-exempt status it ultimately reaches—including under the unlikely assumption that it does not reach any of them.

[282] 15 U.S.C. 45(a)(1).

[283] The Clayton Antitrust Act (38 Stat. 730, ch. 323, Pub. L. 63–212, Oct. 15, 1914) was signed into law weeks after the FTC Act of 1914, 38 Stat. 717.

[284] *See FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986); *FTC* v. *Sperry & Hutchinson,* 405 U.S. 233, 243–44 (1972); *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC* v. *Motion Picture Advert. Serv.,* 344 U.S. 392, 394–95 (1953); *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 309–10 (1934). While some commenters argued the Commission should apply the rule of reason in this rule, as outlined in Parts II.A, II.B, II.C, and II.F, neither the text of section 5, the Supreme Court and other courts' interpretation of section 5, nor the legislative history support the conclusion that the Commission should apply the rule of reason to determine whether conduct violates section 5 as an unfair method of competition. The Commission outlines the legal standard for finding certain uses of non-competes to be unfair methods of competition in the final rule in this Part II.F.

[285] *See e.g., Sperry & Hutchinson Co.,* 405 U.S. at 243 (holding section 5 reaches conduct shown to exploit consumers, citing *R.F. Keppel & Bro.,* 291 U.S. at 313); *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 369 (1965) (holding that the ''utilization of economic power in one market to curtail competition in another . . . . bolstered by actual threats and coercive practices'' was an unfair method of competition)*; FTC* v. *Texaco,* 393 U.S. 223, 228–29 (1968) (finding that use of ''dominant economic power . . . in a manner which tended to foreclose competition'' is an unfair method of competition)*; E.I. du Pont de Nemours* v. *FTC (Ethyl),* 729 F.2d 128, 137, 140 (2d Cir. 1984) (finding that unfair methods of competition includes practices that are ''collusive, coercive, predatory, restrictive or deceitful'' as well as ''exclusionary'').

[286] *See, e.g., Motion Picture Advert. Serv. Co.,* 344 U.S. at 395–96; *Luria Bros. & Co.* v. *FTC,* 389 F.2d 847, 860–61 (3d Cir. 1968). As the Supreme Court has made clear, the inquiry into the nature of the commercial setting does not, however, require market definition or proof of market power. *See, e.g., Atl. Refin. Co.,* 381 U.S. at 371 (finding it ''unnecessary to embark upon a full scale economic analysis of competitive effect''). On November 10, 2022, the Commission issued a policy statement describing the key principles of general applicability concerning whether conduct is an unfair method of competition under section 5. FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022) (hereinafter ''FTC Policy Statement''). The FTC Policy Statement cites a number of cases explaining that section 5 does not require market definition or proof of market power. *Id.* at 10.

[287] *See, e.g., Brown Shoe Co.,* 384 U.S. at 320 (''Thus the question . . . is whether the Federal Trade Commission can declare it to be an unfair practice for Brown, the second largest manufacturer of shoes in the Nation, to pay a valuable consideration to hundreds of retail shoe purchasers in order to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors. We hold that the Commission has power to find, on the record here, such an anticompetitive practice unfair . . . .'')

[288] *Atl. Refin. Co.,* 381 U.S. at 371 (It is ''unnecessary to embark upon a full scale economic analysis of competitive effect.''); *Texaco,* 393 U.S. at 230 (''It is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce.''); *Union Circulation Co.* v. *FTC,* 241 F.2d 652, 657 (2d Cir. 1957) (''The agreements should be struck down if their reasonable tendency, as distinguished from actual past effect, is to injure or obstruct competition. Under the Federal Trade Commission Act, industry agreements and practices have been enjoined without an actual showing of injury to competition . . . .''). *See also Sperry & Hutchinson Co.,* 405 U.S. at 244 (''[U]nfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws.''); *Ethyl,* 729 F.2d at 138 (finding that evidence of actual harm is not required); *In re Coca-Cola Co.,* 117 F.T.C. 795, 915 n.25 (1994) (rejecting argument that section 5 violation requires showing of ''anticompetitive effects'').

[289] *Motion Picture Advert. Serv. Co.,* 344 U.S. at 395; *Union Circulation Co.,* 241 F.2d at 658 (''The tendency of the 'no-switching' agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well-established signatory agencies and to the disadvantage of infant organizations.'').

[290] *Atl. Refin. Co.,* 381 U.S. at 371; *Texaco,* 393 U.S. at 230; *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 19–20 (7th Cir. 1971) (no proof of foreclosure of a relevant market necessary in an exclusive dealing contract case under section 5 (citing *Brown Shoe*)).

[291] *See* Part II.A.

[292] *See, e.g., Ethyl,* 729 F.2d at 137–39; FTC Policy Statement, *supra* note 286, at 9.

[293] *See e.g., Sperry & Hutchinson Co.,* 405 U.S. at 243; *Ethyl,* 729 F.2d at 139, 140 (finding that unfair methods of competition include practices that are ''collusive, coercive, predatory, restrictive, or deceitful'' as well as ''exclusionary''); FTC Policy Statement, *supra* note 286, at 7, 9.

competitive conditions, but a stronger showing of such tendency is required.

In many cases the Commission (and courts) have held conduct to constitute an unfair method of competition by pointing to clear indicia of unfairness, including coercive or exploitative conduct, without conducting a detailed economic analysis of its effects. In *Atlantic Refining Co.* v. *FTC* and *FTC* v. *Texaco, Inc.,* the Supreme Court held that the Commission established an unfair method of competition where an oil company used its economic power over its gas stations to coerce them into buying certain tires, batteries, or accessories only from firms that paid the oil company a commission.[294] The Court determined in *Atlantic Refining* that ''a full-scale economic analysis of competitive effect'' was not required and the Commission needed only to show that the conduct burdened ''a not insubstantial portion of commerce.'' [295] The Court reiterated this standard in *Texaco* holding that, even though the impact was less harmful than the conduct in *Atlantic Refining,* ''the anticompetitive tendencies of [the challenged] system are clear, and . . . the Commission was properly fulfilling the task that Congress assigned it in halting this practice in its incipiency.'' [296] As the Court observed, ''[t]he Commission is not required to show that a practice it condemns has totally eliminated competition.'' [297] In *FTC* v. *R.F. Keppel & Brother, Inc.,* the Supreme Court held that the Commission established an unfair method of competition where a manufacturer exploited the inability of children to protect themselves in the marketplace by marketing inferior goods to them through use of a gambling scheme.[298] The Court considered the extent of the practice and concluded ''[the practice] is successful in diverting trade from competitors'' without engaging in a full-scale economic analysis.[299]

In other cases, the Commission (and courts) have held exclusionary or restrictive conduct was an unfair method of competition based on evidence of the conduct's tendency to negatively affect competitive conditions without focusing on the indicia of unfairness, including whether the conduct is coercive or exploitative. But an evidentiary showing or detailed economic analysis that such conduct generated actual anticompetitive effects or would do so in the future still was not required. For example, in *Union Circulation Company* v. *FTC,* the Second Circuit held the Commission established an unfair method of competition where a group of door-to-door subscription solicitation agencies agreed not to hire workers who were previously employed by another signatory agency.[300] The court looked to whether the ''reasonably foreseeable effect'' of the agencies' conduct would be to ''impair or diminish competition between existing [competitors]'' or prevent potential new rivals.[301] In finding the conduct was an unfair method of competition, the court concluded that ''[t]he tendency of the . . . agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well established signatory agencies and to the disadvantage of infant organizations.'' [302] In *FTC* v. *Brown Shoe Co.,* the Supreme Court held that an exclusive dealing arrangement under which the Brown Shoe Company offered shoe retailers ''a valuable consideration . . . to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors'' violated section 5 consistent with the Commission's authority ''to arrest trade restraints in their incipiency.'' [303] Of course, evidence of actual adverse effects on competition meets the requirement to show a tendency to negatively affect competitive conditions. For example, in *FTC* v. *Motion Picture Advertising Service Co.,* the Supreme Court held that an exclusive dealing arrangement violated section 5 where there was ''substantial evidence'' that the contracts ''unreasonably restrain competition.'' [304]

Respondents in unfair method of competition cases sometimes assert purported justifications as an affirmative defense. Some courts have declined to consider justifications altogether. However, where defendants raise justifications as an affirmative defense, the Commission and courts have consistently held that pecuniary benefit to the party responsible for the conduct in question is not cognizable as a justification.[305] Additionally, to the extent justifications are asserted, they must be legally cognizable,[306] non-pretextual,[307] and any restriction used to bring about the benefit must be narrowly tailored to limit any adverse impact on competitive conditions.[308]

[294] *Atl. Refin. Co.,* 381 U.S. at 369–70; *Texaco,* 393 U.S. at 228–29.

[295] *Atl. Refin. Co.,* 381 U.S. at 371. *See also Texaco,* 393 U.S. at 230 (finding that the practice unfairly burdened competition for a not insignificant volume of commerce); *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 309 (1934) (''A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute.'').

[296] *Texaco,* 393 U.S. at 230 (further noting that ''[i]t is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce.'').

[297] *Id.* at 230. *See also Shell Oil Co.* v. *FTC,* 360 F.2d 470, 487 (5th Cir. 1966) (''A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.'').

[298] 291 U.S. 304, 313.

[299] 291 U.S. at 308–09.

[300] 241 F.2d 652, 655 (2d Cir. 1957).

[301] *Id.* at 658. Notably, the court also considered facially coercive conduct by which the door-to-door subscription agencies coerced magazine publishers into not doing business with one of their competitors because the competitor hired their former workers. *Id.* at 655–56. The court upheld the Commission's order concluding this conduct was an unfair method of competition under section 5. The court did not conduct any related economic analysis and simply concluded that the ''illegal scheme of coercion . . . is clearly unjustified.'' *Id.*

[302] *Id.* at 658; *see also Nichols* v. *Spencer Intern. Press, Inc.,* 371 F.2d 332, 334 (7th Cir. 1967) (''Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.'')

[303] *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 320, 322 (1966).

[304] *FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 395–96 (1953); *see also L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 14 (7th Cir. 1971) (holding that a firm's exclusive dealing contracts violated section 5 where such contracts were 'anti-competitive' '').

[305] *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (considering that defendant's distribution contracts at issue ''may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers'' and holding that the ''Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves''); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the ''anticompetitive tendencies of such system [were] clear''); *Balfour,* 442 F.2d at 15 (while relevant to consider the advantages of a trade practice on individual companies, this cannot excuse an otherwise illegal business practice). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through section 5.

[306] *See, e.g., FTC* v. *Ind. Fed. Dentists,* 476 U.S. 447, 463 (1986); *Fashion Originators' Guild of Am.* v. *FTC,* 312 U.S. 457, 468 (1941); *FTC* v. *Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 423–24 (1990).

[307] *See, e.g., Ind. Fed'n of Dentists,* 476 U.S. at 464. *See also United States* v. *Microsoft Corp.,* 253 F.3d 35, 62–64, 72, 74, 76–77 (D.C. Cir. 2001); *Eastman Kodak Co.* v. *Image Technical Tech. Svcs,* 504 U.S. 541, 472, 484–85 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585, 608–10 (1985).

[308] *NCAA* v. *Alston,* 594 U.S. 69, 100–101 (2021); *Polygram Holding, Inc.* v. *FTC,* 416 F.3d 29, 38

Continued

III. Section 910.1: Definitions

Section 910.1 sets forth definitions of several terms used in the final rule.

A. Definition of "Business Entity"

The Commission adopts the definition of "business entity" as proposed.

1. Proposed Definition

The Commission proposed to define "business entity" as "a partnership, corporation, association, limited liability company, or other legal entity, or a division or subsidiary thereof." [309] The term "business entity" was used in two places: (1) in proposed § 910.3, which contained an exception for certain non-competes entered into in the context of a sale of a business by a substantial owner of, or substantial member or substantial partner in, the business entity,[310] and (2) in proposed § 910.1(e), which defined "substantial owner, substantial member, or substantial partner" as an owner, member, or partner holding at least a 25% ownership interest in a business entity.

The Commission explained in the NPRM that it proposed including divisions and subsidiaries in the definition of "business entity" to apply the sale-of-a-business exception where a person is selling a division or subsidiary of a business entity.[311] The Commission stated the primary rationale for the sale-of-business exception—to help protect the value of a business acquired by a buyer—also applies where a person is selling a division or subsidiary of a business entity.[312]

2. Comments Received

Two commenters specifically addressed the definition of business entity. One commenter suggested a new definition using a functional test that the commenter asserted would prevent employers from structuring their businesses as several smaller legal entities in order to fall within the sale-of-a-business exception. Another commenter also suggested that the definition be amended to explicitly include "general partnerships" and trusts.

3. The Final Rule

The Commission adopts the definition of "business entity" as proposed. The Commission declines to adopt a functional test for the definition of "business entity." As described in greater detail in Part V.A, the sale-of-a-business exception in the final rule does not contain a 25% ownership threshold, so employers will not have an incentive to structure their businesses as several smaller legal entities in order to fall within the sale-of-a-business exception. The Commission also believes replacing the current bright-line definition of "business entity" with a functional test would make it more difficult for workers and employers to know whether a given non-compete is enforceable in the context of the sale of a business. The Commission concludes adding the terms "general partnerships" and "trusts" to the definition is unnecessary, because the phrase "other legal entity" already includes those entity types.

B. Definition of "Employment"

The Commission proposed to define "employment" as "work for an employer, as the term employer is defined in § 910.1(c)." [313] That provision defined "employer" as "a person, as defined in 15 U.S.C. 57b–1(a)(6) [section 20 of the FTC Act], that hires or contracts with a worker to work for the person." [314] Section 20 defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law." The Commission intended the proposed definition of "employer" to clarify that an employment relationship exists, for purposes of the final rule, regardless of whether an employment relationship exists under another law, such as a Federal or State labor law.[315] The final rule clarifies the definitions to better reflect that intent.

While commenters generally did not address the proposed definition of "employment," many commenters expressed concern that the proposed definition of "employer" would exclude workers hired by one entity to work for another, such as workers hired through a staffing agency. To avoid excluding such workers, and consistent with the Commission's intent to cover workers irrespective of whether they are classified as in an "employer-employee" relationship under other State and Federal laws, the final rule defines "employment" as "work for a person" and makes corresponding changes to the definition of "employer," described in Part III.C. This definition of "employment" better clarifies that an employment relationship exists, for purposes of the final rule, regardless of whether an employment relationship exists under another law, such as a Federal or State labor law.

C. Proposed Definition of "Employer"

The Commission proposed to define employer as a "person, as defined in 15 U.S.C. 57b–1(a)(6) [section 20 of the FTC Act], that hires or contracts with a worker to work for the person." [316] Section 20 defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law." [317] The Commission clarified in the NPRM that a person meeting the definition of an employer under proposed § 910.1(c) would be an employer regardless of whether the person meets another legal definition of employer, such as a definition in Federal or State labor law.[318] In response to concerns raised by commenters, the final rule does not adopt a definition of "employer."

1. Comments Received

Several commenters expressed support for the proposed definition of "employer." A few commenters suggested changes to the definition of "employer" to maximize the final rule's coverage and close potential loopholes. Worker and employer advocates noted the proposed definition appeared to exclude certain persons who are commonly understood to be a worker's employer because it assumed that a worker's employer is the same legal entity that hired or contracted with the worker. These commenters contended the proposed definition would not cover arrangements such as when a worker is employed through a contractual relationship with a professional employer organization or staffing agency; under a short-term "loan-out arrangement," during which a worker hired by one employer may work for another employer; under contract with a parent, subsidiary, or affiliate of the business who hired them; or by persons or entities who share common control over the worker's work. A few of these commenters also stated that the proposed definition creates a loophole allowing evasion of the rule through third-party hiring. Most commenters that addressed this issue suggested listing one or more such arrangements in the definition of "employer" to

(D.C. Cir. 2005); 2000 Collaboration Guidelines, sec. 3.36b. *See also Union Circulation Co.* v. *FTC,* 241 F.2d 652, 658 (2d Cir. 1957) ("The agreements here went beyond what was necessary to curtail and eliminate fraudulent practices.").

[309] NPRM, proposed § 910.1(a).

[310] *Id.* at 3508.

[311] *Id.* at 3509.

[312] *Id.*

[313] *Id.,* proposed § 910.1(d).

[314] *Id.,* proposed § 910.1(c).

[315] *Id.* at 3510.

[316] *Id.,* proposed § 910.1(c).

[317] 15 U.S.C. 57b–1(a)(6).

[318] NPRM at 3510.

ensure these kinds of arrangements are covered.

One worker advocacy group argued the term ''hires or contracts'' in the proposed definition of ''employer'' is in tension with the Commission's stated intent to broadly cover all workers, including externs, interns, and volunteers. This commenter suggested the definition of ''employer'' incorporate language from the Fair Labor Standards Act (''FLSA'') definition of ''employ,'' which includes to ''suffer or permit to work.'' [319] The commenter suggested this language because of its breadth, noting the language originated in State laws designed to reach businesses that use third parties to illegally hire and supervise children.

One industry trade organization argued that, to minimize inconsistencies with the FLSA, the Commission should incorporate the FLSA's definition of ''employer.''

2. Final Rule

After considering the comments, the Commission has revised the definitions of ''non-compete clause'' and ''worker'' as described in Parts III.D and III.G. These revisions make the definition of ''employer'' unnecessary, so the Commission is not finalizing a definition of ''employer.''

These revisions clarify that the final rule covers all workers regardless of whether they work for the same person that hired or contracted with them to work. As explained in Part III.D, in the definition of ''non-compete clause,'' the Commission has revised the phrase ''contractual term between an employer and a worker'' to read ''term or condition of employment'' and has revised the phrase ''after the conclusion of the worker's employment with the employer'' to read ''after the conclusion of the employment that includes the term or condition.'' Furthermore, as explained in Part III.G, in the definition of ''worker,'' the Commission has revised the phrase ''a natural person who works, whether paid or unpaid, for an employer'' to read ''a natural person who works or who previously worked, whether paid or unpaid.''

The Commission is adopting this more general language, rather than listing the exact kinds of contractual arrangements and entities (*e.g.,* staffing agencies, affiliates, joint employers, etc.) to avoid unnecessary or confusing terminology, evasion of the final rule through complex employment relationships, and the need to specify myriad fact-specific scenarios. The language is designed to capture indirect employment relationships as a general matter without regard to the label used.

D. Definition of ''Non-Compete Clause''

Based on the comments received, the Commission adopts a slightly modified definition of ''non-compete clause'' in § 910.1. Section 910.1 defines a ''non-compete clause'' as a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating a business in the United States after the conclusion of the employment that includes the term or condition. Section 910.1 further provides that, for purposes of the final rule, ''term or condition of employment ''includes, but is not limited to, a contractual term or workplace policy, whether written or oral.'' Similar to the proposed rule, the final rule applies to terms and conditions that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends, as well as agreements that penalize or effectively prevent a worker from doing the same.

1. Proposed Definition

The Commission's proposed definition of ''non-compete clause'' consisted of proposed § 910.1(b)(1) and (b)(2). Proposed § 910.1(b)(1) would have defined ''non-compete clause'' as ''a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.'' Proposed § 910.1(b)(2) would have provided that the definition in proposed § 910.1(b)(1) includes ''a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.''

The Commission explained that the proposed definition of non-compete clause would be limited to non-competes between employers and workers and would not apply to other types of non-competes, for example, non-competes between two businesses.[320] The Commission further explained the definition would be limited to post-employment restraints (*i.e.,* restrictions on what the worker may do after the conclusion of the worker's employment) and would not apply to concurrent-employment restraints (*i.e.,* restrictions on what the worker may do during the worker's employment).[321]

In the NPRM, the Commission noted that, rather than expressly prohibiting a worker from competing against their employer, some non-competes require workers to pay damages if they compete against their employer. The Commission explained that courts generally view these contractual terms as non-competes and that proposed § 910.1(b)(1) encompassed them.[322]

The Commission also expressed concern that workplace policies—for example, a term in an employee handbook stating that workers are prohibited from working for certain types of firms or in certain fields after their employment ends—could have the same effects as a contractual non-compete even if they are not enforceable, because workers may believe they are bound by the policy. The Commission sought comment on whether the term ''non-compete clause'' should expressly include a provision in a workplace policy.[323]

The Commission stated that proposed § 910.1(b)(1) was a generally accepted definition of non-compete clause that covers both express non-competes and terms purporting to bind a worker that have the same functional effect as non-competes.[324] The Commission stated that the definition would generally not apply to other types of restrictive employment agreements that do not altogether prevent a worker from seeking or accepting other work or starting a business after their employment ends and do not generally prevent other employers from competing for that worker's labor.[325] At the same time, the Commission expressed concern about unusually restrictive employment agreements that, while not formally triggered by seeking or accepting other work or starting a business after their employment ends, nevertheless restrain such an unusually large scope of activity that they have the same functional effect as non-competes.[326] The Commission noted judicial opinions finding some such

[319] 29 U.S.C. 203(g).

[320] NPRM at 3509.

[321] *Id.*

[322] *Id.*

[323] *Id.* at 3510.

[324] *Id.* at 3509.

[325] *Id.*

[326] *Id.*

restrictive employment agreements to be *de facto* non-competes.[327]

Proposed § 910.1(b)(2) accordingly sought to clarify that the definition in proposed § 910.1(b)(1) includes contractual terms that are *de facto* non-competes because they have the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. It then provided two illustrative, non-exhaustive examples of contractual terms that may be such functional non-competes: (1) an NDA between an employer and a worker written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer; and (2) a training-repayment agreement (''TRAP'') that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred to train the worker.[328]

2. Coverage of the Definition

a. Comments Received

Most of the comments on the definition of ''non-compete clause'' addressed whether, and under what circumstances, the rule should apply to functional non-competes.[329] Many commenters that generally supported the NPRM agreed the definition of non-compete clause should cover other restrictive employment agreements when they function as non-competes. These commenters argued that, when restraints on labor mobility are banned, companies switch to functionally equivalent restraints. Some commenters asked the Commission to adopt a broader definition of functional non-competes or to expand the rule to ban additional types of restrictive employment agreements altogether. A few commenters asked the Commission to broaden proposed § 910.1(b)(1) and (2) by replacing the terms ''prevent'' and ''prohibit'' with ''restrains'' and ''limits.''

In contrast, many commenters who generally opposed the NPRM stated that proposed § 910.1(b)(2) was overinclusive. Many such commenters also asserted the definition was vague and could lead to confusion and significant litigation. Several comments suggested clarifications, such as including additional examples of functional non-competes; creating safe harbors for certain restrictive employment covenants; replacing proposed § 910.1(b)(2) with a standard based on antitrust law's ''quick look'' test;[330] or revising the provision to focus on the ''primary purpose'' of a restrictive employment covenant. Several commenters argued the Commission failed to cite evidence that functional non-competes are anti-competitive. Other commenters expressed concern that prohibiting functional non-competes would undermine the rule's intent to permit less restrictive alternatives to non-competes.

At least one commenter argued that proposed § 910.1(b)(2) should be removed because it was redundant, as the proposed definition of non-compete clause in proposed § 910.1(b)(1) already captured any term that prevents an employee from seeking alternative employment, without regard to how the term is labeled. Some commenters who generally supported the NPRM also expressed concern that ambiguity in proposed § 910.1(b)(2) could enable employers to intimidate workers by suggesting that restrictive employment agreements used to evade a final rule are not non-competes under the functional test. Other commenters who generally supported the rule asked for greater specificity in proposed § 910.1(b)(2) to prevent adverse judicial interpretations that could undermine the effectiveness of the rule.

Many commenters addressed issues specific to other types of restrictive employment agreements, including NDAs (also sometimes referred to as confidentiality agreements), TRAPs, non-solicitation agreements, and garden leave and severance agreements.

With respect to NDAs, some commenters stated that the Commission rightly identified overbroad NDAs as a potential method of evasion of the rule and supported the Commission's recognition of overbroad NDAs as functional non-competes. In contrast, some commenters contended that by covering functional non-competes, the proposed rule would limit their ability to use NDAs. Some commenters argued that providing that overbroad NDAs may be functional non-competes would be inconsistent with the proposed rule's separate preliminary finding that NDAs are less restrictive alternatives to non-competes. Similarly, some commenters contended that a functional test may frustrate employers' ability to use NDAs to protect legitimate trade secrets or to enjoin a former worker employed with a competitor under the Defend Trade Secrets Act of 2016, in part because they would be concerned about potential legal liability. Some commenters contended that the example of an overbroad NDA in proposed § 910.1(b)(2) would discourage the use of NDAs, including the use of narrowly tailored NDAs, and undermine confidence in their enforceability. Some commenters stated that reference to cases, including *Brown* v. *TGS Management Co.*[331] and similar cases, represent outliers that are likely to cause more confusion than clarity.

Other commenters addressed the proposed definition's application to TRAPs, which are agreements in which the worker agrees to pay the employer for purported training expenses if the worker leaves their job before a certain date. Several commenters asked the Commission to ban all forms of TRAPs. These commenters argued that employers are increasingly adopting TRAPs and that abusive TRAPs are pervasive throughout the economy. Some commenters asserted millions of workers are likely bound by TRAPs. Commenters stated TRAPs may impose penalties that are disproportionate to the value of training workers received or require the worker to pay alleged training expenses for on-the-job training. Some commenters contended TRAPs may be even more harmful than non-competes, because while non-competes prohibit or prevent workers from seeking or accepting other work or starting a business after they leave their job, TRAPs can prevent workers from leaving their job for any reason.

Some commenters expressed concern that the example in proposed § 910.1(b)(2)(ii) of a TRAP that was a functional non-compete was too narrow, and that the Commission should not imply that TRAPs with penalties that *are* reasonably related to an employer's training expenses cannot be functional

[327] *Wegmann* v. *London,* 648 F.2d 1072, 1073 (5th Cir. 1981) (holding that liquidated damages provisions in a partnership agreement were *de facto* non-compete clauses ''given the prohibitive magnitudes of liquidated damages they specify''); *Brown* v. *TGS Mgmt. Co., LLC,* 57 Cal. App. 5th 303, 306, 319 (Cal. Ct. App. 2020) (holding that an NDA that defined ''confidential information'' ''so broadly as to prevent [the plaintiff] in perpetuity from doing any work in the securities field'' operated as a *de facto* non-compete clause and therefore could not be enforced under California law, which generally prohibits enforcement of non-compete clauses).

[328] NPRM, proposed § 910.1(b)(2).

[329] While the NPRM generally used the term ''*de facto* non-competes,'' the final rule uses the term ''functional non-competes.'' The Commission believes this term more clearly conveys that certain terms are considered non-competes under the final rule where they function to prevent workers from seeking or accepting other work or starting a business after their employment ends.

[330] *See, e.g., Cal. Dental Ass'n* v. *FTC,* 526 U.S. 756, 770–71 (1999).

[331] *See supra* note 327 and accompanying text.

non-competes. One commenter asked the Commission to adopt the standard for TRAPs in the Uniform Restrictive Employment Agreement Act.[332] Another commenter suggested that the Commission ban TRAPs below an income threshold of $75,000. Another commenter asked the Commission to clarify that costs that are inherent in any employer-employee relationship—such as time spent by a supervisor training a new employee how to perform routine business procedures typical for their position or role—should not be considered costs that are ''reasonably related to the costs'' of training.

At least one commenter urged the Commission to treat as functional non-competes other employment terms similar to TRAPs such as equipment loans, where employers provide employees with a loan to purchase equipment that the worker needs in order to perform their job, and damages provisions containing open-ended costs related to the employee's departure—including hiring and training replacements or vague harms such as reputational damages, loss of good will or lost profits. In contrast, some commenters argued that TRAPs should be excluded from coverage under proposed § 910.1(b)(2) because they are not unfair or anti-competitive.

Regarding non-solicitation agreements—which prohibit a worker from soliciting former clients or customers of the employer—a few commenters expressed concern that overbroad non-solicitation agreements may be permitted because they were not listed in the regulatory text for proposed § 910.1(b)(2) as examples of functional non-competes (although the Commission described them in the preamble to the proposed rule as restrictive employment agreements that may fall within the definition of non-compete clause if they restrain such an unusually large scope of activity that they are *de facto* non-compete clauses).[333] These commenters asked the Commission to revise proposed § 910.1(b)(2) to expressly cover non-solicitation agreements that prohibit workers from doing business with prospective or actual customers to an extent that would effectively preclude them from continuing to work in the same field or that prevent a worker from doing business with their former employer's client where the client solicits the worker directly. Other commenters, however, expressed concern that the proposed rule could undermine employers' confidence in the enforceability of non-solicitation agreements and asked that the final rule clarify that non-solicitation agreements are generally not prohibited, or exclude them altogether.

Some comments addressed no-hire clauses, which bar former workers from hiring their former colleagues. One employment lawyer stated that these are less restrictive than non-compete clauses. Other commenters stated that no-hire clauses can still limit careers or make it hard for new businesses to find staff. Some commenters expressed concerns with no-business or non-dealing clauses, which bar former workers from doing business with former clients or customers even if the clients or customers sought them out. These commenters stated such agreements limit the options of clients and customers.

Many commenters raised questions about forfeiture-for-competition clauses, which they stated are often a component of deferred compensation arrangements for executives. Commenters stated that deferred compensation plans often include forfeiture clauses, or contingencies on receiving the promised compensation, to incentivize their recipients to act in ways that benefit the employer. These commenters stated that agreements not to compete for a period of time after employment ends are a common feature of forfeiture clauses. Some commenters stated that such forfeiture-for-competition clauses are non-competes and have the same negative effects as non-competes because they are contingent on competition—they require workers to give up bonus pay or other post-employment benefits if they work for a competing employer or start a competing business, and they keep other employers from being able to hire those workers. Other commenters stated forfeiture-for-competition clauses are a common and important component of deferred compensation arrangements for highly compensated employees and senior executives.[334] Other commenters argued the clauses allow workers to choose between receiving the deferred compensation and forfeiting it if they choose to work for a competitor, and thus they are not non-competes. Other commenters urged the Commission to either clarify that forfeiture-for-competition clauses are not non-competes or to carve them out explicitly.

Many commenters also addressed the application of the rule to garden leave agreements. In using the term ''garden leave,'' commenters seemed to be referring to a number of different types of agreements. Some commenters referred to garden leave agreements as those in which, before a worker left their job, they remained employed and received full pay for a specified period of time but their access to co-workers and company facilities was restricted. In contrast, other commenters considered ''garden leave'' an arrangement to make payments to a worker after their employment concluded. Commenters used different terminology to refer to these kinds of agreements, including severance pay, partial pay, and full pay akin to administrative leave, in exchange for an agreement not to compete. Some commenters argued it is coercive for a worker to sign a non-compete in exchange for severance pay and argued garden leave arrangements are non-competes because they limit a worker's options to work for a competitor. Some commenters asked the Commission to adopt a durational limit for garden leave. At least one commenter also urged the Commission to clarify that an employer cannot unilaterally terminate garden leave.

Other commenters requested clarification that garden leave was not a non-compete on the basis that garden leave does not create a legal obligation on the part of the worker to refrain from competing. Some commenters requested a specific exclusion for garden-leave arrangements. They argued that by forcing employers to pay workers, garden leave would reduce the overuse of non-competes. One talent industry commenter argued that the rule should expressly allow for ''fee tails,'' which require talent agents to pay a portion of future commissions to former employers.

b. The Final Rule

After considering the comments, the Commission has slightly modified the definition of non-compete clause to clarify its scope. In the final rule, § 910.1 defines ''non-compete clause'' as a term or condition of employment that either ''prohibits'' a worker from, ''penalizes'' a worker for, or ''functions to prevent'' a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating a business in the United States after the conclusion of the employment that includes the term or condition.

[332] *See* ULC, *Uniform Restrictive Employment Agreement Act* (2021), sec. 14.

[333] NPRM at 3509.

[334] Commenters also provided purported business justifications for forfeiture-for-competition clauses, which are addressed in Part IV.D.2.

Pursuant to the term ''prohibits,'' the definition applies to terms and conditions that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends. Examples of such agreements would be a contractual term between a national sandwich shop chain and its workers stating that, for two years after the worker leaves their job, they cannot work for another sandwich shop within three miles of any of the chain's locations,[335] or a contractual term between a steelmaker and one of its executives prohibiting the executive from working for any competing business anywhere in the world for one year after the end of the executive's employment.[336] The vast majority of existing agreements covered by the final rule fall into this category of agreements that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends.

Pursuant to the term ''penalizes,'' the definition also applies to terms and conditions that require a worker to pay a penalty for seeking or accepting other work or starting a business after their employment ends. One example of such a term is a term providing that, for two years after the worker's employment ends, the worker may not engage in any business within a certain geographic area that competes with the employer unless the worker pays the employer liquidated damages of $50,000.[337] Because such an agreement penalizes the worker for seeking or accepting other work or for starting a business after the worker leaves their job, it would be a non-compete clause under § 910.1. Indeed, where an agreement restricts who a worker can work for or their ability to start a business after they leave their job, State courts generally characterize the agreement as a non-compete, regardless of whether the agreement contains an express prohibition or requires the worker to pay liquidated damages.[338]

Another example of a term that ''penalizes'' a worker, under § 910.1, is an agreement that extinguishes a person's obligation to provide promised compensation or to pay benefits as a result of a worker seeking or accepting other work or starting a business after they leave their job. One example of such an agreement is a forfeiture-for-competition clause, which, similar to the agreement with liquidated damages described previously, imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship, expressly conditioned on the employee seeking or accepting other work or starting a business after their employment ends. An additional example of a term that ''penalizes'' a worker under § 910.1 is a severance arrangement in which the worker is paid only if they refrain from competing. The Commission also notes that a payment to a prospective competitor to stay out of the market may also violate the antitrust laws even if it is not a non-compete under this rule.[339]

The common thread that makes each of these types of agreements non-compete clauses, whether they ''prohibit'' or ''penalize'' a worker, is that on their face, they are triggered where a worker seeks to work for another person or start a business after they leave their job—*i.e.,* they prohibit or penalize post-employment work for another employer or business. As elaborated in Part IV, such non-competes are inherently restrictive and exclusionary conduct, and they tend to negatively affect competitive conditions in both labor and product and service markets by restricting the mobility of workers and preventing competitors from gaining access to those workers.

Pursuant to the term ''functions to prevent,'' the definition of non-compete clause also applies to terms and conditions that restrain such a large scope of activity that they function to prevent a worker from seeking or accepting other work or starting a new business after their employment ends, although they are not expressly triggered by these specific undertakings. This prong of the definition does not categorically prohibit other types of restrictive employment agreements, for example, NDAs, TRAPs, and non-solicitation agreements. These types of agreements do not by their terms prohibit a worker from or penalize a worker for seeking or accepting other work or starting a business after they leave their job, and in many instances may not have that functional effect, either. However, the term ''functions to prevent'' clarifies that, if an employer adopts a term or condition that is so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends, such a term is a non-compete clause under the final rule.

In response to the comments alleging that covering ''de facto'' or ''functional'' non-competes is overinclusive or vague, the Commission notes that the definition's three prongs—''prohibit,'' ''penalize,'' and ''function to prevent''—are consistent with the current legal landscape governing whether a particular agreement is a non-compete. In addition to generally accepted definitions of non-competes encompassing the ''prohibits'' prong of the definition, terms that ''penalize'' workers for seeking or accepting other work or starting a business after they leave their job (for example, by requiring them to pay liquidated damages) are typically considered non-competes under State law.[340] And the ''functions to prevent'' prong of the definition is likewise consistent with legal decisions holding that restrictive employment agreements other than non-competes may be analyzed under the State law test applicable to non-competes where they function similarly to non-competes.[341] As the First Circuit stated in a recent opinion, ''[O]verly broad nondisclosure agreements, while not specifically prohibiting an employee from entering into competition with the former employer, raise the same policy concerns about restraining competition as noncompete clauses where, as here, they have the effect of preventing the defendant from competing with the plaintiff.'' [342] The fact that whether a given restrictive covenant rises to the level of being a functional non-compete will turn on the facts and circumstances

[335] This example is based on the agreements described in Jamieson, *supra* note 32. The company agreed to remove the non-competes in 2016 as part of a settlement. Office of the Att'y Gen. of the State of N.Y., Press Release, *A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets* (June 22, 2016), *https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete.*

[336] This example is based on *AK Steel Corp.* v. *ArcelorMittal USA, LLC,* 55 NE3d 1152, 1156 (Ohio Ct. App. 2016).

[337] This example is based on *Press-A-Dent, Inc.* v. *Weigel,* 849 NE2d 661, 668–70 (Ind. Ct. App. 2006) (holding that the agreement was an unlawful non-compete).

[338] *See, e.g., Wichita Clinic, P.A.* v. *Louis,* 185 P.3d 946, 951 (Kan. Ct. App. 2008); *Grayhawk Homes, Inc.* v. *Addison,* 845 SE2d 356 (Ga. Ct. App. 2020); *Salewski* v. *Pilchuck Veterinary Hosp., Inc.,* 359 P.3d 884 (Wash. Ct. App. 2015).

[339] *See, e.g., Palmer* v. *BRG of Ga., Inc.,* 498 U.S. 46, 49–50 (1990) (''[A]greements between competitors to allocate territories to minimize competition are illegal'' (citing *United States* v. *Topco Assocs., Inc.,* 405 U.S. 596 (1972)); *FTC* v. *Actavis, Inc.,* 570 U.S. 136, 154 (2013) (''payment in return for staying out of the market'' may violate the antitrust laws).

[340] *See supra* note 338 and accompanying text.

[341] *See, e.g., Brown* v. *TGS Mgmt. Co., LLC,* 57 Cal. App. 5th 303, 306, 316–19 (Cal. Ct. App. 2020); *Wegmann* v. *London,* 648 F.2d 1072, 1073 (5th Cir. 1981); *TLS Mgmt. & Mktg. Servs.* v. *Rodriguez-Toledo,* 966 F.3d 46, 59–60 (1st Cir. 2020).

[342] *TLS Mgmt. & Mktg. Servs.,* 966 F.3d at 57.

of particular covenants and the surrounding market context does not render this aspect of the final rule overinclusive or vague. Such covenants would be subject to case-by-case adjudication for whether they constitute an unfair method of competition even in the absence of the final rule.

In response to the comments alleging the Commission failed to cite evidence that functional non-competes harm competition, the Commission disagrees. This final rule is based on a robust evidentiary record that includes significant empirical evidence and thousands of public comments, as well as the Commission's longstanding expertise in evaluating competition issues. Based on this record, the Commission finds that non-competes are restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets and markets for products and services.[343] In addition, the Commission finds that, with respect to workers other than senior executives, non-competes are exploitative and coercive.[344] The Commission finds that the functional equivalents of non-competes—because they prevent workers from engaging in the same types of activity—are likewise restrictive and exclusionary conduct that tends to negatively affect competitive conditions in a similar way. In response to the commenters who expressed concern that prohibiting functional non-competes would undermine the rule's intent to permit reasonable substitutes, the Commission stresses that, as described throughout this Part III.D, the ''functions to prevent'' prong of the definition of non-compete clause captures only agreements that function to prevent a worker from seeking or accepting other work or starting a business after they leave their job—not appropriately tailored NDAs or TRAPs that do not have that functional effect.

While many commenters requested the Commission state expressly in the final rule whether various specific restrictive employment agreements satisfy the definition of non-compete clause, the Commission declines to adopt a definition that attempts to capture or carve out every edge case. Rather, the final rule focuses on providing a clear, understandable, and generally applicable definition of non-compete clause that reflects the need for case-by-case consideration of whether certain restrictive covenants rise to the level of being functional non-competes—which is fully consonant with the legal landscape employers generally face today. The Commission nevertheless here responds to comments regarding the restrictive clauses that commenters contended should be expressly addressed in the final rule.

As noted in this Part III.D, restrictive employment agreements other than non-competes—such as NDAs, non-solicitation agreements, and TRAPs—do not by their terms or necessarily in their effect prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job. For example, a garden-variety NDA in which the worker agrees not to disclose certain confidential information to a competitor would not prevent a worker from seeking work with a competitor or from accepting such work after the worker leaves their job. Put another way, an NDA would not be a non-compete under § 910.1 where the NDA's prohibitions on disclosure do not apply to information that (1) arises from the worker's general training, knowledge, skill or experience, gained on the job or otherwise; or (2) is readily ascertainable to other employers or the general public.[345]

However, NDAs may be non-competes under the ''functions to prevent'' prong of the definition where they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job. Examples of such an agreement may include an NDA that bars a worker from disclosing, in a future job, any information that is ''usable in'' or ''relates to'' the industry in which they work.[346] Such an agreement would effectively prevent the worker from working for another employer in that industry. A second example would be an NDA that bars a worker from disclosing any information or knowledge the worker may obtain during their employment whatsoever, including publicly available information.[347] These agreements are so broadly written that, for practical purposes, they function to prevent a worker from working for another employer in the same field and are therefore non-competes under § 910.1.

Under the final rule's definition of non-compete clause, the same inquiry applies to non-solicitation agreements. Non-solicitation agreements are generally not non-compete clauses under the final rule because, while they restrict who a worker may contact after they leave their job, they do not by their terms or necessarily in their effect prevent a worker from seeking or accepting other work or starting a business. However, non-solicitation agreements can satisfy the definition of non-compete clause in § 910.1 where they function to prevent a worker from seeking or accepting other work or starting a business after their employment ends. Whether a non-solicitation agreement—or a no-hire agreement or a no-business agreement, both of which were referenced by commenters, as discussed previously—meets this threshold is a fact-specific inquiry. The Commission further notes that—like all the restrictive employment agreements described in this Part III.D—non-solicitation agreements, no-hire, and no-business agreements are subject to section 5's prohibition of unfair methods of competition, irrespective of whether they are covered by the final rule.

Depending on the facts and circumstances, a TRAP can also function to prevent a worker from working for another firm or starting a business. For example, one commenter cited a TRAP that required entry-level workers at an IT staffing agency who were earning minimum wage or nothing at all during their training periods to pay over $20,000 if they failed to complete a certain number of billable hours.[348] The commenter also cited a TRAP requiring nurses to work for three years or else repay all they have earned, plus paying the company's ''future profits,'' attorney's fees, and arbitration costs.[349] These types of TRAPs may be functional non-competes because when faced with significant out-of-pocket costs for leaving their employment—dependent on the context of the facts and circumstances—workers may be forced to remain in their current jobs, effectively prevented from seeking or accepting other work or starting a business.

In response to the comments, the Commission declines at this time to either categorically prohibit all TRAPs related to leaving employment, or to exempt such provisions altogether. The Commission agrees with comments raising substantial concerns about the

[343] *See* Parts IV.B and IV.C.

[344] *See* Part IV.B.2.b.

[345] This example is based on sec. 9 of the Uniform Restrictive Employment Agreement Act, *supra* note 332.

[346] This example is based on *Brown* v. *TGS Mgmt.,* 57 Cal. App. 5th at 316–19 (''Collectively, these overly restrictive provisions [in the NDA at issue] operate as a de facto noncompete provision; they plainly bar Brown in perpetuity from doing any work in the securities field.'').

[347] This example is based on *TLS Mgmt. & Mktg. Servs.,* 966 F.3d at 57 (holding that the NDA was unenforceable).

[348] Comment of Jonathan F. Harris, Dalié Jiménez, & Jonathan Glater, FTC–2023–0007–20873 at 4.

[349] *Id.* at 6–7.

potential effects of such agreements on competitive conditions. As noted in the summary of the comments, commenters cited TRAPs that impose penalties disproportionate to the value of training workers received and/or that claimed training expenses for on-the-job training. However, the evidentiary record before the Commission principally relates to non-competes, meaning on the present record the Commission cannot ascertain whether there are any legitimate uses of TRAPs that do not tend to negatively affect competitive conditions. When TRAPs function to prevent a worker from seeking or accepting other work or starting a business after the employment associated with the TRAP, they are non-competes under § 910.1.

The Commission notes that clauses requiring repayment of a bonus when a worker leaves their job would not be non-competes under § 910.1 where they do not penalize or function to prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job. For example, a provision requiring the repayment of a bonus if the worker leaves before a certain period of time would not be a non-compete under § 910.1 where the repayment amount is no more than the bonus that was received, and the agreement is not tied to who the worker can work for, or their ability to start a business, after they leave their job. Similarly, a term or condition under which a worker loses accrued sick leave when their employment ends would not function to prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job.

With respect to garden leave agreements, as noted previously, commenters used the term ''garden leave'' to refer to a wide variety of agreements. The Commission declines to opine on how the definition of non-compete clause in § 910.1 would apply in every potential factual scenario. However, the Commission notes that an agreement whereby the worker is still employed and receiving the same total annual compensation and benefits on a *pro rata* basis would not be a non-compete clause under the definition,[350] because such an agreement is not a post-employment restriction. Instead, the worker continues to be employed, even though the worker's job duties or access to colleagues or the workplace may be significantly or entirely curtailed. Furthermore, where a worker does not meet a condition to earn a particular aspect of their expected compensation, like a prerequisite for a bonus, the Commission would still consider the arrangement ''garden leave'' that is not a non-compete clause under this final rule even if the employer did not pay the bonus or other expected compensation. Similarly, a severance agreement that imposes no restrictions on where the worker may work following the employment associated with the severance agreement is not a non-compete clause under § 910.1, because it does not impose a post-employment restriction.

The Commission declines a commenter's request to replace the term ''prevent'' with ''restrains'' or ''limits.'' Commenters generally did not express concern about the term ''prevent'' and the Commission is concerned that different language could greatly expand the scope of the definition and reduce its clarity.

The Commission also declines to adopt alternative *de facto* tests raised by commenters, such as a version of the ''quick look'' test. As described in Part II.F, the legal standard under section 5 of the FTC Act is distinct from that of the Sherman Act. The Commission also declines to adopt a test that would consider the primary purpose of a restrictive employment agreement. The Commission believes that it can be difficult to establish an employer's subjective ''purpose'' in entering into an agreement. In addition, such a test could allow extremely overbroad agreements that dramatically restrict a worker's ability to compete against the employer—and have the negative effects described in Parts IV.B and IV.C—as long as the employer entered into the agreement without the subjective intent to restrict competition.

The Commission agrees with the commenter who stated that proposed § 910.1(b)(2) was redundant because proposed § 910.1(b)(1) was already a functional definition. In the final rule, the Commission has revised the text of the definition of non-compete clause to address confusion among commenters about whether proposed § 910.1(b)(2) clarified the definition or extended it.

In response to the commenters requesting that the Commission clarify the circumstances under which the definition would apply to various other types of restrictive employment agreements, the Commission declines at this time to enumerate every circumstance that may arise. As noted, a restrictive employment covenant may be a non-compete clause under § 910.1 if it expressly prohibits a worker from, or penalizes a worker for, seeking or accepting other work or starting a business, or if it does not do so expressly but is so broad or onerous in scope that it functionally has the same effect of preventing a worker from doing the same.

3. International Application of the Rule

a. Comments Received

The Commission received several comments expressing concern about whether the final rule would apply to non-competes that restrict work outside the U.S. In response, the final rule's definition of non-compete clause clarifies that it applies only to work in the U.S. or operating a business in the U.S.

Some commenters raised concerns about the cross-border movement of workers. A research center commenter asserted there is a global shortage of science and technology workers and stated that the final rule's adoption could exacerbate the U.S. shortage by allowing other countries to more easily poach U.S. workers. An academic commenter argued that banning non-competes might deter foreign investors from sending workers to the U.S. if the final rule would invalidate their non-competes.

Some commenters argued that legal systems in the People's Republic of China or other jurisdictions provide insufficient protection for U.S. companies' trade secrets, confidential information, or patent rights, and contended employers need non-competes as *ex ante* protection. These commenters generally say that trade secrets litigation is more challenging in some jurisdictions outside the U.S., for example because of less extensive discovery processes, less frequent use of preliminary injunctions, insufficient remedies, and a lower propensity to prosecute criminal intellectual property cases. An academic commenter argued that some courts may have fewer protections for confidential information compared to the U.S., so a suit concerning only a non-compete is less likely to reveal trade secrets through the course of litigation and thus more effectively prevent technologies from leaking to other governments and protecting U.S. national security interests. However, the comments provided limited evidence on non-competes and trade secret protection outside the U.S., and collectively only

[350] The term and practice of ''garden leave'' appears to have a British origin and is recognized by the Government of the United Kingdom. *See Gov.UK, Handing in your notice, https://www.gov.uk/handing-in-your-notice/gardening-leave* (''Your employer may ask you not to come into work, or to work at home or another location during your notice period. This is called 'gardening leave'.'').

discussed evidence from a few jurisdictions. One commenter noted that legal information and data from some jurisdictions may not be fully accurate because not all court decisions are public.

Two commenters highlighted the domestic semiconductor industry and the CHIPS Act of 2022, arguing the Chinese government seeks to acquire IP related to semiconductors and semiconductor experts with relevant knowledge and information. Those comments expressed concern that a ban on non-competes would damage the semiconductor industry, which relies on skilled workers and trade secrets, by weakening trade secrets protection and disincentivizing investment. Another commenter argued the proposed rule would undermine export controls designed to prevent foreign countries from acquiring U.S. technology and knowledge by allowing workers to move to foreign competitors. One commenter argued the proposed rule conflicts with an October 2022 Bureau of Industry and Security (''BIS'') export control rulemaking, stating that the rulemaking limits worker mobility in certain industries from the U.S. to the People's Republic of China. Another commenter suggested the proposed rule would violate the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires that persons ''shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent . . . .'' [351] Finally, one commenter argued that by making it more difficult for businesses to protect against international theft of their intellectual property, the rule is at odds with the purposes of the Protecting American Intellectual Property Act of 2022.[352]

Some of these commenters made recommendations for the final rule. A law firm suggested that the final rule prevent evasion by barring employers from selecting the law of non-U.S. jurisdictions to govern employment contracts with U.S.-based workers. A trade association requested that the final rule cover only agreements subject to the law of a U.S. State. An academic commenter suggested revisions to the text of the proposed rule to ensure the final rule applies only within the U.S. The commenter also recommended stating that a non-compete restricting work outside the U.S. is not a *per se* unfair method of competition and providing guidance on how employers should evaluate international non-competes, using factors such as the business justification for the non-compete and the impact on the worker. The commenter recommended applying the law of the jurisdiction where the worker seeks to be employed.

b. The Final Rule

In response to commenters' concerns, in this final rule the Commission adopts changes to the definition of ''non-compete clause'' that expressly limit the definition of non-compete to terms or conditions that prevent workers from seeking or accepting work in the U.S. or operating a business in the U.S. The final rule does not apply to non-competes if they restrict only work outside the U.S. or starting a business outside the U.S.

This revision clarifies for stakeholders the scope of the final rule and confirms it does not prohibit employers from using non-competes that restrict work outside the U.S., in compliance with those jurisdictions' own laws. The Commission understands that, as a commenter noted, some companies operating or competing globally already draft non-competes that comply with the laws of multiple jurisdictions and, thus, amending their non-competes to reflect this application of the final rule would not pose a significant challenge for those entities.

The Commission's revision clarifying the final rule's application to work or starting a business only in the U.S. also addresses the concerns from some commenters about key U.S. workers and technology flowing overseas, because the final rule does not ban non-competes that restrict workers from working or starting a business outside the U.S. It also clarifies that the final rule would not invalidate non-competes entered into by foreign companies with foreign workers unless they restrict a worker's ability to work or start a business inside the U.S. Other questions about the final rule's application to cross-border or non-U.S. employment are also addressed by the Foreign Trade Antitrust Improvements Act, codified at 15 U.S.C. 45(a)(3).

The Commission agrees with the academic commenter that, for non-competes that apply outside the U.S., the law of the relevant jurisdiction should govern any issue other than restricting work or starting a business in the U.S. However, the Commission declines to adopt a balancing test for non-competes restricting a worker's ability to work or start a business outside the U.S., as a bright-line rule that applies only to work or starting a business in the U.S. is more administrable. In addition, the Commission declines to add language in the final rule stating that it does not apply to overseas employers or to non-competes not subject to U.S. State law. The final rule may apply to overseas employers if the non-compete purports to restrict work or starting a business in the U.S. and the reviewing court applies U.S. law.

The empirical evidence cited in the NPRM focused on the U.S., primarily consisting of studies based on the effects of changes in State laws in the U.S. The comments provided limited evidence on non-competes and trade secret protection outside the U.S., leaving many issues and most jurisdictions unaddressed. The Commission also notes, as one commenter did, that legal information and data from some jurisdictions may not be fully accurate because not all court decisions are public. On the current record, the Commission cannot reach conclusions on whether other jurisdictions have sufficient alternatives to non-competes, the scope of any potential risk, and many of the other issues raised. As a result, the Commission limits application of the final rule to work in the U.S., where the Commission has ample evidence on non-competes' negative effects.

One commenter argued the rule conflicts with BIS's October 2022 export control rulemaking, which restricts the ability of U.S. persons to support development or production at certain semiconductor facilities in the People's Republic of China without a license from BIS.[353] While the revision addresses the commenter's underlying concern about protection of sensitive technology from other governments by not banning non-competes that restrict the movement of workers to and in other jurisdictions, neither the NPRM nor the final rule is inconsistent with the BIS rule. The final rule will not affect BIS's ability to grant or decline to grant a license. With respect to the commenter that suggested the rule would violate TRIPS, the Commission has found that U.S. law provides alternative means of protecting trade secrets,[354] and TRIPS does not require enforcement of non-competes.

With respect to the commenter that stated that the final rule should include

[351] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, sec. 7, art. 39, para. 2, 33 I.L.M. 81 (as amended Jan. 23, 2017).

[352] 50 U.S.C. 1709.

[353] Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, Interim Final Rule, 87 FR 62186 (Oct. 13, 2022).

[354] *See* Part IV.D.2.

a choice-of-law provision to prevent evasion, there is an existing body of law in the U.S. governing choice of law and conflict of law issues. Accordingly, the Commission declines to add any provisions concerning choice of law or conflict of law to the final rule. Rather, such questions are left to the relevant jurisdiction, whether that is a U.S. State, the Federal government, or another jurisdiction, as determined by applicable law.

4. Other Issues Relating to the Definition

a. Comments Received

While most commenters focused on the proposed definition's application to functional non-competes or international application, some commenters addressed other issues relating to the proposed definition. Several commenters stated that the definition should cover workplace policies or handbooks, to minimize confusion and make clear that employers are prohibited from including non-competes in workplace policies or handbooks, even if such clauses are unenforceable because they are not formal binding contracts. Some commenters stated that such policies or handbooks can affect a worker's decision to leave their job to work with a competitor or start their own businesses. Others stated the same about oral agreements. One commenter stated that the definition should not cover workplace policies because they apply only during, not after, employment.

A few commenters said the Commission should state explicitly in the definition of ''non-compete clause'' that restrictions on concurrent employment, such as prohibitions on ''moonlighting'' with competitors, are excluded. Other commenters urged the Commission to expand the definition to include restraints on concurrent employment because workers often need to take additional jobs during economic downturns, and low-wage workers generally need to take on additional jobs.

An organized labor commenter argued that no-raid agreements, which the commenter described as agreements between labor organizations not to attempt to organize workers already under representation by another union, should be exempted from the definition. An industry trade organization asked the Commission to clarify whether the definition would apply to non-competes in agreements between motor carriers and brokers in the trucking industry. In addition, a few commenters stated that proposed § 910.1(b)(1) was too broad or potentially ambiguous without pointing to any specific features of the definition.

b. The Final Rule

To address the concerns raised by commenters about workplace policies and handbooks, the definition of non-compete clause in § 910.1 uses the phrase ''a term or condition of employment'' instead of ''contractual term.'' The definition further clarifies that term or condition of employment includes ''a contractual term or workplace policy, whether written or oral.'' The Commission finds that employers have used restrictions in handbooks, workplace policies, or other vehicles that are not formal written contracts to successfully prevent workers from seeking or accepting other employment or starting a new business. The Commission finds, consistent with the views expressed by commenters, that such restrictions in handbooks, workplace policies, or other such vehicles have the same tendency to negatively affect competitive conditions as a formal binding contract term. To provide that such conduct is covered by the definition of non-compete clause, this language clarifies that the definition of non-compete clause is not limited to clauses in written, legally enforceable contracts and applies to all forms a non-compete might take, including workplace policies or handbooks and informal contracts. Given the comments expressing concern about oral representations, the Commission clarifies in the definition of non-compete clause that clauses that purport to bind a worker are covered, whether written or oral, and provides in § 910.2(a)(1) and (2) that it is an unfair method of competition to make representations that a worker is subject to a non-compete. (However, as explained in Part V.C, such representations are not prohibited where the person has a good-faith basis to believe that the final rule is inapplicable.)

The Commission declines to extend the reach of the final rule to restraints on concurrent employment. Although several commenters raised this issue, the evidentiary record before the Commission at this time principally relates to post-employment restraints, not concurrent-employment restraints. The fact that the Commission is not covering concurrent-employment restraints in this final rule does not represent a finding or determination as to whether these terms are beneficial or harmful to competition. The Commission relatedly clarifies that fixed-duration employment contracts, *i.e.,* contracts between employers and workers whereby a worker agrees to remain employed with an employer for a fixed term and the employer agrees to employ the worker for that period, are not non-compete clauses under the final rule because they do not restrain post-employment conduct.

While the final rule does not extend to restraints on concurrent employment, the Commission has made a technical edit to the definition of non-compete to clarify how it relates to seeking and accepting employment. Proposed § 910.1(b) defined non-compete clause as a contractual term that ''prevents the worker from seeking or accepting employment with a person . . . after the conclusion of the worker's employment with the employer.'' Because, as a technical matter, non-competes can also prevent workers from seeking or accepting future employment with another person before their work for their previous employer has concluded, the Commission has clarified the relevant language to read ''that prevents a worker from seeking or accepting work in the United States with a different person *where such work would begin after* the conclusion of the employment that includes the term or condition'' and ''that prevents a worker from operating a business in the United States *after the conclusion of the employment* that includes the term or condition'' (emphases added).

In addition, in response to comments expressing concern about evasion of the rule through third-party hiring,[355] the Commission has revised the phrase ''after the conclusion of the worker's employment with the employer'' to read ''after the conclusion of the employment that includes the term or condition.'' The Commission recognizes that non-competes can cover workers who are hired by one party but work for another, such as workers hired through staffing agencies. The Commission intends for the final rule to apply to such non-competes, and for this revision to eliminate any ambiguity as to whether such clauses are covered by the definition of non-compete clause in § 910.1.

With respect to the comment about union no-raid agreements, the Commission notes that the definition would apply only to the extent the agreement is a ''term or condition of employment'' and only if the agreement ''prevents a worker from seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or

[355] These comments are described in greater detail in Part III.G.

condition'' or ''operating a business in the United States after the conclusion of the employment that includes the term or condition.'' [356] The Commission's understanding is that union no-raid agreements are not terms and conditions of employment that prevent workers from seeking or accepting work or operating a business.

With respect to the comment asking whether the definition would apply to non-competes in agreements between motor carriers and brokers in the trucking industry, the Commission notes as a general matter that the definition would not apply to non-competes between businesses, but the Commission declines to opine on specific factual circumstances.

E. Definition of ''Person''

The proposed rule did not separately define the term ''person.'' Instead, proposed § 910.1(c)—the proposed definition of ''employer''—stated that an employer ''means a person, as defined in 15 U.S.C. 57b–1(a)(6), that hires or contracts with a worker to work for the person.'' The statutory provision cross-referenced in proposed § 910.1(c) is section 20(a)(6) of the FTC Act, which defines ''person'' for purposes of the Commission's authority to issue civil investigative demands. Section 20(a)(6) defines ''person'' as ''any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.'' No comments were received concerning the use of ''person'' in proposed § 910.1(c).

As explained in Part III.C, the Commission has removed the defined term ''employer'' from the regulatory text of the final rule. However, the regulatory text still uses the term ''person.'' For example, § 910.2(a)(1) prohibits a ''person'' from, among other things, entering into a non-compete clause. As a result, the Commission has adopted a separate definition of the term ''person.'' Section 910.1 defines ''person'' as ''any natural person, partnership, corporation, association, or other legal entity within the Commission's jurisdiction, including any person acting under color or authority of State law.'' This text consists of the proposed definition from section 20(a)(6), plus the phrase ''within the Commission's jurisdiction,'' which clarifies that only persons within the Commission's jurisdiction are subject to the final rule.

[356] § 910.1.

F. Definitions Related to Senior Executives

With respect to existing non-competes, *i.e.,* non-competes entered into before the final rule's effective date, the Commission adopts a different approach for ''senior executives'' than for other workers. Existing non-competes with senior executives can remain in force; the final rule does not cover such agreements.[357] For workers who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date.[358] The Commission describes its rationale for the final rule's differential treatment of senior executives in Part IV.C.

Section 910.1 defines the term ''senior executive'' as well as related terms. Because the Commission's rationale for the final rule's differential treatment of senior executives provides important context for these definitions, the Commission describes these definitions in Part IV.C.4.

G. Definition of ''Worker''

1. Proposed Definition

In the NPRM, the Commission proposed to define ''worker'' in proposed § 910.1(f) as ''a natural person who works, whether paid or unpaid, for an employer.'' [359] Proposed § 910.1(f) also stated that ''the term [worker] includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.'' [360]

In the NPRM, the Commission explained it intended the term ''worker'' to include not only employees, but also individuals classified as independent contractors, as well as other kinds of workers.[361] The Commission explained that, under proposed § 910.1(f), the term ''worker'' would include any natural person who works, whether paid or unpaid, for an employer, without regard to whether the worker is classified as an ''employee'' under the FLSA or any other statute that draws a distinction between ''employees'' and other types of workers.[362]

The Commission stated in the NPRM that it was concerned that if the rule were to define workers as ''employees'' according to, for example, the FLSA definition, employers may misclassify employees as independent contractors to evade the rule's requirements.[363] The Commission explained it had no reason to believe non-competes that apply to workers who are treated as independent contractors under the FLSA or interns tend to negatively affect competitive conditions to a lesser degree than non-competes that apply to employees, and that such non-competes may, in fact, be more harmful to competition, given that these other types of workers tend to have shorter working relationships.[364] In addition, the Commission explained that the purported business justifications for applying non-competes to independent contractors would not be different or more cognizable from those related to employees.[365]

[357] *See* Part IV.C.3.

[358] *See* § 910.2(a)(1)(i).

[359] NPRM, proposed § 910.1(f).

[360] *Id.*

[361] *Id.* at 3511.

[362] *Id.*

Proposed § 910.1(f) also stated the term worker ''does not include a franchisee in the context of a franchisee-franchisor relationship.'' [366] The Commission explained that the relationship between a franchisor and franchisee may in some cases be more analogous to the relationship between two businesses than the relationship between an employer and a worker, and that the evidentiary record before the Commission related primarily to non-competes arising solely out of employment.[367] The Commission therefore stated that it believed it would be appropriate to clarify that a franchisee—in the context of a franchisor-franchisee relationship—is not a ''worker'' for purposes of proposed § 910.1(f).[368]

Proposed § 910.1(f) further clarified, however, that the term worker ''includes a natural person who works for the franchisee or franchisor,'' and that ''non-competes between franchisors and franchisees remain subject to [F]ederal antitrust law as well as all other applicable law.'' [369] The Commission explained that these laws include State laws that apply to non-competes in the franchise context.[370] The Commission also clarified that it was not proposing to find that non-competes between franchisors and franchisees are beneficial to competition.[371]

2. Comments Received

Several commenters stated that they agreed with the proposed definition of ''worker'' because it applies to all workers without regard to their classification. Many of these

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.* at 3511, 3520.

[367] *Id.*

[368] *Id.*

[369] *Id.* at 3511.

[370] *Id.*

[371] *Id.*

commenters specifically urged the Commission to adopt a final definition that includes all categories of workers regardless of whether they are classified as employees, including independent contractors, ''gig'' workers, and others. These commenters pointed to the Commission's preliminary finding that non-competes are widely used across the economy. They cited employers' frequent misclassification of workers as independent contractors, agreeing with concerns raised in the NPRM that, if ''worker'' excludes independent contractors, employers may misclassify workers as independent contractors to avoid complying with the rule. Many commenters stated that millions of workers are misclassified as independent contractors, including a disproportionate number of women, people of color, and low-income workers. These commenters expressed concern that, if the rule excluded independent contractors from coverage, it would fail to benefit these groups, for whom non-competes may be particularly exploitative and coercive.

On the other hand, several commenters suggested removing bona fide independent contractors and sole proprietors from the definition of ''worker.'' Two industry groups contended that there is a lack of data regarding the prevalence and effects of non-competes among independent contractors as opposed to other kinds of workers and that, as a legal matter, the evidence is insufficient to justify including independent contractors as ''workers'' under the rule. A few industry organizations also contended that, because they have more control over their work and generally work for more than one employer, independent contractors have greater bargaining power than other workers. One academic commenter suggested that non-competes between employers and independent contractors are more akin to agreements between businesses than agreements between employers and workers. A few of these industry organizations also contended that non-competes are justified because independent contractors provide services outside the scope of their employers' expertise and thus have greater access to sensitive information than other workers. Other industry organizations contended that small businesses employ more independent contractors than their larger rivals. These commenters stated that, to protect small businesses from being impacted disproportionately by the rule, the definition of ''worker'' should exclude independent contractors. Finally, a few industry trade organizations and an academic commenter stated that independent contractors should be excluded from coverage under the rule to avoid ''free riding,'' in which a contractor working for one firm can use that firm's assets—like tools or databases—to benefit another firm.

Several commenters suggested changes to the definition of ''worker'' to maximize the rule's coverage and close potential loopholes. One worker advocacy group noted that, combined with the proposed definition of ''employer,'' the proposed definition of ''worker''—a natural person who works ''for an employer''—appeared to exclude workers who work for a person other than the person who hired or contracted with them to work. The commenter noted that workers are often employed indirectly—by way of a contractual relationship with a staffing agency, an affiliate of their common-law employer, or some entity other than their common-law employer—and that non-competes are often imposed on workers by the non-hiring party. In order to ensure these workers are covered by the rule, the commenter suggested that the definition of ''worker'' should also cover a person who works ''directly or indirectly'' for an employer and that the definition specifically include ''a person who works for the employer under an arrangement with a professional employer organization, statutory employer, wholly owned entity of which the person is the sole or principal employee or service provider, loan-out arrangement or similar arrangement.''

The same commenter also argued that employers often impose non-competes on workers who own a portion of the business while not applying the same restriction to outside investors who do not work for the company, and that such worker-owner non-competes should be treated as employment-related non-competes. In order to ensure these workers are covered by the rule, the commenter suggested that ''worker'' should also include ''a person who holds direct or indirect equity or other interest in the employer and who provides services to or for the benefit of the employer.'' Another commenter suggested that, for clarity, ''worker'' should specifically exclude a ''substantial owner, member or partner'' as defined in the sale-of-business exception.

Several State attorneys general, local government commenters, academic commenters, and a worker advocacy group warned that categorically excluding franchisees from the definition of ''worker'' would lead employers to misclassify workers as franchisees to evade the rule's requirements. Some commenters suggested incorporating the ''ABC'' test—a common law test designed to determine whether a worker is an employee based on fact-specific conditions—into the definition of ''worker'' to prevent evasion.[372]

Some commenters requested that the Commission revise the definition of ''worker'' to exclude or include certain workers from coverage under the rule. These comments are addressed in Part IV.C (comments requesting an exclusion for senior executives) and in Part V.D (comments requesting exclusions for other categories of workers).

3. The Final Rule

After considering the comments, the Commission revised the definition of ''worker'' in three ways to clarify that the term covers all current and former workers, regardless of which entity hired or contracted with them to work, and regardless of a worker's title or status under any other applicable law.

First, the Commission added ''or who previously worked'' to the basic definition of ''worker'' as ''a natural person who works.'' This revision is designed to clarify that former workers are considered ''workers'' under the final rule, such as where an employer is required to notify a former worker that their non-compete is no longer enforceable.[373]

Second, the Commission removed ''for an employer'' from the definition. This revision is designed to ensure that the final rule covers workers who are hired by one party but work for another, closing the unintended loophole identified by commenters regarding third-party hiring.

Third, the Commission added ''without regard to the worker's title or the worker's status under any other State or Federal laws'' prior to the list of examples of different categories of workers that the definition covers. This change is designed to make more explicit that the term ''worker'' includes all workers regardless of their titles, status under other laws, or the details of the contractual relationship with their employer.

The Commission has made two additional changes to the definition for clarity. First, the Commission has revised the phrase ''individual classified as an independent contractor'' to ''independent contractor.'' Second, the Commission has added ''a natural person who works for a franchisee or

[372] *See, e.g., Dynamex Operations W.* v. *Superior Ct.*, 4 Cal. 5th 903, 955–957 (Cal. 2018).

[373] *See* § 910.2(b).

franchisor'' to the non-exclusive list of examples of types of workers that would be covered by the definition. This language is simply moved from elsewhere in the definition. Third, the Commission has removed the sentence reading ''[n]on-competes between franchisors and franchisees would remain subject to Federal antitrust law as well as all other applicable law'' from the definition to avoid the implication that only such non-competes remain subject to Federal antitrust law and other applicable law.

The Commission declines to specify that a ''worker'' includes an owner who provides services to or for the benefit of their business because the definition already encompasses the same.

The Commission is not persuaded by commenters' arguments that independent contractors or sole proprietors are inherently different from other kinds of workers with respect to non-competes, and therefore declines to exclude them from the definition of ''worker.'' Commenters did not present persuasive evidence that non-competes that apply to independent contractors or sole proprietors tend to negatively affect competitive conditions to a lesser degree—or are restrictive, exclusionary, exploitative, or coercive to a lesser degree—than non-competes that apply to other workers. As noted by commenters who supported including independent contractors, non-competes' tendency to negatively affect competitive conditions by restricting workers' ability to change jobs or start businesses is not contingent on whether the worker is an employee or an independent contractor. While some commenters contended that independent contractors have more independence and more access to intellectual property than other workers, commenters did not provide evidence that this is the case. Moreover, even were this to be true, it would not justify an exclusion, because the Commission generally declines to exclude workers based on their access to intellectual capital or their independence for the reasons explained in Part V.D.

Furthermore, whether a worker is an employee or an independent contractor does not impact employers' ability to exploit imbalances of bargaining power or limit employers' ability to use less restrictive alternatives to non-competes to protect their intellectual property. While commenters who supported excluding independent contractors contended that independent contractors have more bargaining power than other workers, this contention is not backed by evidence. While some economists hypothesize that, theoretically, independent contractors may have more bargaining power vis-à-vis employers than employees do, they do not provide empirical evidence to support that assertion. Furthermore, as described by a report from the Treasury Department that was based on an extensive literature review, independent contractors may have less bargaining power than employees in many respects.[374]

The Commission is also not persuaded that non-competes are necessary to prevent ''free riding'' by independent contractors who use one firm's assets to benefit another. The final rule prohibits agreements that restrain a worker from working after the scope of employment has ended and does not prohibit agreements which prevent a worker from working for two firms simultaneously. In addition, any ''free riding'' may be addressed through less restrictive means, including through agreements prohibiting an independent contractor from using assets provided by one firm to benefit another.

Nor is the Commission persuaded that small businesses will be disproportionately harmed by a rule which prohibits non-competes for independent contractors. Commenters did not provide evidence to support their assertion that small businesses employ more independent contractors than larger ones.

The Commission agrees with the commenters who contended that excluding independent contractors may have the effect of excluding misclassified workers, who may be among the most vulnerable to exploitation and coercion. The recent overview by the U.S. Department of Labor (''DOL'') of the evidence on misclassification led it to conclude that although the prevalence of misclassification of employees as independent contractors is unclear, there is evidence that it is nonetheless ''substantial'' and has a disproportionate effect on workers who are people of color or immigrants because of the disparity in occupations most affected by misclassification, which include jobs in construction, trucking, delivery, home care, agriculture, personal care, ride-hailing services, and janitorial and building services.[375] The Commission also agrees with commenters' contentions that excluding independent contractors from the definition of ''worker'' could increase employers' incentive to misclassify workers as independent contractors. Indeed, misclassification is often motivated by attempts to evade the application of laws.

Because there is no reason to believe non-competes that apply to independent contractors or sole proprietors tend to negatively affect competitive conditions to a lesser degree, or are restrictive, exclusionary, exploitative, or coercive to a lesser degree, than non-competes that apply to employees—and in light of substantial evidence of widespread employee misclassification—the Commission declines to exclude independent contractors from the definition of ''worker.'' For this reason, the Commission also declines to incorporate the ''ABC'' test or other tests designed to differentiate between independent contractors and employees.

IV. Section 910.2: Unfair Methods of Competition

A. Introduction

1. Overview of the Commission's Findings and Determinations

In the NPRM, the Commission proposed to categorically ban employers from using non-competes with all workers, including existing agreements. However, the Commission sought comment on whether it should adopt different standards for non-competes with senior executives, and, if so, how it should define senior executives.[376] Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission in this final rule finds that non-competes with all workers are an unfair method of competition—although its rationale differs with respect to workers who are and are not senior executives.

The final rule provides that it is an unfair method of competition—and therefore a violation of section 5—for employers to, *inter alia,* enter into non-competes with workers on or after the final rule's effective date.[377] The Commission thus adopts a comprehensive ban on new non-competes with all workers. With respect to existing non-competes, *i.e.,* non-competes entered into before the final rule's effective date, the Commission adopts a different approach for senior executives [378] than for other workers.

[374] U.S. Treasury Dep't, Report, *The State of Labor Market Competition* (Mar. 7, 2022) (hereinafter ''Treasury Labor Market Competition Report'').

[375] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 FR 1638, 1735 (Jan. 10, 2024).

[376] NPRM at 3519.

[377] *See* § 910.2(a)(1)(i) and § 910.2(a)(2)(i).

[378] *See* § 910.1 (defining ''senior executive'').

Existing non-competes with senior executives can remain in force; the final rule does not cover them.[379] For workers who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date.[380] Employers must provide such workers with existing non-competes notice that the non-competes will not be enforced after the final rule's effective date.[381]

Specifically, with respect to workers who are not senior executives, the Commission determines that it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause; or represent to the worker that the worker is subject to a non-compete clause.[382] The Commission finds that with respect to these workers, these practices are unfair methods of competition in several independent ways:

- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets.
- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in product and service markets.
- The use of non-competes is exploitative and coercive conduct that tends to negatively affect competitive conditions in labor markets.
- The use of non-competes is exploitative and coercive conduct that tends to negatively affect competitive conditions in product and service markets.

In contrast, with respect to senior executives, the Commission determines that it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause entered into after the effective date; or represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date. The Commission does not find that non-competes with senior executives are exploitative and coercive. With respect to senior executives, the Commission finds that non-competes are unfair methods of competition in two independent ways:

- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in product and service markets.
- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets.

The final rule allows existing non-competes with senior executives to remain in force. Because the harm of these non-competes is principally that they tend to negatively affect competitive conditions (rather than exploiting or coercing the executives themselves), and due to practical concerns with extinguishing existing non-competes for such executives, the final rule prohibits employers only from entering into or enforcing new non-competes with senior executives.

Parts IV.B and IV.C set forth the findings that provide the basis for the Commission's determinations that the foregoing practices are unfair methods of competition under section 5 for these two categories of workers, respectively.[383] In these sections, the Commission also describes and responds to comments regarding the preliminary findings in the NPRM that informed its preliminary determinations related to unfair methods of competition.

2. Analytical Framework for Assessing Empirical Evidence

Before turning to the basis for its findings, the Commission describes the analytical framework it has applied in assessing the empirical evidence on non-competes. In the NPRM, the Commission discussed the existing empirical literature on non-competes and its assessment of those studies, including its preliminary view of which studies were more robust and thus should be given more weight.[384] In response, some commenters argued the Commission gave too much weight to certain studies or too little weight to others.[385]

The Commission notes that the methodologies of empirical studies on the effects of non-competes vary widely. In this final rule, based on the Commission's longstanding expertise assessing empirical evidence relating to the effects of various practices on competition, the Commission gives more weight to studies with methodologies that it finds are more likely to yield accurate, reliable, and precise results. In evaluating studies, the Commission utilized the following five principles that reflect best practices in the economic literature.

First, the Commission gives more weight to studies examining the effects of a change in legal status or a change in the enforceability of non-competes, and less weight to studies that simply compare differences between workers who are subject to non-competes and those who are not. Studies that look at what happens before and after a change in State law that affects the enforceability of non-competes provide a reliable way to study the effects of the change. This is especially true when only the enforceability of non-competes changes, and not other factors affecting firms and workers. If other substantial changes do not also occur around the same time, this study design often allows the researcher to infer that the change caused the effects—since the likelihood that confounding variables are driving the effects or outcomes is minimal.[386]

In contrast, other studies of the use of non-competes compare a sample of workers who are subject to non-competes with a sample of workers who are not subject to non-competes. The shortcoming of these studies is that they cannot easily differentiate between correlation and causation. For example, if such a study shows that workers with non-competes earn more, there could be many confounding reasons for this result. For example, employers may be more likely to enter into non-competes with workers who earn more. In contrast, a study showing that workers' earnings increase or decrease when non-

[379] *See* Part IV.C.3.

[380] *See* § 910.2(a)(1)(ii) and § 910.2(a)(1)(iii).

[381] *See* § 910.2(b).

[382] *See* § 910.2(a)(1).

[383] In addition to the findings described in Parts IV.B and C, the Commission finds that the use of non-competes by employers substantially affects commerce as that term is defined in section 5 and burdens a not insubstantial portion of commerce. The findings in Parts IV.B and C apply with respect to senior executives and other workers, whether considered together or respectively. The evidence establishes that non-competes affect labor mobility, workers' earnings, new business formation, and innovation, including empirical evidence specifically identifying cross-border effects with respect to earnings, *see infra* notes 464–468 and accompanying text, and innovation, *see infra* note 563 and accompanying text.

[384] *See* NPRM at 3484–93.

[385] The Commission discusses comments addressing specific studies in Parts IV.B, IV.C, and IV.D.

[386] In Parts IV.B and C, the Commission describes how these "enforceability" studies show that increased enforceability of non-competes results in various harms, such as reduced earnings, new business formation, and innovation. Notably, the available evidence also shows that workers are chilled from engaging in competitive activity even where a non-compete is likely unenforceable—for example, because they are unaware of the law or unable to afford a legal battle against the employer. *See* Part IV.B.3.a.i. The fact that many workers may not adjust their behavior in response to changes in State-level enforceability of non-competes suggests that the final rule could result in even greater effects than those observed in the research, particularly because it would require employers to provide workers with notice that their non-compete is no longer in effect, which would help correct for workers' lack of knowledge of the law. *See* § 910.2(b).

competes are made more or less enforceable provides much stronger evidence regarding the effect of non-competes, in isolation. Researchers studying non-competes are aware of this bias and frequently caution that estimates of the correlation between outcomes and the use of non-competes should not be misinterpreted as causal.[387]

Second, the Commission gives more weight to studies examining the effects of changes in non-compete enforceability and less weight to studies that simply compare economic outcomes between States where non-competes are more enforceable and States where non-competes are less enforceable. This latter category of studies is known as "cross-sectional studies of enforceability." Like studies based on the use of non-competes, these cross-sectional studies of enforceability cannot easily differentiate between correlation and causation. This is because differences between States that are unrelated to non-competes and their enforceability can easily pollute comparisons. For example, non-competes are less enforceable in California than in Mississippi, and the cost of living is higher in California than in Mississippi. However, the difference in the cost of living is likely to be due to underlying differences between the economies and geographies of the two States, rather than being attributable to non-competes. In contrast, studies examining how changes in enforceability of non-competes affect various outcomes—studies that look at what happens within States before and after a change in State law that affects the enforceability of non-competes—allow researchers to infer that the change caused the effects.[388]

Despite having this limitation, the Commission believes that cross-sectional studies of enforceability are still superior to the "use" studies described under the first principle. This is because although comparisons of different States may have unreliable results due to confounding variables—depending on which States are compared—"use" studies are inherently unreliable due to confounding effects. For example, because employers enter into non-competes more often with highly paid workers, all "use" studies related to worker earnings are inherently unreliable, although studies that utilize data on the use of non-competes but employ a design that plausibly identifies a causal effect may be less unreliable.

Third, the Commission gives more weight to studies assessing changes in the enforceability of non-competes in multiple States. This reduces the possibility that the observed change in economic outcomes was driven by an idiosyncratic factor unique to a particular State. For example, assume State X changed its laws to make non-competes less enforceable, and new business formation subsequently increased compared with other States. However, around the same time it changed its non-compete law, State X also enacted legislation to provide attractive tax incentives to entrepreneurs. It would be difficult to isolate the effect of the change in non-compete law from the effect of the tax law change. For this reason, the Commission gives more weight to studies that analyze the effects of multiple changes in enforceability. For example, if a study shows that, compared with other States that did not change their non-compete laws, new business formation rose not only in State X, but also in several other States that changed their laws to make non-competes less enforceable, the Commission would be more confident inferring that changes in non-compete law caused these effects.

Fourth, the Commission gives more weight to studies that use sophisticated, nuanced measures of enforceability, such as non-binary measures of non-compete enforceability that capture multiple dimensions of non-compete enforceability. This fourth guiding principle ensures accuracy and granularity in the measurement of non-compete enforceability.

A variety of different factors affect the enforceability of non-competes from State to State, including (among others) the permissible geographic scope and duration of non-competes and how high the employer's burden of proof is to establish that a non-compete is enforceable. Given the different factors involved, the overall level of non-compete enforceability from State to State falls along a spectrum; it is not as simple as whether non-competes are enforceable or not. Thus, scales which use binary measures miss nuance between States. This is true for enforceability overall (*e.g.,* scales which simply assign States to "enforcing" or "non-enforcing" categories) and for elements of enforceability (*e.g.,* scales which assess whether a non-compete is enforceable if a worker is fired with a yes or no answer). While no scale is perfect, scales which allow for multidimensionality and granularity measure non-compete enforceability (and thus the effects that stem from it) with a higher degree of accuracy.[389]

Fifth, the Commission gives more weight to studies in which the outcome studied by the researchers is the same as the outcome the Commission is interested in or is an effective proxy for the outcome the Commission is interested in. It gives less weight to studies that use ineffective proxies. For example, some outcomes are relatively easy to study. There is extensive data on workers' earnings at the State level, so researchers can simply use this data to study how changes in non-compete enforceability affect workers' earnings in a State. Other outcomes, however, may be more challenging to quantify directly, and thus researchers may use proxies for understanding the effect they are studying. For example, there is no single metric that measures innovation in the economy. For this reason, to learn about how non-competes affect innovation, a researcher might study the effect of changes in non-compete enforceability on the number of patents issued in the State as a proxy for innovation. However, proxies can sometimes be ineffective or inapt. For example, a study that analyzes the effect of non-compete enforceability on the number of patents issued is generally a weaker proxy for innovation than a study that also takes into account the quality of patents issued. For this reason, the Commission gives more weight to studies that measure the exact outcome of interest or studies that use effective proxies.

While these five guiding principles are important indicators of the relative strength of empirical studies evaluated by the Commission for the purpose of this final rule, the Commission's assessment of empirical studies was holistic and relied on its economic expertise. In addition to the guiding principles described in this Part IV.A.2, the Commission's holistic, expert assessment of the empirical evidence also included considering characteristics of studies important in any context, such as data quality, statistical precision, and other factors.

[387] *See, e.g.,* Starr, Prescott, & Bishara, *supra* note 68 at 73 ("Our analysis of the relationships between noncompete use and labor market outcomes . . . is best taken as descriptive and should not be interpreted causally."); Johnson & Lipsitz, *supra* note 80 at 711 ("These regressions [of firm investment on non-compete use] should be interpreted as correlations rather than causation, since the decisions to make these investments and use [non-competes] are made jointly.").

[388] Matthew S. Johnson, Kurt J. Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility,* Nat'l Bureau of Econ. Rsch. 2 (2023) (". . . cross-sectional variation in enforceability might be correlated with other unobserved differences across states.").

[389] Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes,* 87 U. Chi. L. Rev. 953 (2020).

In some instances, the Commission cites studies beyond those discussed in the NPRM. The Commission cites such studies only where they check or confirm analyses discussed in the NPRM, or where the Commission is responding to comments raising them. The Commission's findings do not rest on these studies, however, and they are not necessary to support its findings.

B. Section 910.2(a)(1): Unfair Methods of Competition—Non-Competes With Workers Other Than Senior Executives

The Commission now turns to the basis for its findings that non-competes with workers other than senior executives are an unfair method of competition. As explained in Part II.F, under section 5, the Commission assesses two elements: (1) whether the conduct is a method of competition, as opposed to a condition of the marketplace, and (2) whether it is unfair, meaning that it goes beyond competition on the merits. The latter inquiry has two components: (a) whether the conduct has indicia of unfairness, and (b) whether the conduct tends to negatively affect competitive conditions. These two components are weighed according to a sliding scale.

Non-competes with workers other than senior executives satisfy all the elements of the section 5 inquiry.[390] As described in Part IV.B.2, such non-competes are facially unfair because they are restrictive and exclusionary, and because they are exploitative and coercive. And as described in Part IV.B.3, such non-competes tend to negatively affect competitive conditions in labor markets and markets for products and services. As explained in Part II.F, the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions. The inquiry does not turn on whether the conduct directly caused actual harm in a specific instance. Here, the tendency of non-competes to impair competition is obvious from their nature and function. And even if this tendency were not facially obvious, the evidence confirms that non-competes do in fact have a negative effect on competitive conditions.

The Commission finds that the empirical research described in this Part IV.B supports findings related to workers other than senior executives.[391]

1. The Commission Finds That Non-Competes Are a Method of Competition, Not a Condition of the Marketplace

With respect to the first element, whether the conduct is a method of competition, the Commission preliminarily found in the NPRM that non-competes are a method of competition under section 5 because they are specific conduct undertaken by an actor in a marketplace, as opposed to merely a condition of the marketplace.[392] No commenters disagreed with this finding, and the Commission reaffirms its preliminary finding that non-competes are a method of competition.

2. The Commission Finds That Non-Competes Are Facially Unfair Conduct

The Commission finds that non-competes are facially unfair conduct under section 5 because they are restrictive and exclusionary. The Commission further finds that non-competes are facially unfair under section 5 because they are exploitative and coercive.

a. Non-Competes Are Restrictive and Exclusionary Conduct

Under section 5, indicia of unfairness may be present where conduct is restrictive or exclusionary, provided that the conduct also tends to negatively affect competitive conditions.[393] In the NPRM, the Commission explained that non-competes are restrictive conduct.[394] No commenters disputed this analysis, and the Commission reaffirms its preliminary finding that non-competes are restrictive.

The restrictive nature of non-competes is evident from their name and function: non-competes restrict competitive activity. They do so by restricting a worker's ability to seek or accept other work or start a business after the worker leaves their job, and by restricting competitors from hiring that worker. Because non-competes facially restrict competitive activity, courts have long held they are restraints of trade and proper subjects for scrutiny under the antitrust laws.[395]

The restrictions that non-competes impose on workers are often substantial. Non-competes can severely restrict a worker's ability to compete against a former employer. For most workers, the most natural alternative employment options are jobs in the same geographic area and in the same field. These are the very jobs that non-competes typically prevent workers from taking. Furthermore, for most workers, the most practical entrepreneurship option is starting a business in the same field. This is the very opportunity that non-competes typically prevent workers from pursuing. Moreover, the record before the Commission reflects that non-competes are often so broad as to force a worker to sit out of the labor market altogether.

In the NPRM, the Commission used the term ''restrictive'' to encompass both restrictive and exclusionary conduct.[396] In this final rule, in addition to finding that they are restrictive conduct, the Commission separately finds that non-competes are exclusionary conduct because they tend to impair the opportunities of rivals. Where a worker is subject to a non-compete, the ability of a rival firm to hire that worker is impaired. In addition, where many workers in a market are subject to non-competes, the ability of firms to expand into that market, or entrepreneurs to start new businesses in that market, is impaired.

For the foregoing reasons, the Commission finds that the use of non-competes with workers other than senior executives is facially unfair under section 5 because it is conduct that is restrictive or exclusionary.

b. Non-Competes Are Exploitative and Coercive Conduct

Conduct may violate section 5 where it is exploitative or coercive and tends to negatively affect competitive conditions.[397] Indeed, where conduct is exploitative or coercive, it evidences

[390] For the sake of readability, in this Part IV.B, the Commission refers to non-competes with workers other than senior executives as ''non-competes.''

[391] Some of the studies described in Part IV.B analyze non-competes between employers and workers across the labor force. Other studies analyze non-competes with particular populations of workers. In each of the studies described in Part IV.B, non-competes with workers other than senior executives represented a large enough segment of the sample that the study supports findings related to the effects of non-competes for such workers. Studies that focus primarily on non-competes for senior executives are described in Part IV.C, which explains the Commission's findings related to non-competes with senior executives.

[392] NPRM at 3504.

[393] *See* Part II.F.

[394] NPRM at 3500.

[395] *See, e.g., Am. Tobacco Co.,* 221 U.S. 106, 181–83 (1911) (holding that several tobacco companies violated Sections 1 and 2 of the Sherman Act due to the collective effect of six of the companies' practices, one of which was the ''constantly recurring'' use of non-competes); *Newburger, Loeb & Co., Inc.,* 563 F.2d 1057, 1082 (2d Cir.) (''Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired. Moreover, employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry.'') (internal citation omitted).

[396] NPRM at 3500 (''Non-competes also restrict rivals from competing against the employer to attract their workers.'').

[397] *See* Part II.F.

clear indicia of unfairness, and less may be necessary to show a tendency to negatively affect competitive conditions.[398]

In the NPRM, the Commission preliminarily found that non-competes with workers other than senior executives were exploitative and coercive because in imposing them on workers, employers take advantage of their unequal bargaining power.[399] The Commission also preliminarily found that non-competes are exploitative and coercive at the time of the worker's potential departure, because they force a worker to either stay in a job the worker wants to leave or force the worker to bear other significant harms and costs, such as leaving the workforce or their field for a period of time; relocating to a different area; violating the non-compete and facing the risk of expensive and protracted litigation; or attempting to pay the employer to waive the non-compete.[400]

The Commission received an outpouring of comments on the question of whether non-competes were exploitative or coercive. Thousands of workers described non-competes as pernicious forces in their lives that took advantage of their lack of bargaining power and forced them to make choices detrimental to their finances, their careers, and their families. Above all, the predominant themes that emerged from the comments were powerlessness and fear.

Thousands of workers reported feeling powerless to avoid non-competes, either because the worker needed the job or because non-competes were pervasive in the worker's field. Hundreds of workers reported non-competes were unilaterally imposed on them. Workers overwhelmingly reported that they did not bargain over non-competes, did not receive compensation for non-competes, and were not represented by counsel in connection with non-competes, with only rare exceptions.

And hundreds of workers reported that even where they wanted a job with better pay or working conditions, or to strike out on their own, the fear of litigation from a deep-pocketed employer or the fear of being without work prevented them from doing so. Hundreds of workers described how this fear coerced them into remaining in jobs with poor conditions or pay, including dangerous or toxic work environments; into leaving an industry or profession that they invested, trained, studied, or were experienced in, damaging or derailing their careers; into moving away from their home, uprooting or separating their families; or into enduring long-distance commutes, which made it harder to care for and spend precious time with their loved ones. Many workers described how this fear hung above them even if they thought the non-compete was overbroad and probably unenforceable under State law, because having to defend a lawsuit from an employer for any length of time would devastate their finances.

Based on the entirety of the record, for the following reasons, the Commission finds non-competes with workers other than senior executives are exploitative and coercive because they are unilaterally imposed by a party with superior bargaining power, typically without meaningful negotiation or compensation, and because they trap workers in worse jobs or otherwise force workers to bear significant harms and costs.

i. Non-Competes With Workers Other Than Senior Executives Are Unilaterally Imposed

The Commission finds that employers almost always unilaterally impose non-competes, exploiting their superior bargaining power to impose—without any meaningful negotiation or compensation—significant restrictions on workers' abilities to leave for better jobs or to engage in competitive activity.

The Commission finds that employers have significantly more bargaining power than workers. Most workers, especially workers other than senior executives, depend on income from their jobs to get by—to pay their rent or mortgage, pay their bills, and put food on the table. The loss of a job or a job opportunity can severely damage workers' finances and is far more likely to have serious financial consequences for a worker than the loss of a worker or a job candidate would have for most employers.

The Treasury Department, in a report based on an extensive literature review, finds that firms generally have considerable labor market power.[401] The report states that concentration in particular industries and locations can increase employers' labor market power.[402] However, the report explains that, even in the absence of concentration, firms have significant labor market power due to a variety of factors.

As the report notes, some of these factors are inherent in the firm-worker relationship. The report states that workers are at an informational disadvantage relative to firms, often not knowing what other workers earn or the competitive wages for their labor.[403] The report states further that workers often have limited or no ability to switch locations and occupations quickly and may lack the financial resources to support themselves while they search for jobs that pay more and better match their skills and abilities.[404] According to the report, these conditions often enable firms to exert market power even in labor markets that are not highly concentrated.[405]

In addition to factors inherent to the employer-worker relationship, the report concludes that firms use a wide range of practices to restrain competition for workers, including sharing wage information and conspiring to fix wages with other firms; agreeing not to hire other firms' workers; and adopting non-competes, mandatory arbitration agreements, and overbroad NDAs.[406] The report also states that practices such as outsourcing and worker misclassification have further diminished workers' market power.[407] Overall, the report finds that employers' labor market power has resulted in a 20% decrease in wages relative to the level in a fully competitive market.[408]

The Commission finds that employers are able to exploit their considerable labor market power—and indeed routinely do so—with respect to non-competes imposed on workers other than senior executives. Employers are repeat players likely to have greater experience and skill at bargaining than individual workers in the context of negotiating employment terms such as non-competes.[409] Research has found that employers present non-competes in standard-form contracts,[410] which workers are unlikely to read,[411] and that

[398] *See id.*

[399] NPRM at 3502–04.

[400] *Id.* at 3504.

[401] Treasury Labor Market Competition Report, *supra* note 374 at i–ii.

[402] *Id.* at i.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.* at ii.

[408] *Id.*

[409] *See, e.g., Samuel Stores, Inc.* v. *Abrams,* 108 A. 541, 543 (Conn. 1919); *Sunder Energy, LLC* v. *Jackson,* 305 A.3d 723, 753 (Del. Ct. Chancery 2023).

[410] Starr, Prescott, & Bishara, *supra* note 68 at 72 (''Taken together, the evidence in this section indicates that employers present (or employees receive) noncompete proposals as take-it-or-leave-it propositions.'').

[411] *See, e.g.,* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction,* 96 Harv. L. Rev. 1173 (1983); Russell Korobkin, *Bounded Rationality, Standard-Form Contracts, and*

Continued

workers rarely bargain over non-competes and rarely seek the assistance of counsel in reviewing non-competes.[412] Many workers also lack the legal training or legal knowledge necessary to understand whether a particular non-compete is enforceable or the consequences of entering into a non-compete. The available evidence indicates that many workers are not aware of the applicable law governing non-competes or their rights under those laws.[413] Research has also found that employers exploit their power over workers by providing them with non-competes after they have accepted the job offer—and in many cases, on or after their first day of work—when the worker's negotiating power is at its weakest, since the worker may have turned down other job offers or left their previous job.[414]

The comment record provides strong support for the Commission's finding that non-competes are coercive and exploitative because they are typically unilaterally imposed by employers on workers other than senior executives. Illustrative examples of the comments the Commission received include the following:

• I am a practicing OB/GYN physician in Shreveport, LA. . . . I was put into a non-negotiable, vague non-compete with NO expiration date. . . . I needed a job. I was in a large amount of debt with accumulating interest during my four years of residency with a minimal salary. Honestly, I could not afford an attorney. So naively I trusted that the people that had been training me for the past 4 years would not take advantage of me in a contract. I did not have the ability to seek advice on ''how'' to negotiate a contract with my mentors since my mentors were the ones who wrote the contract.[415]

• As [a] physician who recently negotiated a new contract, I support FTC changes to the non-compete rules. . . . All three institutions [I considered working for] had unreasonable and onerous non-competes. Essentially making it impossible to get another job in the entire state of NJ—not just a few mile radius but two thirds of the state. . . . Non-competes are never negotiable even when hiring a lawyer to review and negotiate the contract. Hospitals refused to negotiate on the majority of the contract citing it is [an] across the board provision that cannot be altered.[416]

• I'm a worker that has had to consider whether to take a job that requires signing a no-compete agreement . . . . Several times in my career, after weeks of interviewing and salary negotiation, I've found myself facing a required no-compete agreement that would drastically limit my future career options and negotiating power. Several times I've accepted these agreements because I had already turned down competing offers and found myself with limited options.[417]

• I'm a project manager at an Interior Design & Home Staging company in Manhattan; we're the largest staging company on the East Coast. After I accepted my job offer and went in to file paperwork, I was very briefly walked through what this non-compete means (the details were not made entirely clear; I believe they left it intentionally murky) and it was buried deep in the new employee rules and regulations packet I needed to read and sign at my onboarding. I personally am very against these agreements because, as mine states, I cannot work with ''a competing staging company'' or for any of the clients of my current company. Again, we're the largest staging firm on the east coast and have a lot of clients (we do over 100 stagings per year). Essentially, I am completely shut out of working in the industry in NYC as there are only a handful of other staging companies that can pay me a living wage to do so.[418]

• You might say that we might be able to negotiate out of a non-compete in our contract, but that is simply not true. In my hospital, I was already established, owning a house and having kids in school in a spouse in a career when the Hospital came forward and sit on my next contract renewal that I had no choice, but to sign a noncompete. They had me over a barrel. At my next contract negotiation, I try to negotiate out of the noncompete, with less salary or less benefits, and it was a nonstarter. There is zero tolerance for negotiating out of the noncompete.[419]

• At the end of 2018, as a Manager at a small business (150 employees) in a niche technology industry, I was offered shares in our company as we were acquired by a Private Equity firm. . . . I worked with a company-provided attorney on an Employment Agreement. This agreement offered a 6-month severance with a 1-year non-compete period, which I negotiated down to a 6-month non-compete to match the severance period. Later that month, I was sent an additional, previously unseen 120-page Share Agreement that governed how I would vest the shares I had earned. I didn't realize it at the time, but buried toward the end of this document was another non-compete that had a much longer timeframe dictated—1 year from when I no longer held any shares. As it would potentially take up to 6 years for the company to sell again, that meant an incredibly long and indefinite sounding time period. I was given only one business day to review this agreement, and was sent a signature packet the following day. I honestly thought I was signing my Employment Agreement negotiated with a company attorney, not the share agreement that neither myself nor the attorney had reviewed, and which I had only received the day prior.[420]

• Desperate to obtain an entry level job in the Accounting field in which I am currently obtaining my Associate's degree, I was presented with an offer of employment and a non-compete agreement contract to sign. Because I needed to pay rent, I signed it.[421]

• On the first day of my husband's employment, without prior notice, an extensive 2 year non-compete clause was put in his employment contract and while it was noted within the clause he could seek counsel, when you are in the middle of your first day of work it's not practical. In addition, for most people, if it is your first experience with a non-compete, you likely do not have the funds to pay a $750 per hour lawyer to advise and negotiate on your behalf, nor realize the possible long-term consequences.[422]

Many commenters agreed with the Commission's preliminarily finding that employers generally have considerable labor market power. Even commenters opposing the NPRM did not generally dispute the notion that there is unequal bargaining power between employers and workers. Many workers stated that non-competes are pervasive in their industry, meaning they could not find a job without one. Many commenters stated that high wages or skills do not automatically translate into more bargaining power or sufficiently mitigate the harms from non-competes, especially in concentrated markets or markets where so many employers use non-competes that workers effectively have no choice but to sign them. Commenters also said that underrepresented groups may have even less bargaining power to negotiate non-competes and are less likely to have the resources for litigation, which could have an increased deterrent effect on worker mobility.

Hundreds of commenters stated that workers are rarely, if ever, able to negotiate their non-competes because non-competes are typically presented in a take-it-or-leave-it fashion. These comments spanned both lower-wage workers and workers in high-wage industries.[423] Workers often stated that they were ''forced'' to sign a non-

Unconscionability, 70 U. Chi. L. Rev. 1203, 1217 (2003).

[412] Starr, Prescott, & Bishara, *supra* note 68 at 72.

[413] J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability,* Forthcoming, J. L. Stud. 10–11 (2022).

[414] Marx (2011), *supra* note 81 at 706.

[415] Individual commenter, FTC–2023–0007–4414.

[416] Individual commenter, FTC–2023–0007–10547.

[417] Individual commenter, FTC–2023–0007–12428.

[418] Individual commenter, FTC–2023–0007–12480.

[419] Individual commenter, FTC–2023–0007–14706.

[420] Individual commenter, FTC–2023–0007–2347.

[421] Individual commenter, FTC–2023–0007–2600.

[422] Individual commenter, FTC–2023–0007–5933.

[423] Industries that the Commission considered as higher wage industries included but were not limited to engineers, entertainment (namely on-air talent), entrepreneurs, financial services, dentists, physicians, sales workers, tech industry workers, and veterinarians. Industries were assessed as high wage based on BLS occupational wage data. BLS, *Occupational Employment and Wage Statistics, https://www.bls.gov/oes/tables.htm* (based on the May 2022 National XLS table).

compete. Very few workers said they were able to decline signing a non-compete and still be hired or employed. An employment law firm also agreed with the Commission and stated that non-competes are rarely subject to negotiation.

Confirming the research described in this Part IV.B.2.b.i, many workers—including highly paid and highly skilled workers—stated that they did not receive notice that they would be required to sign a non-compete until after accepting a job offer. Some workers said they were told of the non-compete after accepting the job but before starting work. Many workers who described when they were notified of a non-compete said it was on their first day of work or even later. Many workers stated that they were required to sign their non-compete after a merger or acquisition—*i.e.,* after they were already on the job but there was a change in ownership of the company. For example, a trade organization stated that it is common for the purchaser of a business to impose non-competes on its workers, which may trap workers in an organization different from the one they originally agreed to work for. An employment law firm commented that even highly paid or highly skilled workers do not always receive notice of non-competes with the employment offer.

Many workers also stated that non-competes are often hidden or obscured. Several workers said their non-compete was buried in other paperwork or confusingly worded or vague. Some commenters stated that their employer refused to allow them to have a copy of their non-compete. Many workers said their employers gave them misleading or incorrect information about the terms or enforcement of non-competes. Each of the above categories included not only workers from low-wage industries, but also workers from high-wage industries. While these practices appear to be commonplace, based on the comments, the Commission also notes that even workers who knew about non-competes before accepting the job offer—and who did not report being misled about the non-compete—did not report bargaining or negotiating over it.

Only a small number of workers reported any negotiating over non-competes. For example, a sales worker said they were able to negotiate a non-compete, though that worker still supported the proposed rule. A surgeon group stated hospitals were willing to negotiate over non-competes, but that hospitals use the non-competes as a negotiating tactic to drive down surgeon salaries.

Few workers who submitted comments reported being compensated for signing a non-compete. Among those workers who did report receiving compensation, most still said they considered their non-competes to be exploitative or coercive. For example, some workers said they were laid off and then required to sign a non-compete as a condition for receiving severance. A few workers said their employer had threatened to withhold their commissions and/or pay on departure if they did not sign a non-compete. One worker reported never receiving the compensation associated with a non-compete, because they were terminated two months after signing.

In addition, the Commission finds that employers frequently impose non-competes even when they are unenforceable under State law. An economist suggested that non-competes may be used in States in which they are unenforceable because the employer hopes the State's policy might change, or the employer might be able to forum-shop to apply the law of another jurisdiction more favorable to non-competes. Some commenters stated that firms may remind workers they are subject to a non-compete upon departure even when those non-competes are unenforceable because they hope that workers and competitors will abide by them.

These comments that employers often use unenforceable non-competes are supported by research finding that employers frequently use non-competes even when they are unenforceable under State law.[424] This research suggests that employers may believe workers are unaware of their legal rights, or that employers may be seeking to take advantage of workers' lack of knowledge of their legal rights or the challenges workers face enforcing their rights.

A far smaller number of commenters—a group that included many businesses and trade organizations, and very few workers—argued that non-competes were not exploitative or coercive. An industry organization said non-competes are understandable to a layperson with respect to their geographic scope, time in effect, and industry to which they apply, while an alternative trade secret case would be more complex. But even if workers understand the basic terms of non-competes, that does not alter the Commission's core concern that non-competes are exploitative and coercive because they take advantage of unequal bargaining power between employers and workers and force workers to stay in jobs they want to leave or otherwise bear significant harms or costs. It also does not alter the Commission's concern that non-competes tend to negatively affect competitive conditions. Moreover, the Commission notes that the available evidence indicates that many workers are not aware of the applicable law governing non-competes or their rights under those laws.[425] In addition, many commenters stated that non-competes were not disclosed to them before they started their job. Furthermore, the Commission addresses why trade secret law is a less restrictive alternative for protect employers' legitimate interests in Part IV.D.2.

A few commenters stated that unequal bargaining power does not constitute an unfair method of competition. In response, the Commission notes that it does not find that unequal bargaining power itself is an unfair method of competition; rather, unequal bargaining power informs its analysis of exploitation and coercion.

The comment record indicates that while some highly paid workers may seek the assistance of counsel when negotiating non-competes, many do not. Commenters did not present studies or other quantitative evidence that undermines the finding in Starr, Prescott, & Bishara that less than 8% of workers seek assistance of counsel in connection with non-competes.[426] The Commission thus finds that the vast majority of workers lack assistance of counsel in connection with entering non-competes. The Commission believes that its definition of senior executives, discussed in Part IV.C.4, captures those workers who are most likely to seek assistance of counsel. To the extent any other individual workers seek assistance of counsel and/or are able to actually bargain over non-competes sufficient that a given non-compete is not exploitative and coercive, the Commission still finds that such non-competes are unfair methods of competition for the independent reason that they are restrictive and exclusionary conduct that tends to negatively affect competitive conditions.

Overall, the comments provide strong support for the Commission's finding that, with respect to workers other than senior executives, employers almost always unilaterally impose non-competes—exploiting their superior bargaining power to significantly restrict workers' abilities to leave for better jobs or engage in competitive activity.

[424] Starr, Prescott, & Bishara, *supra* note 68 at 81.

[425] *See supra* note 413 and accompanying text.

[426] Starr, Prescott, & Bishara, *supra* note 68 at 72.

ii. Non-Competes With Workers Other Than Senior Executives Trap Workers in Jobs or Force Them to Otherwise Bear Significant Harms and Costs

The Commission finds that non-competes are exploitative and coercive because they force workers to either stay in jobs they want to leave or bear other significant harms and costs, such as leaving the workforce or their field for a period of time; relocating out of their area; or violating the non-compete and facing the risk of expensive and protracted litigation. In addition, the Commission finds non-competes exert a powerful *in terrorem* effect: they trap workers in jobs and force them to bear these harms and costs even where workers believe the non-competes are overbroad and unenforceable, due to workers' fear that having to defend a lawsuit from their employer for any length of time would devastate their finances or ruin their professional reputations.

The comment record provides strong support for this finding. Many workers submitted comments supportive of the Commission's preliminary finding that non-competes coerce workers into remaining in their current jobs. Many workers reported staying in their jobs because they feared harm to their careers if they were forced out of their field; feared having to relocate or endure a lengthy commute due to a non-compete; or feared their non-competes would cause them to be unemployed if they left. Several workers reported they were unable to take a specific desired job because of a non-compete. Many workers recounted how non-competes trapped them in jobs with poor working conditions or where they were subject to illegal conduct, including sexual harassment.[427] Some workers said they were subject to particularly broad, even global, non-competes, meaning leaving their field was their only option if they left their current job. These comments spanned both lower-wage workers and workers in high-wage industries.

Illustrative examples of the comments the Commission received include the following:

- I am a journalist who has been forced to move across the country three times, and leave my field entirely for one year, in order to comply with stringent non-compete agreements. . . . In [one] situation, I was stuck working for abusive management who fostered a toxic and abusive workplace, and I had to work there for more than a year until I could find a job in another city entirely because they had threatened to sue me under the non-compete if I left and worked for another local station. . . . [E]ven if these clauses are unenforceable, as we've all heard before, who can afford the legal representation to go up against a corporation and their lawyers when the lawsuit threat comes? My life would have been very different if I weren't trapped by non-competes at points in my career.[428]
- As a veterinarian I support the elimination of non-compete agreements. In our profession they still are overwhelmingly the normal expectation with contracts. . . . [C]ompanies use the fear of litigation to enforce them. As veterinary medicine very quickly becomes more corporate owned, basically they pit us as a singular employee against large corporations that have substantial means both financially and legally. No reasonable employee wants to take on that battle or even can financially take on that battle. So regardless if the clauses are 'unenforceable' they are enforced via intimidation. . . . When [my] job was a terrible fit and my boss ultimately ended up 'not renewing my contract' I was still left with a noncompete. This basically eliminated my ability to work within a reasonable distance of our home. I ended up commuting an hour and 15 minutes one way for 10 months until my husband, myself, and my very young child were able to move closer to my new job. While it was likely legally unreasonable in nature, I did not have the resources financially to even consider the legal battle that would have had to happen for reconsideration and I desperately needed an income to continue to pay the student debt that comes with being a young doctor. Furthermore I had a baby that needed my focus as well.[429]
- I was fired unjustly 11/2021 for declining the Covid vaccine. My medical and religious exemptions were both denied. In addition to this, I was required by my former employer contract to abide by the two-year 10 mile restrictive covenant. This greatly hindered my ability to find employment, and I was out of work for approximately three months. I could only find part-time work for a fraction of my former salary. Had I not had the noncompete clause, I could have found a full-time job almost immediately.[430]
- Unfortunately, the average dental school graduate has nearly $300,000 in student loan debt, and most new dentists are unable to make their practice-ownership dreams a reality immediately after residency. Thus, we rely on entry-level associate dentist positions to gain experience, pay off debt, and become fiscally/professionally prepared to become practice owners. Much to my dismay, upon interviewing for my first associate dentist position, I quickly realized how non-competes are being used in the dental profession to prevent vulnerable young dentists like myself from taking the next step in our careers. . . . Although dental associate positions come with relatively high compensation, it doesn't make this issue any less problematic.[431]
- My daughter had an inter-state non-compete enforced as a minimum wage medical scribe. Originally she was working with a medical scribe company in Indiana prior to Covid. Due to COVID and graduating from college she then moved to our home in Oregon. She applied for a medical scribe job in Oregon with a company that did not provide any scribe services in Indiana. But her original scribe company had 1 ''office'' they were providing scribe services to in Salem, Oregon. My daughter had applied with the local scribe company to provide services but when examined further found that her original scribe company from Indiana was going to enforce a $5000 non-compete buy-out fee on her to provide the services in Salem, Oregon that were within the sphere of restriction for her ''new'' local scribe opportunity.[432]

Many commenters explained that non-competes forced them to relocate and described the toll the relocation took on their families. Other commenters stated that their families have been forced to live apart, or they had been separated from elderly relatives, due to a non-compete forcing the relocation of one of the family members. Many commenters described how long commutes undertaken to avoid non-competes increased transportation costs and caused the worker to lose precious time with their families.

The comment record bolsters the Commission's finding that employers wield non-competes to coerce and exploit workers into refraining from competitive activity even where non-competes are unenforceable. Many workers explained that they—and others in their industry—abided by non-competes, even where they believed the non-compete was overbroad and likely unenforceable. According to a law firm specializing in executive compensation, even workers who can afford counsel may be unwilling to mount a long and uncertain legal battle to challenge a non-compete. The firm said employers almost always have deeper pockets and more access to counsel than individual workers, making workers more reluctant to litigate. Commenters further stated that employers may be able to deduct litigation costs as a business expense, giving them the wherewithal to enforce their non-competes.

Many workers with non-competes stated that they feared legal action from their employer or enormous legal fees if they left their current job, and most of those workers said they could not afford litigation. Workers also stated that they are reluctant to engage in litigation against an employer because it would harm their reputation in their industry.

Many workers reported being threatened with litigation over a non-

[427] These comments are addressed in greater detail in Part IV.B.3.a.iii.

[428] Individual commenter, FTC–2023–0007–0747.

[429] Individual commenter, FTC–2023–0007–2855

[430] Individual commenter, FTC–2023–0007–7561.

[431] Individual commenter, FTC–2023–0007–8858.

[432] Individual commenter, FTC–2023–0007–15249.

compete when they attempted to leave an employer. Some commenters said their non-competes contained additional clauses making litigation more difficult, such as attorneys' fee-shifting provisions or forced arbitration. Other workers feared having to pay financial penalties or feared having their compensation clawed back if their employer claimed they violated the non-compete. Each of the above comment categories included numerous comments from workers in high-wage industries.

Commenters asserted that employers have several advantages in litigation, further increasing the risk of challenging a non-compete. A commenter said even an extremely overbroad non-compete may be enforceable because a court can modify it to reduce its scope or duration. An employment attorney said employers who use overbroad non-competes to stifle competition suffer few if any negative consequences for doing so. The employment attorney further said that most employers do well even in a legal regime that nominally disfavors non-competes, due to the chilling effect of the threat of litigation. One researcher cited in the NPRM stated that non-competes have a powerful chilling effect because State laws generally do not prohibit employers from requiring employees to sign overbroad non-competes. Accordingly, the researcher recommended that non-competes be banned rather than restricted in scope, thereby preventing the possibility of lawsuits (and the threat thereof).

No commenters submitted studies or empirical evidence to contradict or otherwise call into question the research cited in the NPRM finding employers frequently use non-competes even when they are unenforceable under State law. Many commenters said they perceived non-competes to be a tool used to intimidate workers, and others specifically said they had been intimidated when their employers took legal action against other workers who left. These comments spanned workers in both lower-wage and high-wage industries.

The comments reflected that fields with high compensation levels were not immune from coercion and exploitation, and that, to the contrary, specialization can increase employers' ability to coerce and exploit workers. For example, some commenters said highly trained and/or specialized workers face heightened challenges in finding a job that does not violate a non-compete without relocating or become entirely unemployable, given the smaller number of such specialized jobs available. One commenter said that many workers are compensated highly because they are in a small field or have a niche skillset, meaning non-competes significantly limit their ability to find another job in their field. Some commenters in professions requiring advanced education also submitted comments stating that significant student loan debt decreased their bargaining power or increased the financial risk of attempting to change jobs. An employment law firm stated that highly paid or highly skilled workers in roles that are not limited to a single industry or business, such as finance or human resources, are more likely to be able to find employment in another industry, while those with training and expertise in a particular industry or type of business are at a greater risk of unemployment. Some medical organizations and others pointed out that non-competes can be particularly exploitative and coercive for professions such as physicians that require State licenses, credentials, and insurance, making relocation even more difficult.

A far smaller number of commenters claimed non-competes are not exploitative or coercive and do not trap workers in jobs or force workers to bear significant harms or costs. Several commenters argued that, because non-competes are often not exploitative and coercive at the time of contracting, they are also not exploitative and coercive at the time workers seek to leave their jobs. According to these commenters, to the extent a non-compete is bargained for and fairly compensated, that same non-compete does not become exploitative and coercive at the time of departure. In response, the Commission notes that commenters overwhelmingly reported workers rarely bargain in connection with, or receive compensation for, non-competes,[433] and the mere existence of compensation does not automatically make that compensation fair.

Some business and business association commenters contended that workers with higher earnings can more easily forgo wages to wait out non-competes, and thus do not feel forced to stay in their jobs. These commenters also argued that non-competes for these workers are often tied to equity or severance, which the worker can choose to forego if they want to compete. These comments are contrary to the extensive comment record indicating that even workers with higher earnings cannot afford to forgo compensation and feel forced to stay in jobs they want to leave due to non-competes. To the extent any such individual workers bargained for or received compensation for a non-compete, the Commission still finds that such non-competes are unfair methods of competition for the independent reason that they are restrictive and exclusionary conduct that tends to negatively affect competitive conditions.

[433] *See* Part IV.B.2.b.i.

Overall, the comments provide strong support for the Commission's finding that non-competes are exploitative and coercive because they trap workers in jobs or force them to bear significant harms and costs.

For the foregoing reasons, the Commission finds that non-competes with workers other than senior executives are exploitative and coercive and thus facially unfair under section 5.

3. The Commission Finds That Non-Competes Tend To Negatively Affect Competitive Conditions

Based on the Commission's expertise and after careful review of the rulemaking record, including the empirical research and the public comments, the Commission finds that non-competes tend to negatively affect competitive conditions in labor markets for the reasons explained in this Part IV.B.3.a. (As explained in Part IV.B.3.b, the Commission further finds that non-competes tend to negatively affect competitive conditions in markets for products and services.)

As explained in Part II.F, the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions. The inquiry does not turn on whether the conduct directly caused actual harm in a specific instance. Here, the tendency of non-competes to impair competition is clear from their nature and function. In any event, the evidence confirms that non-competes do in fact have a negative effect on competitive conditions.

The Commission turns now to the significant evidence of harm to competition in labor markets from non-competes, including evidence of suppressed labor mobility, suppressed earnings, and reduced job quality.

a. Non-Competes Tend to Negatively Affect Competitive Conditions in Labor Markets

The Commission finds that non-competes tend to negatively affect competitive conditions in labor markets by inhibiting efficient matching between workers and employers.

Labor markets function by matching workers and employers. In a competitive labor market, workers compete for jobs by offering their skills and time (*i.e.,* their labor services) to

employers, and employers in turn compete for those labor services by offering better pay, benefits, or other elements of job satisfaction.[434] A worker who is seeking a better job—more pay, better hours, better working conditions, more enjoyable work, or whatever the worker may be seeking—can enter the labor market by looking for work. Prospective employers can compete for the worker's services, and the worker's current employer may also compete by seeking to retain the worker—*e.g.,* by offering a raise, promotion, or other enticement.[435] Ultimately, the worker chooses the job that best meets their objectives, and the employer chooses the worker who best meets theirs. In general, the more jobs and the more workers that are available—*i.e.,* the more competing options the worker and employer each have—the stronger the match will be.

Thus, a key component of a competitive labor market is voluntary labor mobility. Choice—the ability of market participants to satisfy their preferences where possible—facilitates competition. In the labor market, voluntary labor mobility reflects both the choices or preferences of workers and that of rival competitors.

However, non-competes introduce a major friction that tends to impair the competitive functioning of labor markets. Non-competes inhibit the efficient matching between workers and employers via the competitive process because, even if a competing employer offers a better job and the worker wants to accept that better job, the non-compete will prevent the worker from accepting it if the new job is within the scope of the non-compete (or if the worker is unsure or afraid it may be). Meanwhile, the employer who would like to hire the worker is prevented from competing to attract that talent. The result is less competition among employers for the worker's services and less competition among workers for available jobs. Since the worker is prevented from taking many jobs that would otherwise be available, the worker may decide not to look for a job at all. Or the worker may enter the labor market but take a job in which they are less productive, such as when a non-compete forces a worker to leave their field of expertise and training.

In this way, non-competes frustrate competitive processes in labor markets. In competitive markets, the ''unrestrained interaction of competitive forces'' yields a variety of benefits such as lower prices for consumers, better wages and working conditions for workers, and higher quality products.[436] In contrast, when ''[i]ndividual competitors lose their freedom to compete'' in the labor market, the importance of worker preference in setting the level of wages and working conditions is reduced, which is ''not consistent with [the] fundamental goal of antitrust law.'' [437] The restraint imposed by non-competes on the interaction of competing employers and competing workers directly undercuts the functioning of the competitive process in determining wages and working conditions. Accordingly, non-competes facially harm the competitive process and tend to negatively affect competitive conditions in labor markets. Evidence that non-competes have in fact had actual detrimental impacts on outcomes of the competitive process—such as workers' earnings, new business formation, and innovation—demonstrate that non-competes do in fact harm competition.

The Commission notes that the actual effect of any one individual non-compete on the overall level of competition in a particular labor market may be marginal or impossible to discern statistically. However, as explained in Part I.B.2, non-competes are prevalent across the U.S. labor force. The empirical literature and other record evidence discussed in this section reflect that non-competes, in the aggregate, negatively affect competitive conditions in labor markets—resulting in harm not only to workers subject to non-competes and the employers seeking to hire them, but also workers and employers who lack non-competes.

The Commission finds that evidence of the effects of non-competes on workers' labor mobility and earnings is sufficient to support its finding that non-competes tend to negatively affect competitive conditions in labor markets.[438] In addition, the Commission believes that this finding is further bolstered by strong qualitative evidence that non-competes reduce job quality.[439]

The Commission's findings relating to labor mobility and earnings are principally based on the empirical evidence described in Parts IV.B.3.a.i and ii. However, the comments provide strong qualitative evidence that bolsters these findings. Furthermore, the Commission notes that the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions; empirical evidence of actual harm is not necessary to establish that conduct is an unfair method of competition. In the case of non-competes, however, there is extensive empirical evidence, as well as extensive corroborating public comments, that non-competes negatively affect competitive conditions in labor markets.

i. Non-Competes Suppress Labor Mobility

Evidence of Suppressed Labor Mobility

The Commission finds that non-competes tend to negatively affect competitive conditions in labor markets by suppressing labor mobility, which inhibits efficient matching between workers and employers. The evidence indicates that non-competes reduce labor mobility. Several empirical studies find that non-competes limit the movement of workers between firms and reduce the pool of labor available to existing employers and potential entrants.[440]

In the NPRM, the Commission described the empirical research on non-competes and labor mobility.[441] The Commission stated that, across the board, studies of non-competes and labor mobility find decreased rates of mobility, measured by job separations, hiring rates, job-to-job mobility, implicit mobility defined by job tenure, and within-industry and between-industry mobility.[442] Based on that body of empirical evidence and its review of the record as a whole following the comment period, the Commission finds that non-competes reduce labor mobility.

Several empirical studies find that non-competes reduce labor mobility. Some of these studies analyze the effects of non-competes on labor mobility across the labor force.

A study by Johnson, Lavetti, and Lipsitz examined the impact on labor mobility of all legal changes in the enforceability of non-competes from 1991 to 2014 across the entire labor force.[443] This study finds that

[434] *See* Treasury Labor Market Competition Report at 3–4.

[435] *See id.*

[436] *See N. Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

[437] *See NCAA* v. *Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 106–07 (1984).

[438] *See* Part IV.B.3.a.i–ii.

[439] *See* Part IV.B.3.a.iii.

[440] As the Commission stated in the NPRM, it does not view reduced labor mobility as a harm in and of itself. *See* NPRM at 3490. Instead, the Commission finds that the empirical evidence showing non-competes reduce labor mobility is powerful evidence that non-competes do indeed restrict labor market competition by inhibiting the movement of workers between firms—and therefore efficient matching between workers and firms.

[441] NPRM at 3489.

[442] *Id.*

[443] Johnson, Lavetti, & Lipsitz, *supra* note 388. This study was updated in 2023. The updated

substantial decreases in non-compete enforceability cause a significant increase in job-to-job mobility in industries that use non-competes at a high rate.[444]

Evan Starr's study comparing workers in occupations that use non-competes at a high versus low rate finds that a State moving from mean enforceability to no enforceability would cause a decrease in employee tenure for workers in high-use occupations of 8.2%, compared with those in low-use occupations. Tenure in this study serves as a proxy for mobility, since tenure is the absence of prior mobility.[445] This use of a proxy means the outcome of interest is not precisely measured, and the study is less robust than those that examine changes in legal enforceability of non-competes. The study's findings are, however, consistent with the other studies finding that non-competes reduce labor mobility.

Starr, Prescott, and Bishara's study of non-compete use likewise finds that having a non-compete was associated with a 35% decrease in the likelihood that a worker would leave for a competitor.[446] While this finding is based on the use of non-competes (and is accordingly given less weight), the authors also survey workers, who report that the cause of their reduced mobility is their non-compete. The study finds that the mechanism underlying reduced mobility is not whether non-competes are legally enforceable or not, but rather, it is the worker's belief about the likelihood that their employer would seek to enforce a non-compete. Workers who did not believe that employers would enforce non-competes in court were more likely to report they would be willing to leave for a competitor.[447] This study thus not only supports the Commission's finding that the use of non-competes impacts labor mobility, but also supports the Commission's finding that non-competes can exert an *in terrorem* effect on labor mobility even where they are unenforceable.[448] This supports the need to ensure that workers are aware of the prohibition on non-competes.[449]

Other studies analyze how non-competes affect the labor mobility of specific populations of workers. A study by Jessica Jeffers finds that decreases in non-compete enforceability were associated with a substantial increase in departure rates of workers, especially for other employers in the same industry.[450] This study's sample is limited to knowledge workers (*i.e.,* workers whose primary asset is applying their mental skills to tasks), and the study uses a binary—rather than continuous—measure of non-compete enforceability. It does, however, examine several changes in the enforceability of non-competes to generate its results, making it fairly robust.

In addition, two recent studies examined subgroups of the population that were affected by State law changes and find major effects on those populations' labor force mobility. Balasubramanian et al., in 2022, focused on Hawaii's ban of non-competes for high-tech workers and find that the ban increased mobility by 12.5%.[451] Lipsitz and Starr, in 2022, focused on Oregon's ban of non-competes for hourly workers and find that mobility increased by 17.3%.[452]

Comments Pertaining to Labor Mobility Evidence and Commission Responses

The Commission's finding that non-competes suppress labor mobility is principally based on the empirical evidence described in this Part IV.B.3.a.i. However, the comments provide strong qualitative evidence that bolsters this finding.

Many commenters agreed with the Commission's preliminary finding that non-competes suppress labor mobility and stated that this reduction in labor mobility leads to less labor market competition and poorer wages and working conditions.

In response to the NPRM's discussion of this literature, some commenters questioned the adequacy of the studies. For example, one commenter stated that the available research is either limited to specific sectors of the economy, limited geographically, or limited by small sample sizes. Some commenters claimed the empirical research lacked appropriate counterfactuals.

The Commission acknowledges that some of the studies focus on specific industries or specific geographies, and that the studies vary in the methodologies the authors rely on. These arguments do not undermine the utility of the studies, particularly given that they all find that non-competes reduce labor mobility. Moreover, the Commission finds that each of the studies discussed in this Part IV.B.3.a.i conduct their analyses against appropriate counterfactuals. And while there may be some variation in the magnitude of the effect on mobility among industries, several of the empirical studies find economy-wide effects. That evidence shows that non-competes restrict the movement of workers to a significant degree.

Additionally, the record is replete with examples of commenters who recounted personal stories that accord with the empirical literature. The Commission received comments from several thousand individual workers stating that their mobility is or has been restricted by a non-compete. While some commenters who opposed the proposed rule disputed that non-competes prevent workers from finding other jobs in their industry, the Commission finds the weight of the evidence clearly demonstrates a significant effect on labor mobility.

The Commission further notes that many commenters' submissions substantiated its finding that non-competes can have an *in terrorem* effect on labor mobility even where they would not ultimately be enforceable in court.[453] As many commenters explained, the high costs and complexities of non-compete litigation can have a chilling effect on workers and thus reduce worker mobility regardless of whether a court would enforce the non-compete. For this reason, the very existence of a non-compete is likely to deter workers from switching jobs or starting their own business, even if it would ultimately not be enforced. This supports the Commission's view that not only should non-competes' enforcement be prohibited, it is also important to provide a readily understandable,

version of the study reports results slightly differently than the 2022 version cited in the NPRM, but the analysis and results themselves do not meaningfully change. Accordingly, the update to Johnson, Lavetti, and Lipsitz does not materially affect the Commission's analysis of the study.

[444] *Id.* at 21.

[445] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete,* 72 I.L.R. Rev. 783 (2019). The value is calculated as 8.2% = 0.56/6.46, where 0.56 is the reported impact on tenure and 6.46 is mean tenure in the sample.

[446] Evan Starr, J.J. Prescott, & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts,* 36 J. L., Econ., & Org. 633, 652 (2020).

[447] *Id.* at 664.

[448] *See* Part IV.B.2.b.ii.

[449] *See* Part IV.E (describing the final rule's notice requirement).

[450] Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship,* 37 Rev. Fin. Stud. 1 (2024). The 2024 version of Jeffers' paper finds a decline in the departure rate of 7% of the sample mean, and a decline in the within-industry departure rate of 10%.

[451] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers,* 57 J. Hum. Res. S349, S351 (2022).

[452] Lipsitz & Starr, *supra* note 72 at 157.

[453] *See* Part IV.B.2.b.ii.

uniform Federal approach, and notice to workers of unenforceability.[454]

Some commenters who generally opposed the rule questioned the virtue of labor mobility, arguing that when colleagues leave, remaining workers can experience increased workloads or harm to their employer. However, this comment ignores the benefits that will also accrue from those same firms having more ready access to incoming potential colleagues as well. The Commission also notes that unfair conduct cannot be justified on the basis that it provides the firm undertaking the conduct with pecuniary benefits.[455]

Some commenters argued labor mobility has generally been increasing in the U.S. labor market. Setting aside whether this is true, it is not probative of whether the practice of using non-competes reduces labor mobility or negatively affects labor market competition.

For these reasons, the empirical evidence that non-competes suppress labor mobility supports the Commission's finding that non-competes tend to negatively affect competitive conditions in labor markets.

ii. Non-Competes Suppress Workers' Earnings

Evidence of Suppressed Earnings

The Commission finds that non-competes suppress workers' earnings as a result, in part, of decreased labor mobility, supporting the Commission's finding that non-competes tend to negatively affect competitive conditions in labor markets. As the NPRM explained, many studies find increased enforceability of non-competes reduces earnings for workers across the labor market generally; for specific types of workers; and even for workers not subject to non-competes.[456] Several major empirical studies of how changes in non-compete enforceability affect workers' earnings show that increased enforceability of non-competes suppresses workers' earnings.

A study conducted by Johnson, Lavetti, and Lipsitz finds that non-competes limit workers' ability to leverage favorable labor markets to receive greater pay.[457] The authors find that when non-competes are more enforceable, workers' earnings are less responsive to low unemployment rates, which workers typically leverage to negotiate pay raises. The authors estimate that a nationwide ban on non-competes would increase average earnings by approximately 3–14%.[458] Of the studies of how non-competes affect earnings, this study has the broadest coverage. It spans the years 1991 to 2014, examines workers across the labor force, and uses all known common law and statutory changes in non-compete enforceability to arrive at its estimates. This study is very robust, as it satisfies all of the principles outlined in Part IV.A.2.

The same study also finds that non-competes increase racial and gender wage gaps by disproportionately suppressing the wages of women and non-White workers. While the study estimates that earnings of White men would increase substantially if a nationwide ban on non-competes is enacted, the comparable earnings increase for workers in other demographic groups would be up to twice as large, depending on the characteristics of the group.[459] The authors estimate that making non-competes unenforceable would close racial and gender wage gaps by meaningful amounts, although the mechanism behind this effect is unclear.[460]

Furthermore, a study conducted by Evan Starr estimates that earnings fall by about 4% where a State shifts its policy from non-enforcement of non-competes to a higher level of enforceability.[461] This study covers a sample which is broadly representative of the entire labor force from 1996 to 2008. Unlike many of the other studies described in this Part IV.B.3, this study does not use a change in enforceability of non-competes to analyze the impact of enforceability. Rather, it examines the differential impact of enforceability on workers in occupations that use non-competes at a high rate versus workers in occupations that use non-competes at a low rate. As described in Part IV.A.2, studies comparing differential usage of non-competes are generally less informative than studies examining changes in enforceability, although in this particular study the comparison between workers in high- and low-use occupations may effectively control for State-level differences between labor markets, lending more credibility to the estimates. More importantly, the Commission notes that the study corroborates the estimates from other studies that rely on more credible research designs, and therefore is appropriately viewed as additional evidence supporting the range of estimated effects on wages across the labor market.

Two additional studies analyze effects of non-competes on earnings for specific populations of workers. A study conducted by Lipsitz and Starr focuses on a natural experiment in Oregon, where non-competes were banned for hourly workers with relatively low earnings. The study estimates that when Oregon stopped enforcing non-competes for hourly workers, their wages increased by 2–3% relative to workers in States that did not experience legal changes. The study also finds a greater effect (4.6%) on workers in occupations that used non-competes at a relatively high rate.[462] The authors additionally find that women's earnings increased at a higher rate, with earnings increases after the non-compete ban of 3.5% for women, versus 1.5% for men.

A study by Balasubramanian et al. focuses on a natural experiment in Hawaii, which banned non-competes for high-tech workers in 2015. The study finds earnings of new hires increased by about 4% after the ban, relative to earnings in other States without bans.[463]

In addition to this research, which shows that increased enforceability of

[454] *See* Part IX.C. *See also supra* note 386 (explaining that studies assessing changes in enforceability of non-competes likely underestimate the effects of non-competes, given that workers may refrain from seeking or accepting work or starting a business even if the non-compete is likely unenforceable, and explaining the importance of notice to workers).

[455] *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (considering that defendant's distribution contracts at issue ''may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers'' and holding that the ''Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves''); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the ''anticompetitive tendencies of such a system [were] clear''); *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 15 (7th Cir. 1971) (''While it is relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice.''). Justifications that are not cognizable under other antitrust laws are also not cognizable under section 5.

[456] NPRM at 3486–88.

[457] Johnson, Lavetti & Lipsitz, *supra* note 388 at 37.

[458] *Id.* at 3. The NPRM reported an increase in average earnings of 3.3–13.9%. Those numbers were taken from an earlier version of the Johnson, Lavetti, and Lipsitz paper. The updated paper finds an increase in average earnings of 3.2–14.2%. The change does not materially affect the paper's findings or the Commission's analysis of the paper.

[459] *Id.* at 42. The 2023 version of the paper by Johnson, Lavetti, and Lipsitz reports earnings increases of 1.3% for White men, and increases between 1.5–3.2% for workers in other demographic groups, corresponding to a change in non-compete enforceability equal to the difference between the 75th and 25th percentiles. These differences are statistically significant for Black men and non-White, non-Black women.

[460] *Id.* The 2023 version of the paper reports that the earnings gaps would close by 1.5–3.8% given a change in non-compete enforceability equal to the difference between the 75th and 25th percentiles.

[461] Starr, *supra* note 445 at 783.

[462] Lipsitz & Starr, *supra* note 72 at 143.

[463] Balsubramanian et al., *supra* note 451 at S349.

non-competes reduces workers' earnings across the labor market generally and for specific types of workers, two empirical studies find that increased enforceability of non-competes suppresses earnings even for workers who are *not* subject to non-competes.

The Johnson, Lavetti, and Lipsitz study, in a separate analysis, isolates the impact of a State's enforceability policy on workers not directly affected by that policy to demonstrate that non-competes affect not just the workers subject to non-competes, but the broader labor market as well. The study finds that increases in non-compete enforceability in one State have negative impacts on workers' earnings in bordering States, and that the effects are nearly as large as the effects in the State in which enforceability changed (but taper off as the distance to the bordering State increases).[464] The study estimates that a legal change in one State has an effect on the earnings of workers just across that State's border that is 76% as great as for workers in the State in which the law was changed.[465] In other words, when one State changes its law to be more permissive of non-competes and itself experiences a decrease in workers' earnings of 4%, workers just across the border (*i.e.,* workers who share a labor market)[466] would experience decreased earnings of 3%.[467] The authors conclude that, since the workers across the border are not directly affected by the law change (*i.e.,* contracts that they have signed do not become more or less enforceable), this effect must be due to changes in the local labor market.[468] The researchers based their analysis on where workers worked, rather than their residence, so the results are not tainted by workers who worked in the State where the law changed but lived across the border.

The second of these studies, a study conducted by Starr, Frake, and Agarwal, analyzed workers without non-competes who worked in States and industries in which non-competes were used at a high rate.[469] The authors find that, when the rate of use of non-competes in an industry in a State is higher, wages are lower for workers who do not have non-competes but who work in the same State and industry. This study also finds that this effect is stronger where non-competes are more enforceable.[470]

The authors show that the reduction in earnings (and in labor mobility) is due to a reduction in the rate of job offers. Individuals in State/industry combinations that use non-competes at a high rate do not receive job offers as frequently as individuals in State/industry combinations in which non-competes are not frequently used.[471] The authors also demonstrate that decreased mobility and earnings are not due to increased job satisfaction (*i.e.,* if workers are more satisfied with their jobs, they may be less likely to change jobs, and more likely to accept lower pay).[472]

Given some methodological limitations of this study, the Commission views it as supporting the other evidence that non-competes have negative spillover effects on earnings for workers without non-competes and reduce labor mobility. Namely, the research design relies on cross-sectional differences in enforceability of non-competes. Although this study also examines the use of non-competes, it does not compare individuals who are bound by non-competes to individuals who are not. Instead, it examines the rate of use across industries and States, and therefore avoids the statistical biases inherent in studies which compare individuals with and without non-competes. The authors also employ tests to increase confidence in the causal interpretation of these results, but they cannot conclusively rule out explanations outside of the scope of their data.

Several additional studies examine the association between non-compete use—rather than enforceability—and earnings. For the reasons described in Part IV.A.2, the Commission finds that these studies are less credible in measuring how non-competes affect earnings, and accordingly the Commission gives these studies minimal weight.

In one such study, Starr, Prescott, and Bishara examine survey results and find that non-compete use is associated with 6.6% to 11% higher earnings.[473] In another study, using Payscale.com data, Balasubramanian, Starr, and Yamaguchi find that individuals with non-competes (regardless of what other post-contractual restrictions they had) had 2.1–8.2% greater earnings than individuals with no post-contractual restrictions. However, this positive association may be due to non-competes often being bundled with NDAs. The authors find that, compared with individuals subject only to NDAs, non-competes are associated with a 3.0–7.3% *decrease* in earnings, though the authors do not disentangle this effect from the effects of non-solicitation and non-recruitment provisions.[474] Another study, by Lavetti, Simon, and White, finds that use of non-competes among physicians is correlated with greater earnings (by 14%) and greater earnings growth.[475] Finally, Rothstein and Starr find that greater use of non-competes is correlated with higher earnings.[476]

Because these studies merely reflect correlation and are unlikely to reflect causation, the Commission gives them little weight. The NPRM noted that the Lavetti, Simon, and White physician study partially mitigates this methodological flaw by comparing earnings effects in a high- versus a low-enforceability State (Illinois versus California). However, at best, this comparison is a cross-sectional comparison with a minimally small number of States being compared. The study does not consider changes in non-compete enforceability over time. Therefore, it is impossible to disentangle underlying differences in those two States from the effects of non-compete enforceability. The Commission accordingly gives this study, like the other studies reliant on comparisons of populations using non-competes and not using non-competes, little weight, though the shortcoming is slightly mitigated in the case of this study. While this study is specific to physicians, the Commission nonetheless finds that studies employing stronger methodologies (especially studies of

[464] The NPRM cited an earlier version of Johnson, Lavetti, and Lipsitz's study that estimated that a legal change in one State would have an effect on the earnings of workers just across that State's border that was 87% as great as for workers in the State in which the law was changed. NPRM at 3488. The data cited in this final rule reflect an updated version of this study.

[465] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 51. Seventy-six percent is calculated as the coefficient on the donor State NCA score (−.137) divided by the coefficient on own State NCA score (−.181).

[466] See U.S. Econ. Rsch. Serv., Commuting Zones and Labor Market Areas, *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.*

[467] The Commission notes that the estimates in the updated version of Johnson, Lavetti, and Lipsitz's study are slightly different, but qualitatively similar to the earlier estimates noted in the NPRM. The results remain statistically significant and do not materially affect the Commission's analysis.

[468] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 30.

[469] Evan Starr, Justin Frake, & Rajshree Agarwal, *Mobility Constraint Externalities,* 30 Org. Sci. 961 (2019), online ahead of print at *https://pubsonline.informs.org/doi/abs/10.1287/orsc.2018.1252* at 6.

[470] *Id.* at 11.

[471] *Id.* at 10.

[472] *Id.* at 13.

[473] Starr, Prescott, & Bishara *supra* note 68 at 75.

[474] Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 40. The percentage range is calculated as $e^{-0.030}-1$ and $e^{-0.076}-1$, respectively.

[475] Lavetti, Simon, & White, *supra* note 82 at 1051. The increase in earnings is calculated as $e^{0.131}-1$.

[476] Rothstein & Starr, *supra* note 77 at 1.

workers positioned similarly in the income distribution[477] and studies which broadly represent the U.S. workforce[478]) provide compelling evidence that non-competes significantly suppress wages.

Comments Pertaining to Suppressed Earnings and Commission Responses

The Commission's finding that non-competes suppress earnings is principally based on the empirical evidence described in this Part IV.B.3.a.ii. However, the comments provide strong qualitative evidence that bolsters this finding.

The Commission received thousands of comments from workers describing how non-competes suppressed their earnings. These commenters spanned a wide variety of industries, hailed from across the U.S., and recounted a common experience: a non-compete prevented them from earning more. Illustrative examples of these comments include the following:

- I worked at a TV station. A corporation owned us and forced me to sign a yearly non-compete in order to remain in my position. After a few years, I was offered a management job with a much bigger title and much more money. . . . However, the corporation that owned us wouldn't even talk about letting me out of the non-compete. They wouldn't even discuss a settlement. They totally refused to allow me to pursue a much higher salary and a much higher position, no matter what was offered. I was forced to choose between staying in my current job, and not being able to improve my job or money, or being unemployed for 6 months.[479]
- I have been subject to a non-compete for 11 years in aggregate as a physician. Because of my non-compete, I am unable to take a position with another organization without having to drive much farther outside of my non-compete stipulated geographic restrictions (which would add to the time that I am away from my family, and costs more in fuel and vehicle maintenance). Because of my non-compete, I haven't had a raise in 6 years, because I can't negotiate with my employer because I have no bargaining position to negotiate from if I don't have options of alternate employment within the restrictions of my non-compete.[480]
- I recently received two job offers with better compensation, but I had my non-compete reviewed by an attorney and learned that it would open myself up to a significant lawsuit and potential fines. I most likely have to sit out a year and either work completely outside my field where I have advanced degrees or not work at all. Since I am the primary breadwinner, this is not financially possible for my family, so I have to stick with my current employer who has not given me a pay increase in 2 years.[481]
- I am a Certified Nurse Practitioner and signed [a non-compete]. I live in Minnesota and would be required to travel one hour one way in order to fulfill [the] agreement. . . . My employer increased my responsibilities (on-call hours added) without additional pay using vague language in my binding agreement. I would have to hire a lawyer and spend thousands of dollars to file a lawsuit to get the agreement releasing me. . . . My employer took advantage of my binding agreement and did not increase my [Relative Value Unit] rate in 5 years for my or other Nurse Practitioners in our organization.[482]
- I was just starting out in my career when I finally got a part time job in my field of geology. Unfortunately, it didn't last long and I was let go. But because of a non compete agreement I had to sign I couldn't take another job in my field even though I had a good lead on one. Instead I had to take a job as a waitress making less than minimum wage.[483]
- I work for an IT company, low-level employee just above minimum wage, and I had to sign one of these to get the job even though I don't know any knowledge above what someone could learn in 10 or 15 hours on YouTube, yet I still had to sign this which makes it so I can't compete . . . if they offered me better pay.[484]
- I began working for my employer 10 years ago as a very young and inexperienced single mother. I desperately needed a job that could pay more than minimum wage, and I eagerly accepted my position and non-compete status. I have now been working at almost the same rate of pay (as raises are not readily given to us regardless of recessions or cost of living increases)—for a DECADE. My children are approaching college age, and I will absolutely need a higher income to help fund their educations.[485]
- I am in the laboratory medicine field and was laid off from a job as an implementation rep for an instrument vendor. Other companies were the competition, and I was held to a non-compete. This caused me to go from a six figure salary with great benefits back to the hospital making barely 60k as a single mother with twins and no emergency fund saved! I later went into the UV disinfection field and developed a tremendous amount of knowledge regarding minimizing the spread of infections in hospitals (pre-covid). After 5 years, I was laid off and prevented from continuing in this niche field that I had spent so much time developing a skillset and statistics within. I was only given a 2 week severance (along with a reminder of legal action if I worked for the competition). Companies use this as a bully tactic![486]

In addition to receiving thousands of comments recounting personal stories of non-competes stymieing the commenters' ability to get a better-paying job or a raise, many commenters also described how, over the long term, non-competes can lower wages and diminish career prospects for workers forced to sit out of the market or start over in a new field. The Commission also received numerous comments stating that non-competes exacerbate wage gaps based on gender and race, including by decreasing entrepreneurship and wages to a greater extent for women and people of color and by giving firms more power to engage in wage discrimination.[487]

With respect to the empirical literature, numerous commenters agreed that there is a wealth of empirical evidence to support the Commission's preliminary finding that, by inhibiting efficient matching between workers and employers, the use of non-competes is harming workers by suppressing their earnings. In addition to the literature discussed in the NPRM and in this final rule, some commenters pointed to a 2016 report from the Treasury Department that examines the correlation between non-compete enforceability and both earnings and earnings growth at the State level. The Treasury report finds that a one-standard-deviation increase in State-level enforceability of non-competes is correlated with 1.38% to 1.86% lower earnings, which can be found in both lower earnings upon starting a job and lower earnings growth.[488] The Commission agrees with commenters that this provides additional support for the final rule. However, the Commission gives less weight to cross-sectional studies of enforceability, like the 2016 Treasury report, that examine the correlation between non-compete enforceability and earnings growth.[489] The Commission relies more heavily on the studies that find that non-competes suppress earnings based on examining natural experiments.

Some commenters opposing the rule argued that studies of non-compete use, including the studies described in this Part IV.B.3.a.ii, show a positive association between non-compete use and earnings, especially when early notice of non-competes is provided,

[477] Balasubramanian et al., *supra* note 451.

[478] Johnson, Lavetti, & Lipsitz, *supra* note 388.

[479] Individual commenter, FTC–2023–0007–8067.

[480] Individual commenter, FTC–2023–0007–0616.

[481] Individual commenter, FTC–2023–0007–0651.

[482] Individual commenter, FTC–2023–0007–0857. Relative value units are a component of a methodology that calculates earnings for some healthcare workers.

[483] Individual commenter, FTC–2023–0007–11973.

[484] Individual commenter, FTC–2023–0007–11137.

[485] Individual commenter, FTC–2023–0007–7238.

[486] Individual commenter, FTC–2023–0007–2416.

[487] *See also* Part IV.B.3.a.iii (summarizing comments from workers and worker advocates stating that non-competes increase illegal conduct by employers and make it harder for workers to report illegal conduct).

[488] Dept. of the Treasury, *Non-Compete Contracts: Economic Effects and Policy Implications* (March 2016) at 20.

[489] *See* Part IV.A.2.

while others cautioned against interpreting these relationships as causal. The Commission agrees with commenters who caution against a causal interpretation of these studies, which are unable to determine whether non-compete use causes differences in earnings, whether earnings cause differences in non-compete use, or whether a third factor simultaneously determines both, as discussed in Part IV.A.2.

Some commenters opposing the rule stated that the most comprehensive study of the earnings effects of non-competes (the Johnson, Lavetti, and Lipsitz study described in this Part IV.B.3.a.ii) examines only relatively incremental changes in laws governing the enforceability of non-competes (*i.e.,* changes other than full bans), and claimed that this study thus does not shed light on the effects of a full prohibition. In response, the Commission notes that the analysis in Johnson, Lavetti, and Lipsitz finds that the effects of changes in non-compete enforceability are broadly linear. This means the effect of a change in enforceability twice the size of another change results in a change in workers' earnings that is approximately twice as large. As a result, the Commission finds that it would be appropriate to extrapolate from the effects of incremental changes in non-compete laws to the effects of prohibitions, at least in the context of worker earnings.[490] In other words, if incremental changes in enforceability lead to a certain level of earnings effects, it is reasonable to presume—based on the linearity of the relationship between changes in enforceability and workers' earnings—larger changes will lead to larger effects.

That said, in the regulatory impact analysis, the Commission does not extrapolate from the incremental changes observed in these studies with respect to earnings effects.[491] Instead, the Commission follows a conservative approach and assumes that the prohibition in the final rule, even though it is comprehensive, will have the same effects on earnings as the incremental legal changes observed in these studies. Therefore, even if the effects of changes in non-compete enforceability are not linear, the Commission's analysis of the economic impacts of the final rule is not undermined because, if anything, it underestimates the benefits of the rule.

A commenter argued that the Johnson, Lavetti, and Lipsitz dataset is outdated because it examines enforceability between 1991 and 2014. In response, the Commission finds that while the enforceability measures contained in that dataset do not perfectly reflect current enforceability due to changes in State law in the intervening several years, the measures still reflect the impacts of non-compete enforceability on economic outcomes, and likely still have strong predictive power.

Some commenters opposing the rule asserted that the overall competitiveness of U.S. labor markets undermines the argument that workers suffer from non-competes. In response, the Commission notes that a range of factors have weakened competition in labor markets.[492] In any event, the level of competitiveness of a labor market does not justify use of a practice that tends to negatively affect competitive conditions.

Some commenters opposing the rule pointed to academic writings, including a summary of the research by an FTC economist writing in his personal capacity in 2019, stating that there was limited evidence on the effects of such clauses. The Commission finds that these writings are generally outdated and disagrees with them. As the various explanations of the empirical research in Parts IV.B and IV.C illustrate, much of the strongest evidence on the effects of non-competes has been published in recent years. The Commission notes further that Evan Starr, one expert who voiced concerns over the state of the evidence in the past, submitted a comment that was broadly supportive of the interpretation of the evidence in the NPRM and of the proposed rule.[493]

Other comments opposing the rule stated that the heterogeneity of the impact of a non-compete ban on earnings undermined the Commission's preliminary finding regarding the effects of non-competes on earnings. These commenters asked whether the population-wide average effects noted in certain studies apply across the workforce or only to certain individuals (*e.g.,* at certain points in the income distribution), certain professions, or in certain geographies (*e.g.,* where local labor markets tend to be more concentrated). Another commenter argued that if a ban on non-competes drives up earnings for highly skilled workers, wages might decrease for other categories of workers.[494]

In response to these comments, the Commission finds that, while estimates of the magnitude of the effect of non-competes on earnings vary to some extent across groups of workers, the effects are directionally and qualitatively similar across groups. For example, while Balasubramanian et al. do not report a table with average earnings for workers in their study, workers in the high tech jobs studied tend to be relatively highly paid, and the study finds non-competes suppress these workers' earnings.[495] On the lower end of the earnings spectrum, Lipsitz and Starr report average earnings of $16.41 per hour for workers in their study, which corresponds to annual earnings of approximately $34,133 per year (assuming 2,080 hours worked per year), and their study likewise finds that non-competes suppress the earnings of these workers.[496]

Additionally, Johnson, Lavetti, and Lipsitz's study of workers across the economy shows that, while college-educated workers and workers in occupations and industries in which non-competes are used at a high rate experience relatively larger adverse effects on their earnings from non-compete enforceability, the estimated effect of increased enforceability on other workers is still negative (albeit statistically insignificant in this study).[497] In short, while these studies do not estimate the magnitude of negative effects for every subset of the population, the finding of negative effects on earnings is consistent across dissimilar subsets of the population.

A commenter that opposed the NPRM asserted that a categorical ban could decrease wages for highly paid workers, arguing that such workers could negotiate higher wages in exchange for the non-compete that they would lose with a ban. This speculative assertion is belied by the comment record, which indicates that the highly paid, highly skilled workers who are not senior

[490] *See* Figure 3; Johnson, Lavetti, & Lipsitz, *supra* note 388 at 17.

[491] *See* Part X.F.5.

[492] See Treasury Labor Market Competition Report at i.

[493] Comment of Evan Starr, FTC–2023–0007–20878.

[494] These commenters were generally referring to higher-wage workers, but not senior executives. Comments that focused on senior executives are addressed in Part IV.C.

[495] Workers in the occupation Computer and Information Research Scientists (SOC code 15–1221) in the private sector had median earnings of $156,620 in 2022, while Software Developers (SOC code 15–1252) in the private sector had median earnings of $127,870 in 2022. BLS, Occupational Employment and Wage Statistics, *https://www.bls.gov/oes/tables.htm.* These private-sector data are from the May 2022 National industry-specific and by ownership XLS table (*see* table labeled "national_owner_M2022_dl").

[496] Lipsitz & Starr, *supra* note 72 at 148.

[497] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 57.

executives are also unlikely to negotiate non-competes.[498] It is also belied by empirical evidence that non-competes suppress earnings for highly paid workers.[499]

Similarly, commenters opposing the rule questioned whether earnings effects merely result from firms hiring different types of workers after changes in non-compete enforceability (for example, workers with different levels of experience or education). In response to these comments, the Commission first notes that the studies find adverse impacts across the labor force. Therefore, even if a different mix of types of workers were hired due to non-compete enforceability, the evidence shows workers' wages are suppressed across the labor force when non-competes are more enforceable. Additionally, the Commission notes that the study by Lipsitz and Starr compares the earnings growth of individual workers before and after the legal change in Oregon, showing that earnings growth increased after the non-compete ban. This provides some evidence that the effects observed in the literature are not simply due to substitution, since individual workers' earnings trajectories would not be changed if all the effects were simply due to firms substituting one type of worker for another.[500]

Some commenters opposing the rule asserted that enforceability indices are likely measured with substantial error. These commenters argue that the indices are based on qualitative analyses of State laws and not data on how frequently non-competes are actually enforced or the results of these enforcement cases. The Commission finds the enforceability indices are sufficiently reliable, because they are generated through careful analysis of State law that takes into account variation in legal enforceability along multiple dimensions.[501] Moreover, a 2024 study using enforcement outcome data finds that a non-compete ban in Washington increased earnings, consistent with the studies using enforceability indices.[502]

[498] *See* Parts IV.B.2.b.i and IV.C.1.

[499] *See, e.g.,* Balasubramanian et al., *supra* note 451.

[500] Lipsitz & Starr, *supra* note 72, Online Appendix at 18.

[501] Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy,* 13 U. Pa. J. Bus. L. 751 (2011); Barnett & Sichelman, *supra* note 389.

[502] Takuya Hiraiwa, Michael Lipsitz, & Evan Starr, *Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach* (2024), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4364674.*

Some commenters opposing the rule asserted that Hawaii's prohibition of non-competes in the technology industry may not have covered the workers claimed (in particular, omitting workers in the broadcast industry).[503] These commenters also asserted that Hawaii simultaneously banned non-solicitation clauses.

The Commission finds the study of Hawaii's non-compete ban to be informative, despite these limitations. First, any workers omitted from coverage by the statute, but considered as affected in the study, would lead to a phenomenon known as ''attenuation bias,'' which causes estimated effects to underestimate the true impact.[504] Second, the non-solicitation agreements banned by the Hawaii law were non-solicitation of coworker agreements (otherwise known as non-recruitment agreements)—agreements under which workers are barred from recruiting former coworkers, as opposed to non-solicitation of client agreements, under which workers are barred from soliciting former clients. While non-solicitation of coworker agreements may have a marginal impact on workers' earnings (*e.g.,* in situations in which workers only find out about job opportunities via past coworkers), the Commission does not find it likely that they have a major effect on workers' earnings. They may prevent some workers from hearing about some job opportunities, but unlike non-competes, they do not prevent workers from taking those opportunities. And unlike non-solicitation of client agreements, they do not frustrate workers' ability to build up a client base after moving to a new employer. The Commission therefore finds it likely that much of the impact identified in the study of the Hawaii law is due to non-competes. The Commission also notes that the Hawaii study is directionally consistent with the results from other more robust studies that use different methodologies.

Some commenters opposing the rule argued that the impact of Oregon banning non-competes for low-wage workers may have been limited because the law did not affect existing non-competes; because non-competes were already disfavored in Oregon before the law change; and because the law included multiple carve-outs. Commenters also argued the negative effects on earnings found in Oregon may have been confounded by the Great Recession.

[503] Balasubramanian et al., *supra* note 451.

[504] Attenuation bias occurs when the independent variable (here, whether a worker is covered by the ban) is measured with error.

The Commission finds that those concerns are not a compelling reason to discard the study. The study carefully examines multiple comparisons of workers within Oregon and across States. The results therefore cannot be explained by a differential response of Oregon to the Great Recession, a differential response of hourly workers to the Great Recession, or even a differential response of hourly workers in Oregon to the Great Recession. The Commission also does not believe that the study is undermined because the law did not affect existing non-competes and included multiple carve-outs, or because non-competes were disfavored in Oregon before the law changed. These factors likely mitigated the magnitude of the law's negative effect on earnings, rather than exaggerating it.

Some commenters opposing the rule argued that Johnson, Lavetti, and Lipsitz[505] claim that ''[t]he overall effect of [non-compete] enforceability on earnings is ambiguous,'' and that this undermines the Commission's preliminary findings. However, these commenters take this quote out of context. The authors were referring to a theoretical model, not to the empirical work in their paper. When economists do empirical research, they often begin by constructing a theoretical model and describing what the theory would predict; they then describe their empirical findings, which may show a different result. The authors described that it is unclear, theoretically, whether non-compete enforceability would increase or decrease earnings. However, the empirical findings of the study were clear: as the authors stated, ''We find that increases in [non-compete] enforceability decrease workers' earnings.''[506] The fact that the authors described the theoretical results of a hypothesized model as ambiguous does not undermine the fact that their study had clear empirical results.

Some healthcare businesses and trade organizations opposing the rule argued that, without non-competes, physician shortages would increase physicians' wages beyond what the commenters view as fair. The commenters provided no empirical evidence to support these assertions, and the Commission is unaware of any such evidence. Contrary to commenters' claim that the rule would increase physicians' earnings beyond a ''fair'' level, the weight of the evidence indicates that the final rule

[505] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (2021) at 11; *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.*

[506] *Id.* at 2.

will lead to fairer wages by prohibiting a practice that suppresses workers' earnings by preventing competition; that is, the final rule will simply help ensure that wages are determined via fair competition. The Commission also notes that it received a large number of comments from physicians and other healthcare workers stating that non-competes exacerbate physician shortages.[507]

One commenter opposing the rule criticized the analysis in the Johnson, Lavetti, and Lipsitz study, suggesting that data on where individuals live are not necessarily indicative of where individuals work, and that identified spillover effects may simply be due to cross-border commuters. The Commission disagrees, because, as noted, the study considers whether the workers are subject to enforceable non-competes based on their work location.

A commenter also argued that if the absence of non-competes helped workers, one would expect California, North Dakota, and Oklahoma to have the highest median incomes among all the States. The Commission believes this expectation is inapt. Given the evidence that non-competes suppress workers' earnings, earnings in California, North Dakota, and Oklahoma are likely higher than they would be if non-competes were enforceable, but there is no reason to expect they would necessarily be higher than all other States.

One commenter opposing the rule asserted that the Commission's citation of one study in the NPRM was insufficient to show that non-competes are directly tied to discriminatory behavior by employers, or that non-competes worsen racial or gender wage gaps. The Commission does not rest its finding in this final rule that non-competes tend to negatively affect competitive conditions on findings of increased discriminatory behavior or exacerbation of gender and wage gaps. The Commission merely notes that there are two empirical studies—described under ''Evidence of suppressed earnings''—that find that non-competes do, in fact, exacerbate earnings gaps.

One commenter opposing the rule stated that closing racial and gender wage gaps may harm racial minorities and women if their wages were to fall in absolute terms. Another commenter argued that the proposed rule would reduce capital investment and output, which would decrease White male workers' wages. In response, the Commission notes that the study by Johnson, Lavetti, and Lipsitz shows that the impact of a decrease in non-compete enforceability on earnings is positive for workers in each of these groups.

The empirical evidence makes clear that, by restricting a worker's ability to leave their current job to work for a competitor or to start a competing business, non-competes reduce workers' earnings, supporting the Commission's finding that non-competes tend to negatively affect competitive conditions in labor markets.

iii. Non-Competes Reduce Job Quality

In the NPRM, the Commission recognized that non-competes may also negatively affect working conditions, *i.e.,* job quality,[508] although this had not been studied in the empirical literature (likely because it is harder to quantify). Competition in labor markets yields not only higher earnings for workers, but also better working conditions.[509] In a well-functioning labor market, workers who are subject to poor working conditions can offer their labor services to an employer with better working conditions. Such workers can also start businesses, giving them more control over working conditions. Non-competes frustrate this competitive process by restricting a worker's ability to switch jobs or start a business. Furthermore, in a well-functioning labor market, employers compete to retain their workers by improving working conditions. Where workers are locked into a job—because their alternative employment options are restricted—those competitive forces are diminished and working conditions can suffer. The Commission accordingly sought comment on this topic.

In response, thousands of workers with non-competes described how, by frustrating these competitive processes, non-competes prevent them from escaping poor working conditions or demanding better working conditions. Based on the large number of comments the Commission received on this issue and the wide variety of negative and severe impacts commenters described, the Commission finds that, in addition to suppressing earnings, non-competes negatively affect working conditions for a significant number of workers.

The Commission finds that the effects of non-competes on labor mobility and workers' earnings are sufficient, standing alone, to support its finding that non-competes with workers other than senior executives tend to negatively affect competitive conditions in labor markets. However, the Commission believes its finding that non-competes are an unfair method of competition is further bolstered by this strong qualitative evidence related to non-competes degrading working conditions.

Numerous workers and worker advocacy organizations described how non-competes compel workers to endure jobs with poor working conditions. Illustrative examples of these comments include the following:

- In March 2018, I was fired from a job in local news for refusing to go into an unsafe situation. I'd recently received a letter from a man threatening to kidnap me. When my boss decided he would still send me out alone in the field, I fought him on it, lost, and was terminated. Three weeks later, I found out I was pregnant. Unable to work in my field because of a noncompete enforced even AFTER I was terminated, I had no choice but to apply for WIC and government assistance, and work at a retail job making half my previous salary. I wanted to work. I wanted money to support my child. I wanted money to move closer to home, to escape a domestic violence situation. My noncompete kept me in a horrible spot, and nearly cost me my life.[510]
- I started my first job as a Nurse Practitioner in 2019. All positions I interviewed for required a non-compete. . . . In my case, I work for an employer that is hostile, discriminated against me during pregnancy and maternity leave and has raised his voice at me in meetings. He told me I was lucky to even have a job after becoming pregnant. I learned after starting at the practice that he has shown this pattern before with previous employees. I say this because all of these above-mentioned reasons are why I have the right to want to quit my job and move on. I desperately want to leave and start another job but I can't because of the non compete. I feel like a prisoner to my job. I feel depressed in my work conditions and I feel like I have no way out.[511]
- I'm a barber and violated a non-compete about 6 months ago. . . . I worked for my previous employer for two years in a toxic environment. I told my employer how work was affecting my home life on more than one occasion and she did nothing. . . . How was I to know that I would be working in a toxic environment when I applied? So ultimately, I decided in order to be happy and make a living wage, I'd have no choice but to violate my non-compete. She came after me in no time flat. Now I'm paying legal fees and at risk of going to court and losing my job for 6 more months. . . . [I]f I'm working in poor working conditions, I should be able to work where I please. For two years, my job and employer affected my mental health. I chose to take anti-depressants after things got bad at work, upped my dosage twice as work

[507] *See* Part IV.B.3.b.iv for a more detailed summary of these comments.

[508] NPRM at 3504.

[509] Treasury Labor Market Competition Report at i.

[510] Individual commenter, FTC–2023–0007–12813.

[511] Individual commenter, FTC–2023–0007–4989.

became progressively worse and since I've left, I've stopped taking my medication.[512]

- I am a commissioned employee in the mortgage world, and I had a non-compete with my former company in Ohio. Near the end of my time at this company, they merged with another company and put the new company in charge of the sales staff. It was miserable. We started having issues, even with having basic supplies, and it went from just harming me to harming my ability to get business complete, which harms the consumer. I left and I was sued for a three year period. . . . I really do not feel that [non-competes] should be allowed. You are stuck at employers and they can treat you in any manner that they please because they know that they can make your life a living hell if you leave them.[513]
- Like many new graduates in the medical field, I signed on with a company that made numerous empty promises. . . . What I was not prepared for, was the company's strategic increase in facilities in which I was to perform services under this contract. In the short span of 2 years, I did neurophysiological monitoring for 24 facilities . . . . When working conditions fell apart regardless of my requests for adequate sleep following 36 hours straight of working on call at my designated stroke hospital, time for meals or breaks within 18+ hour work days, and a reasonable travel distance within the area the company demanded I relocate to, I was met with threats from HR regarding my non-compete if I were to leave. . . . Working conditions became so intense, I was placed on migraine medications at the recommendations of my doctor and required three separate trips in the ER for medical conditions related to stress, inability to eat or drink while tied within tens of hours long surgeries . . . . Again I was met with threats from HR and now their legal team.[514]

Many commenters stated that non-competes harm working conditions for lower-wage workers. However, there were many commenters in higher-wage jobs who also stated that non-competes harmed their working conditions. For example, numerous physicians explained that they were trapped in jobs with poor working conditions because of non-competes. Many of these physicians described how non-competes accelerate burnout in their profession by making it harder for workers to escape bad working conditions or demand better working conditions. Many commenters recounted how they left poor work environments but non-competes harmed them by forcing them to leave their field, move out of the area where they lived, or spend time and money defending themselves from legal action. Many commenters argued that prohibiting non-competes would increase workers' bargaining power and in turn incentivize employers to provide better work environments.

Workers in both high-wage and low-wage professions, as well as worker advocacy groups, stated that by diminishing workers' competitive alternatives, non-competes keep workers trapped in jobs where they experience dangerous, abusive, or toxic conditions; discrimination; sexual harassment; and other forms of harassment. These commenters also described how non-competes trap some workers in jobs where their employer commits wage and hour violations, such as wage theft, as employers that use non-competes can insulate themselves from the free and fair functioning of competitive markets and are thus more likely to be able to steal worker wages with impunity. Several commenters said they were unable to receive benefits because a non-compete rendered them unable to switch to a job with better benefits or rendered them unable to leave their job when their employer took their benefits away. A professional membership network for survivors of human trafficking explained that traffickers masquerading as legitimate businesses use non-competes to prevent trafficking victims from leaving.

Some workers and advocacy organizations stated that non-competes increase the potential for harm from retaliation. These commenters stated that restricting a worker's employment opportunities makes it even harder for workers to find new jobs after experiencing retaliation. These commenters argued that this discourages workers from reporting fraud, harassment, discrimination, or labor violations. A labor union commented that, by making it harder for workers to find new jobs, non-competes can deter unionization and chill activities protected by the National Labor Relations Act, including activities to address unsafe, unfair, or unsatisfactory working conditions. According to a trade organization of attorneys, whistleblower protections may come too late for a fired whistleblower who cannot obtain another job because of a non-compete. Several commenters provided survey or case evidence showing that workers who report sexual harassment, wage theft, or poor working conditions are frequently retaliated against, including by being fired.[515] These commenters stated that, because non-competes make it harder for these workers to find new jobs, non-competes decrease the likelihood that workers report these kinds of harms.

Many workers described how, by limiting their ability to get out of harmful workplace environments, non-competes contributed to stress-related physical and mental health problems. Many commenters, particularly in the healthcare profession, stated that suicide is a major problem in their profession and described non-competes as one of the stressors, because non-competes make it harder to leave jobs with unsustainable demands, leaving workers feeling trapped.

While thousands of commenters described, often in personal terms, how non-competes have negatively affected their working conditions, the Commission received few comments from workers or worker advocates stating that non-competes improved working conditions. The few comments received stated that workers who remain with an employer can be harmed by departing and competing colleagues, via increased workloads or harm to their employer.

Taken together, these comments provide strong qualitative evidence that non-competes degrade working conditions, which supports the Commission's finding that non-competes tend to negatively affect competition in labor markets.

b. Non-Competes Tend to Negatively Affect Competitive Conditions in Product and Service Markets

Based on the Commission's expertise and after careful review of the rulemaking record, including the empirical research and the public comments, the Commission finds that non-competes tend to negatively affect competitive conditions in markets for products and services by inhibiting new business formation and innovation.

New businesses are formed when new firms are founded by entrepreneurs or spun off from existing firms. New business formation increases competition by reducing concentration, bringing new ideas to market, and forcing incumbent firms to respond to new firms' ideas instead of stagnating. New businesses disproportionately create new jobs and are, as a group, more resilient to economic

[512] Individual commenter, FTC–2023–0007–3323.

[513] Individual commenter, FTC–2023–0007–3955.

[514] Individual commenter, FTC–2023–0007–1252.

[515] For example, the National Women's Law Center, which operates and administers the TIME'S UP Legal Defense Fund, reported that among individuals who contacted the Fund to request legal assistance related to sexual harassment in the workplace, 72% reported facing retaliation, and, among those, 36% had been fired. Comment of Nat'l Women's L. Ctr., FTC–2023–0007–20297 at 5 (citing Jasmine Tucker & Jennifer Mondino, *Coming Forward: Key Trends and Data from the TIME'S UP Legal Defense Fund,* 4 (Oct. 2020), *https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf*).

downturns.[516] With respect to spinoffs, research shows that spinoffs within the same industry are highly successful relative to other entrepreneurial ventures.[517]

Non-competes, however, tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation in two ways. First, since many new businesses are formed by workers who leave their jobs to start firms in the same industry, non-competes reduce the number of new businesses that are formed in the first place.[518] Second, non-competes deter potential entrepreneurs from starting or spinning off new businesses—and firms from expanding their businesses—by locking up talented workers.[519] Non-competes thus create substantial barriers to potential new entrants into markets and also stymie competitors' ability to grow by making it difficult for those entrants to find skilled workers.

Innovation refers to the process by which new ideas result in new products or services or improvements to existing products or services. Innovation may directly improve economic outcomes by increasing product quality or decreasing prices, and innovation by one firm may also prompt other firms to compete and improve their own products and services. However, non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting innovation.

Non-competes tend to reduce innovation in three ways. First, non-competes prevent workers from starting businesses in which they can pursue innovative new ideas.[520] Second, non-competes inhibit efficient matching between workers and firms.[521] Where workers are less able to match with jobs that maximize their talents, employers' ability to innovate is constrained. Third, and relatedly, non-competes reduce the movement of workers between firms.[522] This decreases knowledge flow between firms, which limits the cross-pollination of innovative ideas.

As described in Parts IV.B.3.b.i and ii, the Commission finds that the effects of non-competes on new business formation and innovation are sufficient to support its finding that non-competes tend to negatively affect competitive conditions in product and service markets. In addition, as described in Parts IV.B.3.b.iii and iv, the Commission believes this finding is further bolstered by evidence that non-competes increase concentration and consumer prices, as well as evidence that non-competes reduce product quality.

The Commission's findings relating to new business formation and innovation are principally based on the empirical evidence described in Parts IV.B.3.b.i and ii. However, the comments provide strong qualitative evidence that bolsters these findings. Furthermore, the Commission notes that the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions; empirical evidence of actual harm is not necessary to establish that conduct is an unfair method of competition. In the case of non-competes, however, there is extensive empirical evidence, as well as extensive corroborating public comments, that non-competes negatively affect competitive conditions in product and service markets.

i. Non-Competes Inhibit New Business Formation

Evidence of Inhibited New Business Formation

The Commission finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation. The weight of the empirical evidence establishes that when non-competes become more enforceable, the rate of new business formation (*i.e.,* the number of new businesses formed) declines.

Several empirical studies assess the effects of non-competes on the rate of new business formation. A study conducted by Jessica Jeffers examines several State law changes in the technology sector and the professional, scientific, and technical services sector and finds a decline in new firm entry when non-competes become more enforceable. Jeffers finds that as non-competes became more enforceable, the entry rate of new firms decreases substantially.[523] Jeffers' study uses several changes in non-compete enforceability that are measured in a binary fashion. While this study therefore does not satisfy all the principles outlined in Part IV.A.2, it satisfies most of them and is accordingly quite robust and weighted highly.

Another study, conducted by Matt Marx, examines the impact of several changes in non-compete enforceability between 1991 and 2014 on new business formation, and likewise finds a negative effect of non-competes on new business formation.[524] Marx finds that, when non-competes become more enforceable, men are less likely to found a rival startup after leaving their employer, that women are even less likely to do so (15% less likely than men), and that the difference is statistically significant.[525] This study therefore supports both that non-competes inhibit new business formation and that non-competes tend to have more negative impacts for women than for men. Marx uses several changes in non-compete enforceability measured in a continuous fashion. The study therefore satisfies the principles outlined in Part IV.A.2 and is weighted highly.

In addition, Johnson, Lipsitz, and Pei analyze the extent to which non-compete enforceability affects the rate of firm entry in high-tech industries. They find that an average increase in non-compete enforceability decreases the establishment entry rate by 3.2%.[526] Outside of examining only innovative industries, this study's methodology is otherwise strong, and the study is therefore weighted highly. While this study uses multiple changes in a granular measure of non-compete enforceability, a quite robust methodology, the study is limited to high-tech industries.

In addition, a study conducted by Can and Fossen indicates that decreases in enforceability of non-competes in Utah and Massachusetts increased entrepreneurship among low-wage workers.[527] Can and Fossen examine just two changes in non-compete enforceability, measured in a binary fashion, and the study is therefore given slightly less weight than studies which

[516] *See, e.g., The Importance of Young Firms for Economic Growth,* Policy Brief, Ewing Marion Kauffman Foundation (Sept. 24, 2015).

[517] Aaron K. Chatterji, *Spawned With a Silver Spoon? Entrepreneurial Performance and Innovation in the Medical Device Industry,* 30 Strategic Mgmt. J. 185 (2009).

[518] *See, e.g.,* Evan Starr, Natarajan Balasubramanian, & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms,* 64 Mgmt. Sci. 552 (2018).

[519] *See, e.g.,* Shi, *supra* note 84.

[520] *See* Part IV.B.3.b.i.

[521] *See* Part IV.B.3.a. While the Commission focuses on the most direct negative effects on competition in product and service markets in this Part IV.B.3.b, inefficient matching between workers and firms may have additional negative effects, including on output.

[522] *See* Part IV.B.3.a.i.

[523] Jeffers, *supra* note at 450. The 2024 version of Jeffers' study reports a 7% impact.

[524] Matt Marx, *Employee Non-Compete Agreements, Gender, and Entrepreneurship,* 33 Org. Sci. 1756 (2022).

[525] *Id.* at 1763.

[526] Matthew S. Johnson, Michael Lipsitz, & Alison Pei, *Innovation and the Enforceability of Non-Compete Agreements,* Nat'l. Bur. Of Econ. Rsch. (2023) at 36.

[527] Ege Can and Frank M. Fossen, *The Enforceability of Non-Compete Agreements and Different Types of Entrepreneurship: Evidence From Utah and Massachusetts,* 11 J. of Entrepreneurship and Pub. Pol. 223 (2022).

examine more changes or use a more granular measure of enforceability. The study corroborates the results of studies using these stronger methodologies.

Furthermore, a study conducted by Benjamin Glasner focused on high-tech industries finds that technology workers increased entrepreneurial activity in Hawaii after non-competes were restricted, but finds no effect on entrepreneurial activity from Oregon's restriction on non-competes with low-wage workers.[528] Similar to the study by Can and Fossen, this study by Glasner uses two changes in non-compete enforceability measured in a binary fashion. Additionally, a study published by Stuart and Sorenson shows that increased enforceability of non-competes decreases the amount by which firm acquisitions and IPOs induce additional local business formation.[529] This study uses cross-sectional variation in non-compete enforceability measured in a binary fashion, and studying the amount by which firm acquisitions and IPOs induce additional local business formation does not cover all entrepreneurship. These studies are thus given more limited weight, but generally are in line with other evidence that non-competes reduce new business formation and innovation.

Additionally, a study conducted by Starr, Balasubramanian, and Sakakibara analyzes the effect of non-compete enforceability on spinouts (*i.e.,* when a firm creates a new business by splitting off part of its existing business). The authors find that, when non-compete enforceability increases by one standard deviation, the rate of spinouts within the same industry decreases by 32.5%—a major decrease in new business formation.[530] Research shows that spinouts within the same industry are highly successful, on average, when compared with typical entrepreneurial ventures.[531] This study uses cross-sectional differences in non-compete enforceability, measured in a continuous fashion, though it attempts to avoid problems related to the use of cross-sectional differences in non-compete enforceability by using law firms—which likely do not use non-competes due to ethical limits in the legal profession [532]—as a control group. The Commission therefore gives this study somewhat less weight than studies of changes in non-compete enforceability, though the findings corroborate the findings of the studies by Jeffers and Marx.

In addition, a study by Salomé Baslandze shows that non-competes reduce new business formation, finding that greater non-compete enforceability inhibits entry by spinouts founded by former employees of existing firms.[533] Baslandze notes that spinouts tend to innovate more and are relatively higher quality than other new firms. This study examines changes in non-compete enforceability on a continuous measure but assumes that changes over a 19-year period occur smoothly over time instead of identifying exactly when the legal changes were made. While this study uses changes in non-compete enforceability and corroborates the findings of the aforementioned studies on new business formation, the assumption regarding the timing of changes yields an imprecise measure of non-compete enforceability over time. The Commission therefore gives this study somewhat less weight than studies which precisely identify the timing of changes in non-compete enforceability.

Finally, in a 2011 study, Samila and Sorenson find that when non-competes are more enforceable, rates of entrepreneurship, patenting, and employment growth slow. They find that an increase in venture capital funding creates three times as many new firms where non-competes are unenforceable, compared to where non-competes are enforceable.[534] This study uses cross-sectional variation in non-compete enforceability along two dimensions, both of which are measured in a binary fashion. Due to this measurement, the Commission gives this study less weight, though its results corroborate the findings of the other studies on new business formation.

The Commission gives minimal weight to two additional studies. One of these estimates the job creation rate at startups increased by 7.8% when Michigan increased non-compete enforceability.[535] However, the Commission places less weight on this study than the studies discussed previously because it examines only one legal change in one State and because the change to non-compete enforceability was accompanied by several other simultaneous changes to Michigan's antitrust laws. Thus, it is not possible to isolate the effect of the change in non-compete enforceability standing alone.

The other study finds mixed effects of non-compete enforceability on the entry of businesses into Florida. The study examines a legal change in Florida which made non-competes more enforceable. The authors find larger businesses entered the State more frequently (by 8.5%) but smaller businesses entered less frequently (by 5.6%) following the change.[536] Similarly, Kang and Fleming find that employment at large businesses rose by 15.8% following the change, while employment at smaller businesses effectively did not change.[537] This study examines a single change in non-compete enforceability. However, the Commission gives this study minimal weight because the study does not examine new business formation specifically; instead, it assesses the number of ''business entries,'' which does not necessarily reflect new business formation because it also captures existing businesses moving to the State.

Additional research analyzes the effects of non-competes on the number of jobs created by new businesses.[538]

[528] Benjamin Glasner, *The Effects of Noncompete Agreement Reforms on Business Formation: A Comparison of Hawaii and Oregon,* Econ. Innovation Group White Paper (2023), *https://eig.org/noncompetes-research-note/.*

[529] Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity,* 48 Admin. Sci. Q. 175 (2003).

[530] Starr, Balasubramanian, & Sakakibara, *supra* note 518 at 561. 32.5% is calculated as 0.0013/0.004, where 0.0013 is the coefficient reported in Table 2, Column 6, and 0.004 is the mean WSO entry rate reported in Table 1 for ''nonlaw'' firms.

[531] For reviews of the literature, *see, e.g.,* Steven Klepper, *Spinoffs: A Review and Synthesis,* 6 European Mgmt. Rev. 159 (2009) and April Franco, *Employee Entrepreneurship: Recent Research and Future Directions,* in Handbook of Entrepreneurship Research 81 (2005).

[532] *See* Am. Bar Ass'n, Model Rule 5.6, *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_6_restrictions_on_rights_to_practice/.*

[533] Salomé Baslandze, *Entrepreneurship Through Employee Mobility, Innovation, and Growth,* Fed. Res. Bank of Atlanta Working Paper No. 2022–10 (2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4277191.*

[534] Samila & Sorenson find that a 1% increase in venture capital funding increased the number of new firms by 0.8% when non-competes were enforceable, and by 2.3% when non-competes were not enforceable. Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth,* 57 Mgmt. Sci. 425, 432 (2011). The values are calculated as 0.8% = $e^{0.00755} - 1$ and 2.3% = $e^{0.00755 + 0.0155} - 1$, respectively.

[535] Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment,* Fed. Res. Bank of Phila. Working Paper No. 21–26 at 16 (2021).

[536] Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence From a Florida Case Study,* 29 J. Econ. & Mgmt. Strategy 663, 673 (2020).

[537] *Id.* at 674. The value is calculated as 15.8% = $e^{0.1468} - 1$.

[538] In the NPRM, the Commission stated that the evidence relating to the effects of non-competes on job creation was inconclusive. However, in the final rule, the Commission does not make a separate finding that non-competes reduce job creation.

While the research described previously shows that non-competes inhibit the rate of new business formation, this research indicates that even where new businesses are created, these new businesses have fewer workers where non-competes are more enforceable. This evidence suggests that non-competes not only prevent small businesses from being formed, but they also hinder entrepreneurship by tending to reduce the number of employees new firms are able to hire.

In addition to analyzing the rate of firm entry in high-tech industries, Johnson, Lipsitz, and Pei analyzes the number of jobs created at newly founded firms in innovative industries.[539] Using evidence from several State law changes, the authors find that increases in non-compete enforceability lead to a reduction in the number of jobs created at newly founded firms in innovative industries (though not necessarily across all industries or all types of firms) by 7.2%.[540]

A study by Starr, Balasubramanian, and Sakakibara finds that increases in non-compete enforceability decreased average per-firm employment at new firms.[541] In the NPRM, the Commission stated that this study found that several increases in non-compete enforceability were associated with a 1.4% increase in average per-firm employment at new firms.[542] However, upon further review of the study, the Commission interprets this study as finding that increases in non-compete enforceability decreased average per-firm employment at new firms—both for spinouts within the same industry and spinouts into a different industry.[543] For spinouts into a different industry, average per-firm employment at the time of founding decreases by 1.4% due to greater non-compete enforceability. For spinouts into the same industry, average per-firm employment decreases by 0.3%.[544] At seven years after founding, the results are similar: spinouts into a different industry have average per-firm employment that is 1.5% lower due to greater non-compete enforceability, while spinouts into the same industry have per-firm employment that is 0.7% lower.[545] The Commission notes that this study compares States with different levels of enforceability, using law firms as a control group, instead of considering changes in non-compete enforceability. It is therefore given less weight than studies with stronger methodologies.[546]

Comments Pertaining to Inhibited New Business Formation and the Commission's Responses

The Commission's finding that non-competes inhibit new business formation is principally based on the empirical evidence described in this Part IV.B.3.b.i. However, the comments provide strong qualitative evidence that bolsters this finding.

Hundreds of commenters agreed with the Commission's preliminary finding that non-competes reduce new business formation. Illustrative examples of comments the Commission received include the following:

- I am a hairstylist . . . and have been with the company for 11 years. Our work conditions have changed drastically over the years and Covid has really sent us on a sharp decline. It is not the same salon I signed on to work for. That being said, a few coworkers want to open a salon and take some of us with them to bring back the caliber of service we want to give our clients. Our non-compete contracts state that we can't work within 30 miles of this salon. We didn't expect that standards would drop so low and they would raise prices so high that we lost so many clients. . . . We have all had enough of the toxic environment and need to be free of this unfair contract.[547]
- I am a veterinarian that has had to suffer under non-compete clauses my entire career. I have had to sell my home and relocate several times including moving out of State due to non-compete clauses. I'm currently stuck in a [non-compete covering a] 30 mile radius of all 4 practices of a group of hospitals I work for. This basically keeps me from working in an enormous area. I had to sign it due to circumstances out of my control and they took advantage of my situation. I recently tried to start my own business, not related to the type of practice that I have the non-compete clause with, and had to abandon the idea because I couldn't get funding without my current employer releasing me from the contract or by relocating again out of the huge area of non-compete.[548]
- We own a small family practice in urban Wisconsin. I previously was employed by a large healthcare organization and burned out. When I left to star[t] my own business, I was restricted from working close by, by a non-compete. I spent $24,000 [in] legal fees challenging this successfully. . . . Now as a business owner for 5 years, we have the opportunity to hire some physician assistants who have been terminated without cause from my prior employer. I am unable to do so because they also had to sign non-competes. I have seen many disgruntled patients who have delayed care because of this.[549]
- I am aesthetic nurse practitioner wanting to start my own business but I am tied to a 2 year 10 mile non compete. I was basically obligated to sign the non-compete when I needed to reduce my hours to finish my master's degree (that I paid for and they wanted me to get). I feel forced to stay at a job that is not paying me what I am worth.[550]
- I am a licensed social worker with a non-compete which is hindering my employment options. . . . I would like to start my own business as the mental health facility I work for is not supportive of mental health. This rule would be a great benefit for mental health professionals and those seeking quality mental health services.[551]
- As a recently graduated physician, I wanted to start my own practice and become a small business owner. However, I also needed a source of income to start out and wanted to work part time at a local hospital for income and benefits. However, due to a non-compete clause in their contracts, I could not start my own business and practice in the same city if I was to work with them. This hindered my ability to work as much as I wanted (ended up having to work as an independent contractor for significantly less

Instead, it cites the research described herein—which relates solely to job creation at newly founded firms—to support its finding that non-competes inhibit new business formation.

[539] Johnson, Lipsitz, and Pei, *supra* note 526 at 36.

[540] *Id.* While this study satisfies each of the other metrics outlined in Part IV.A.2, the sample is restricted to firms in innovative industries, and therefore the outcome of interest is not reflective of the entire population.

[541] Starr, Balasubramanian, & Sakakibara, *supra* note 518 at 552.

[542] NPRM at 3488–89.

[543] While this study satisfies some of the principles for robust design outlined in Part IV.A.2, the Commission notes that average per-firm employment does not precisely correspond to the economic outcome of interest, which is overall employment or job creation.

[544] Calculated as 1.4% − 1.1%, based on the effect for non-within-industry spinouts (1.4%) and the relative impact on within-industry spinouts compared with non-within-industry spinouts (−1.1%). *See* Starr, Balasubramanian, & Sakakibara, *supra* note 518 at 561.

[545] Calculated as 1.5% − 0.7%, based on the effect for non-within-industry spinouts (1.5%) and the relative impact on within-industry spinouts compared with non-within-industry spinouts (−0.8%). *See id.* at 563.

[546] There are also two studies analyzing how non-competes affect job creation or employment generally. Neither study relates to new business formation specifically. Goudou finds a decreased job creation rate from an increase in non-compete enforceability in Florida. Felicien Goudou, *The Employment Effects of Non-compete Contracts: Job Retention versus Job Creation* (2023), *https://www.jesugogoudou.me/uploads/JMP_Felicien_G.pdf*. This study considers just one change in non-compete enforceability, and is therefore given less weight, though the results corroborate findings in papers which satisfy more of the guideposts in Part IV.A.2. Additionally, the 2023 version of Johnson, Lavetti, & Lipsitz, *supra* note 388, finds that increased non-compete enforceability reduces employment by 1.9%, though they do not estimate the impact on job creation directly. Rather, the authors look only at the closely related metric of changes in overall employment. This study otherwise has a strong methodology, as discussed in Part IV.B.3.a.ii.

[547] Individual commenter, FTC–2023–0007–3299.

[548] Individual commenter, FTC–2023–0007–1448.

[549] Comment of Three Oaks Health, FTC–2023–0007–1397.

[550] Individual commenter, FTC–2023–0007–10157.

[551] Individual commenter, FTC–2023–0007–11922.

shifts per month and no benefits), and made it more difficult to get my business off the ground due to expenses for providing my own benefits. Banning non-compete clauses would significantly help the ability for citizens to pursue starting small businesses or other work to increase their income and prosperity.[552]

- Mr. Z had worked for a company for over 15 years installing windshields in vehicles. He was a lower-level employee making $18.50 an hour and did not learn any trade secrets or confidential information. After years of working for the company the employer refused to raise his wages despite his experience, so he decided to start his own business. Shortly after giving notice and beginning his new endeavor, he received a letter from his previous employer informing him that he was in breach of his non-compete agreement and the employer would enforce it if he continued with his business plan.[553]
- Non-competes have prohibited me from making a living as a fitness and wellness professional to such an extent, that it hurt me economically. I opened up my own business that was different than my previous employer, even though it was different and I told him I was going to focus on a different area in wellness, my previous employer sued me. I ended up having to hire an attorney to defend myself and when it was all said and done, I spent close to 12,000 in fees and penalties.[554]
- Non compete agreements are detrimental to the average worker, preventing them from pursuing better paying job offers or from starting their own business in the same industry. I am directly affected by a non-compete clause I had signed as part of a job acceptance. I am now forming my own business in the same industry as my employer, and cannot do business within a 50-mile radius of my employer. That radius covers the hometown I live in. Even though we are in the same industry, we have very different target markets.[555]

As these comment excerpts reflect, many potential entrepreneurs wrote to the Commission to describe how they wanted to strike out on their own, but a non-compete preventing them from doing so. These comments indicate that non-competes have deprived communities of homegrown businesses—with respect to everything ranging from tech companies, to hair salons, to physician practices, and many more types of firms. This deprives markets of competing firms that can reduce concentration—which in turn has benefits for lowering prices and raising the quality of products and services, and increasing innovation in bringing new ideas to market—as well as depriving communities of opportunities for new job creation.

Even where entrepreneurs were able to start businesses, they explained how non-competes prevented them from hiring talented workers and made it harder for their nascent businesses to grow and thrive. Many other commenters described personal experiences in which their newly formed businesses were threatened by litigation costs related to non-competes. Other commenters stated that the threat of litigation related to non-competes increases the risk and cost of starting a new business, particularly if that business intends to compete against a large incumbent firm. One commenter stated that incumbent firms can use non-compete litigation as a mechanism to chill startup formation where startups lack the resources to contest a non-compete.

Numerous small businesses and organizations representing small businesses submitted comments expressing support for the proposed rule and describing how it would help small business owners. These commenters contend that categorically prohibiting non-competes will empower small businesses by providing them with new access to critical talent and will drive small business creation as entrepreneurial employees will be free to compete against their former employers. Many small businesses also argued that non-competes can hinder small business formation and can keep small businesses from growing once they are formed. The extensive comments the Commission received from small businesses are also addressed in Part XI.C.

Some small businesses said they spent tens or hundreds of thousands of dollars defending themselves from non-compete lawsuits. A one-person surveying firm said it has to regularly turn down work because of the former employer's threat to sue over a non-compete. A small, five-worker firm said it was sued by a billion-dollar company for violating a non-compete despite the fact that the firm waited out the non-compete period and did not use proprietary information or pursue the former employer's customers; it fears the legal fees will force it out of business. A legal aid organization relayed the story of a client, a self-employed beauty worker who was unable to provide their service during a non-compete lawsuit despite working outside the non-compete geographic radius. The CEO of one small transport and logistics company said a ban would remove a tool used mostly by the largest companies in each industry to maintain their market dominance, as small competitors cannot match their legal budgets. Further, many workers said they would open their own business if non-competes were banned.

Many small businesses shared their experiences of how non-competes have made hiring more difficult. For example, a small physician practice said non-competes made it difficult to compete with larger practices to attract and retain physicians. A small business and a medical association said small businesses could not afford a lawsuit when hiring workers. An IT startup tried to hire an executive who had retired from a large firm, but the large firm sued the startup to enforce what the startup said was an unenforceable non-compete. According to the startup, because a lawsuit would have cost up to $200,000, it was forced to settle and could not work with numerous potential clients, and its growth was significantly slowed. It stated that it continues to turn away many potential hires to avoid being sued over non-competes.

Other commenters raised additional issues relevant to hiring. According to one technology startup organization, the inability to assemble the right team is a major reason startups fail, and small businesses lose opportunities because they must avoid hiring workers who are subject to even unenforceable non-competes. That organization also said startups currently face legal and time costs from navigating the patchwork and complexity of State non-compete laws, especially when trying to determine if a potential hire's non-compete is enforceable; the time and expense of navigating this landscape will thus often cause the startups to forego that hire. That organization said some non-competes prevent experienced workers from counseling, advising, or investing in startups, and such mentoring can double a startup's survival rate.

Several self-identified entrepreneurs commented that because of their non-competes, they feared not being able to operate, build, or expand their business. Numerous workers reported that they wanted to or planned to start their own business, but their non-compete made them too afraid to do so. A public policy organization referenced the Census Bureau's Annual Business Survey to argue that a majority of business owners and an even higher majority of Black business owners view starting their own business as the best avenue for their ideas, and that non-competes may prevent these potential entrepreneurs' ideas from coming to market.

Several commenters stated that non-competes make it harder for new businesses to hire workers with relevant

[552] Individual commenter, FTC–2023–0007–11777.

[553] Comment of NW Workers' Justice Project, FTC–2023–0007–15199 (discussing a client).

[554] Individual commenter, FTC–2023–0007–12904.

[555] Individual commenter, FTC–2023–0007–12697.

experience or industry knowledge. Some commenters argued that non-compete bans, such as in California, have contributed to higher rates of successful start-ups, while new firms in States where non-competes are more enforceable tend to be smaller and are more likely to fail.

In contrast, several commenters opposed to the rule argued that non-competes promote new business formation by protecting small and new firms' investments, knowledge, and workers from appropriation by dominant firms poaching their employees. Commenters also theorized that, while non-competes directly inhibit employee spinoffs, they may encourage businesses to enter the market by enhancing their ability to protect their investments. As described in Part IV.D.2, the Commission finds that firms have viable alternatives for protecting these investments that burden competition to a less significant degree than non-competes. The Commission further notes that these commenters did not provide evidence to support their assertions.

In addition, when assessing how non-competes affect new business formation, the Commission believes it is important to consider the net impact. It is possible that the effects described by these commenters and the effects described by the Commission earlier in this Part IV.B.3.b.i can be occurring at the same time. That is, a non-compete might in some instances be protecting a firm's investments in a manner that is productivity-enhancing holding all else equal. But even that same non-compete can—and certainly non-competes in the aggregate do—inhibit new business formation by prohibiting workers from starting new businesses and by locking up talented workers, preventing the worker from efficiently matching with the job that is the highest and best use of their talents. What the empirical evidence shows is that non-competes reduce new business formation, overall and on net, indicating that the tendency of non-competes to inhibit new business formation more than counteracts any tendency of non-competes to promote new business formation.

Other commenters said non-competes protect firms' value and assets for sale in future acquisitions, which they said drives seed capital investment in start-ups. An investment industry organization commented that private-equity financing, particularly for early-stage companies, often includes non-competes and is used to support growth, in turn increasing competition. In response, the Commission notes that these commenters provided no empirical evidence that decreases in non-compete enforceability have affected seed capital investment and private-equity financing. Moreover, the Commission notes that there is no indication that small businesses or early-stage companies in States that have banned or limited non-competes have been unable to obtain financing. To the contrary, California, where non-competes are unenforceable, has a thriving start-up culture.

Other commenters addressed empirical research related to new business formation. Some commenters similarly argued that research on the average quality of employee spinouts due to changes in non-compete enforceability may imply negative effects of the rule (*e.g.,* if prohibiting non-competes decreases average employment or average survival rates of new firms). Some commenters also noted that the Baslandze study finds that weaker non-compete enforceability increases the rate at which spinouts form but result in a lower proportion of high-quality spinouts.[556]

In response to these comments, the Commission notes commenters primarily referenced Starr, Balasubramanian, & Sakakibara[557] to support this view. The findings in this study have been misinterpreted by commenters. This study actually finds that spinouts that form when non-compete enforceability is stricter are *lower* quality (*i.e.,* create fewer jobs), but that the effect is less drastic for spinouts within the same industry versus spinouts into different industries. Coupled with other evidence discussed in Part IV.B.3.b.i, the weight of which points to increased job creation due to the rule, the Commission finds that empirical studies have not established that non-competes lead to higher-quality startups or higher-quality spinouts. The Commission also notes that the result in the Baslandze study regarding the quality of spinouts is theoretical, and the study does not test this theory empirically.

Commenters also argued that non-competes may have different effects on different types of workers—for example, across different industries, occupations, or levels of pay—and that these differences may affect the impacts of non-competes on new business formation. In response, the Commission notes that the studies show negative effects across a range of industries and are directionally consistent, even if they do not provide results for all subgroups.

Commenters asserted that non-competes may affect job creation through several different mechanisms. The Commission agrees and finds that, regardless of the specific mechanism, the weight of the evidence indicates that non-competes inhibit job creation.

Commenters opposing the rule also questioned the usefulness of studies of Michigan's law change, given that existing non-competes remained enforceable under the Michigan law; they state that as a result, it would take longer for effects from the law to be realized. As noted under "Evidence of inhibited new business formation," the Commission gives minimal weight to this study, but for other reasons.

In an ex parte communication entered into the record, the author of the study of the Michigan law change expressed concern over the Commission's interpretation of the study.[558] In particular, he stated that his methodology mitigated concerns that the study's findings of an increase in the job creation rate may be due to decreases in that rate's denominator (total employment). While the Commission does not agree with this assessment,[559] the Commission places less weight on the study for different reasons, as noted.

Some commenters who opposed the rule also addressed the evidence relating to non-competes and job creation, although these commenters generally did not focus on job creation related to new businesses specifically. Some of these commenters asserted that the studies addressed in the NPRM indicated that non-competes are associated with a greater number of jobs available and increased rates of job creation, rather than decreased rates of job creation. Some asserted that the evidence on job creation is mixed and that the issue is understudied. In the NPRM, the Commission stated that the evidence relating to the effects of non-competes on job creation was inconclusive. However, in the final rule,

[556] Baslandze, *supra* note 533 at 40.

[557] Starr, Balasubramanian, & Sakakibara, *supra* note 518.

[558] Ex Parte Communication: Email from G. Carlino to E. Wilkins (Jan. 30, 2023), *https://www.ftc.gov/system/files?file=ftc_gov/pdf/P201200NonCompeteNPRMExParteCarlinoRedacted.pdf.*

[559] In particular, the long time period and the difference-in-difference methodology used in the study do not mitigate concerns that decreases in employment due to non-compete enforceability could drive increases in the job creation rate. The concern is not that the findings somehow represent effects on anything other than the average job creation rate (as noted by the author in his ex parte communication), but that a rate is comprised of a numerator and denominator, and effects on either may drive effects on the rate as a whole. This concern is shared by at least two empirical studies of non-competes. *See* Johnson, Lavetti, & Lipsitz *supra* note 388 at 19 and Johnson, Lipsitz, & Pei *supra* note 526 at 19.

the Commission does not make a separate finding that non-competes reduce job creation. Instead, it cites the research described herein—which relates to job creation at newly founded firms—to support its finding that non-competes inhibit new business formation.

ii. Non-Competes Inhibit Innovation

Evidence of Inhibited Innovation

The Commission finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting innovation. Three highly reliable empirical studies find that non-competes reduce innovation.

One such study, a study by Zhaozhao He, finds that the value of patents, relative to the assets of the firm, increases by about 31% when non-compete enforceability decreases.[560] In contrast to some other studies of innovation discussed here, He's study focuses on the value of patents, rather than the mere number of patents. The study does so to mitigate concerns that patenting volume may not represent innovation.[561] The study analyzes the impact of several legal changes to non-compete enforceability, using a binary measure of non-compete enforceability. While this study therefore does not satisfy all the principles outlined in Part IV.A.2, it nonetheless satisfies many of them and contains a reasonably strong methodology.

A second study, by Johnson, Lipsitz, and Pei, finds that increased enforceability of non-competes decreases the rate of ''breakthrough'' innovations and innovations which make up the most cited patents. This study lends weight to the finding that non-competes harm both the quantity and the quality of innovation.[562] The authors also show that when non-compete enforceability decreases, patenting increases even in industries where most new innovations are patented. These increases imply that the effect is a true increase in innovation, rather than firms substituting between patents and non-competes.

Johnson, Lipsitz, and Pei also show that State-level changes in non-compete policy do not simply reallocate innovative activity across State lines, which would result in no change in innovation at the national level. Instead, they find that decreasing non-compete enforceability, even in one State, increases innovative activity nationally.[563] Johnson, Lipsitz, and Pei's study uses several legal changes to analyze the impact of enforceability. It also uses several metrics of quality and quantity to mitigate concerns over whether patenting is an accurate reflection of innovation, especially in this context. The study thus satisfies all the principles outlined in Part IV.A.2 and is therefore given substantial weight by the Commission.

A third study, by Rockall and Reinmuth, finds that non-competes have a significant negative impact on innovation. They further find that this effect is not driven solely by the entry of new businesses. Their work suggests a potentially central role for knowledge spillovers, which are hampered when worker mobility is diminished. The study uses many changes to non-compete enforceability quantified on a continuous basis and considers several metrics which represent the quantity and quality of patenting, in order to accurately capture the relationship between non-competes and innovation.[564] Similar to the study by Johnson, Lipsitz, and Pei, this study therefore satisfies all the principles described in Part IV.A.2 and is given substantial weight.

The Commission places the greatest weight on the foregoing three studies, in which factors unrelated to the legal changes at issue are less likely to drive the results. There are additional studies that relate to non-competes and innovation, but the Commission gives them less weight.

A study by Samila and Sorenson finds that venture capital induced less patenting by 6.6 percentage points when non-competes are enforceable.[565] However, the authors note that patenting may or may not reflect the true level of innovation, as firms may use patenting as a substitute for non-competes where they seek to protect sensitive information.[566] Furthermore, this study assesses only the quantity of patents and does not take into account the quality of patents, which would be a better proxy for innovation. For this reason, the Commission gives less weight to this study (although its findings are directionally consistent with the first three studies described herein). This study also uses cross-sectional variation in non-compete enforceability, which is measured along two dimensions in a binary fashion. In addition, a study by Gerald Carlino examined how patenting activity in Michigan was affected by an increase in non-compete enforceability. The study finds that mechanical patenting increased following the change in the law, but that drug patenting fell, and that the quality of computer patents fell.[567] However, the increase in mechanical patenting appears to have primarily occurred approximately 14 years after non-compete enforceability changed. This suggests that some other mechanism may have led to the increase in patenting activity.[568] Moreover, the study uses a single change in non-compete enforceability to generate its results, and it uses only one measure of innovation outside of patent quantity—quality as measured by patent citations. Finally, this study examines a change to non-compete enforceability which was accompanied by several other changes to Michigan's antitrust laws, making it impossible to identify the effect of the change in non-compete enforceability standing alone. For these reasons, the Commission gives less weight to this study.

A study by Clemens Mueller does not estimate the overall impact of non-compete policy on innovation, but instead focuses on career detours of inventors.[569] Mueller shows that inventors are more likely to take ''career detours''—that is, to change industries to avoid the reach of their non-compete—when enforceability of non-competes is stricter. Due to the lower match quality between that inventor and their new industry, the innovative productivity of those inventors suffers after they take career detours. However, the Commission assigns this study less weight because, while its methodology satisfies the principles outlined in Part IV.A.2, the study is only informative of the productivity of individuals taking career detours. It does not address whether innovation in the aggregate increases. Mueller uses several changes in non-compete enforceability to generate results, but those changes are measured in binary—rather than continuous—fashion.

Coombs and Taylor examine the impact of non-compete enforceability on innovation. They find that research

[560] Zhaozhao He, *Motivating Inventors: Non-Competes, Innovation Value and Efficiency* 21 (2023), *https://ssrn.com/abstract=3846964.* Thirty one percent is calculated as $e^{0..272} - 1$.

[561] *Id.* at 17.

[562] Johnson, Lipsitz, & Pei, *supra* note 526.

[563] *Id.*

[564] Emma Rockall & Kate Reinmuth, *Protect or Prevent? Non-Compete Agreements and Innovation* (2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459683.*

[565] Samila & Sorenson, *supra* note 534 at 432. The value is calculated as $6.6\% = e^{0.0208 + 0.0630} - e^{0.0208}$.

[566] *Id.*

[567] Carlino, *supra* note 535 at 40.

[568] *Id.* at 48.

[569] Clemens Mueller, *Non-Compete Agreements and Labor Allocation Across Product Markets,* Proceedings of the EUROFIDAI-ESSEC Paris December Finance Meeting 2023 (2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4283878.*

productivity, as measured by the number of products in biotechnology firms' prospectuses, was lower in California than other States, which they suggest implies that California's ban on non-competes hampers research productivity.[570] However, this study is purely cross-sectional, and results may be due to other differences between California and other States; the Commission accordingly places less weight on this study.

Two additional studies address firm strategies related to innovation. However, the Commission gives them little weight because the outcomes studied do not inform how non-competes would affect the overall level of innovation in the economy. The first, by Raffaele Conti, uses two changes in non-compete enforceability (in Texas and Florida), and indicates that firms engage in riskier strategies with respect to research and development (''R&D'') when non-compete enforceability is greater.[571] However, this study does not address whether these riskier strategies lead to greater innovation. The second, by Fenglong Xiao, finds that increases in non-compete enforceability led to increases in exploitative innovation (*i.e.,* innovation which stays within the bounds of the innovating firm's existing competences) in the medical device industry.[572] The study finds this increase in exploitative innovation leads to an increase in the rate at which new medical devices are introduced. However, the study also finds that explorative innovation (*i.e.,* innovation which moves outside those bounds) decreased, and explorative innovation is the mode of innovation which the empirical literature has found to be associated with high growth firms.[573] The net impact on innovation from this study is thus unclear. The study examines several changes in non-compete enforceability, measured with a binary indicator of non-compete enforceability.

[570] Porcher L. Taylor, III, and Joseph E. Coombs, *Non-Competition Agreements and Research Productivity in the Biotechnology Industry,* 26 Frontiers of Entrepreneurship Rsch. 1 (2006).

[571] Raffaele Conti, *Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Strategies?,* 35 Strategic Mgmt. J. 1230 (2014).

[572] Fenglong Xiao, *Non-Competes and Innovation: Evidence from Medical Devices,* 51 Rsch. Pol'y 1 (2022).

[573] Alessandra Colombelli, Jackie Krafft & Francesco Quatraro, *High-Growth Firms and Technological Knowledge: Do Gazelles Follow Exploration or Exploitation Strategies?,* 23 Indus. And Corp. Change 262 (2014).

Comments Pertaining to Inhibited Innovation and the Commission's Responses

The Commission's finding that non-competes inhibit innovation is principally based on the empirical evidence described in this Part IV.B.3.b.ii. However, the comments provide strong qualitative evidence that bolsters this finding.

Several academics and economic research groups, among other commenters, agreed with the Commission's preliminary finding that non-competes inhibit innovation. Commenters argued that non-competes reduce knowledge flow and collaboration, force workers to leave their field of expertise, and discourage within-industry spinouts that promote innovation. Many commenters stated that banning non-competes would make it easier for workers to pursue innovative ideas and to hire the best talent to help develop those ideas. Illustrative examples of comments the Commission received include the following:

- I am a geneticist at Stanford University, and I am co-founding a biotech startup that aims to discover new cancer immunotherapies. Many of the most talented geneticists, immunologists, cancer biologists, and other scientists with unique and valuable skillsets for drug development are bound by non-competes that prevent them from leaving jobs at big pharma companies to join biotech startups like mine. The result is artificial scarcity in the market for top scientific talent—a phenomenon that precludes healthy competition between industry incumbents and new entrants. Given that much of our country's most cutting-edge translational research happens within biotech startups, and given that many of the most successful drugs on the market originate in biotech startups, non-competes in pharma and biotech prevent the most talented scientists from working on the most innovative science and obstruct the development of new treatments and cures for human disease—leaving our society worse off.[574]
- As a practicing Physician for over thirty years, and one who trained fellows in pain management, who followed many of their students' careers, I was able to see the detriments of unfair Non-Compete clauses in their contracts. Often a physician would take a job, and if it did not work out, the restrictions were so severe, that they would need to move to a new geographic location in order to be employed. . . . Other scenarios exist as well. Where large institutions can block scientific discovery of their research physicians from moving to other institutions which may be better able to support their research, potentially blocking the promotion of scientific discovery.[575]

[574] Individual commenter, FTC–2023–0007–0198.

[575] Individual commenter, FTC–2023–0007–3885.

- I am an engineer in the orthopedic space. I have an idea for a truly innovative foot and ankle plating system that I believe could become the standard of care for fracture fixation and foot deformity correction. It could save 10–15 minutes of operating room time per surgery, which studies show carries a cost of $1000 (times millions of surgeries annually). It does not directly compete with my former employer's product, but I have to wait a year to start engaging surgeons about it because of a very broad non-compete, for a product that does not even compete.[576]
- I currently work as a mid-level technical employee at a company that enforces long (a year or longer) noncompetes. . . . After working for larger companies for a few years after college, many of my friends started their own companies. Some succeeded massively and some didn't but what was common among most of them was that the companies they started were somewhat related to what they were working on before. They either saw a gap in the industry while working for a larger company, or had a bold idea in their domains that they wanted to quit their jobs and try executing it. All this risk taking has in turn resulted in innovation, more competition, and hundreds of jobs. This would not have been possible if these people were under non-compete agreements from their previous employers. In fact, many of my friends who are currently working for companies that have non-competes have personally told me that they want to try a different approach than the current incumbents in their industry, but they simply can't take this risk because of the long non-competes they are under. Note that non-competes are even more consequential for workers of relatively less experience because sitting out for 1 year while only having 3 to 4 years of experience is a lot more detrimental to one's career when compared to an individual with 20 years of experience. Given that younger workers are more willing to take risks and try new ideas, the impact of non-competes on innovation is far worse than many think.[577]
- I am an engineer who has worked on software and hardware in several domains, including the semiconductor industry. I perceive non-competes to not only be detrimental to free trade but also to be detrimental to American innovation and manufacturing. If the United States is serious about supporting the growth of the semiconductor industry in the U.S., it must ensure that semiconductor companies inside the United States truly act to benefit American innovation. . . . The FTC would act prudently to ban such agreements.[578]
- I am a physician. I have worked for public entities for my entire career. I have worked under non-competes for my entire career. The result of these non-compete clauses is that myself and my colleagues keep our imagination and creativity locked away. We see novel applications of pharmaceuticals and medical devices which our leadership

[576] Individual commenter, FTC–2023–0007–0760.

[577] Individual commenter, FTC–2023–0007–19807.

[578] Individual commenter, FTC–2023–0007–12872.

does not want to pursue, and we are also precluded from pursuing these ideas due to the noncompete. We see new ways to reach people and help people with our unique skill sets, and our noncompete keeps us from being able to reach them. The noncompete allows our employer to own us. They monopolize the talent of their workforce and this deprives the community of the innovation that may stem from the unleashing of the creativity of the physician workforce. I see the direct impact of non-compete clauses. The public has so much to gain by releasing healthcare workers from their noncompete clauses. These talented individuals, once released from their noncompetes, will begin to contribute to their communities with new ideas and innovation that will serve their communities. Many entities have so many reasons to avoid innovation and this stifles the individuals who work for them and oppresses new ideas. Once released from the bureaucracy and burden of non-competes I believe you will see an abundance of community outreach, device innovation and community service from many physicians currently subjugated by their noncompete clauses.[579]

A research organization said a ban on non-competes would increase the value workers realize from creativity and inventiveness, though it also asserted that non-competes can incentivize firms to create and share information. Some workers commented that they had innovative ideas or research that their employer was unwilling to pursue, but the worker could not leave to pursue their ideas elsewhere. A commenter also argued that captive workforces can stifle competition for workers and for clients or patients that leads to innovation. According to several commenters, trapping workers in jobs can also lead to decreased productivity and so-called ''quiet quitting.''

Some commenters contended that California's ban on non-competes helped Silicon Valley and other industries in California thrive. For example, a public policy organization pointed to industry clusters where studies have identified job hopping, which may otherwise be prohibited by non-competes, as the primary mechanism of knowledge diffusion and argued that restricting non-competes for knowledge workers would improve the U.S.'s competitiveness. Other commenters questioned whether non-competes played a role in Silicon Valley's growth. In response, the Commission notes that it does not attribute California's success in the technology industry to its non-compete laws. The Commission merely notes (in Part IV.D) that the technology industry is highly dependent on protecting trade secrets and that it has thrived in California despite the inability of employers to enforce non-competes, suggesting that employers have less restrictive alternatives for protecting trade secrets.

Other commenters opposing the rule argued that non-competes may promote innovation by encouraging firms to make productivity-enhancing investments and by decreasing the risk of workers leaving. These commenters stated that non-competes protect firms' investments in workers, R&D, intellectual capital, and innovation. The Commission does not believe that non-competes are needed to protect valuable firm investments. As described in Part IV.D.2, the Commission finds that firms have less restrictive alternatives that protect these investments adequately while burdening competition to a less significant degree.

In addition, when assessing how non-competes affect innovation, the Commission believes it is important to consider the net impact. It is possible that the effects described by these commenters and the effects described by the Commission earlier in this Part IV.B.3.b.ii can be occurring at the same time. That is, a non-compete might in some instances be protecting a firm's investments in a manner that is productivity-enhancing holding all else equal. But even that same non-compete can—and certainly non-competes in the aggregate do—inhibit innovation by preventing workers from starting new businesses in which they can pursue innovative ideas; inhibiting efficient matching between workers and firms; and reducing the movement of workers between firms. What the empirical evidence shows is that non-competes reduce innovation, overall and on net, indicating that the tendency of non-competes to inhibit innovation more than counteracts any tendency of non-competes to promote innovation.

The Commission addresses the available evidence on the relationship between non-competes and firm investment in Part IV.D.1.

A business commenter contended that worker mobility does not necessarily improve innovation since the new firm may be unable or unwilling to use the worker's knowledge or ideas, or the new start-up may fail and leave consumers with less innovative products and services. In response, the Commission notes that it is certainly possible that some workers switch jobs to firms that are unable or unwilling to use their knowledge or ideas, or to startups that may fail. However, the fact that the empirical evidence shows that reduced non-compete enforceability increases innovation suggests that these effects are outweighed by workers who can switch jobs to firms that make better use of their talents, or to startups that thrive and bring innovative new products to market.

Other commenters stated that non-competes promote the sharing of ideas and information within firms and incentivize risk-taking. The Commission is not aware of evidence that non-competes promote the sharing of ideas within firms specifically, but in any event the Commission explains in Part IV.D.2 that trade secrets and NDAs provide less restrictive means than non-competes for protecting confidential information. With respect to risk-taking, the Commission notes that the Conti study finds that firms engage in riskier R&D strategies when non-compete enforceability is greater, but it is not clear whether these riskier R&D strategies translate into increased innovation.

Commenters also argued that non-competes may have different effects on different types of workers—for example, across different industries, occupations, or levels of pay—and that these differences may affect the impacts of non-competes on innovation. In response, the Commission notes that the most methodologically robust studies show negative effects across a range of industries and are directionally consistent, even if they do not provide results for all subgroups.

A research organization argued that non-competes decrease the likelihood that innovative technologies are developed outside the U.S. and that non-competes promote economic growth, competitiveness, and national security. The Commission is not aware of any reliable evidence of the effects of non-competes on whether innovative technologies are developed outside the U.S. However, the weight of the empirical evidence indicates that non-competes reduce the amount of innovation occurring within the U.S.

Some commenters noted that innovation hubs have emerged in States that enforce non-competes. In response, the Commission notes that it does not find that it is impossible for innovation hubs to emerge where non-competes are enforceable. Instead, the Commission finds that, overall, non-competes inhibit innovation.

One commenter performed an empirical exercise in which he correlated Global Innovation Index rankings of innovation clusters with the enforceability of non-competes in each location. The commenter found that only one of the top five clusters bans non-competes, and only three others in the top 100 ban non-competes. The

[579] Individual commenter, FTC–2023–0007–2340.

commenter cited the success of Chinese innovation clusters, noting that non-competes are permitted in each of them.[580] The Commission does not find this evidence persuasive. Other differences across countries may explain these results better than policy towards non-competes, which is one factor among many that affect the level of innovation in an economy.

Some commenters argued that the empirical research cited in the NPRM has mixed results. These commenters point to the study by Xiao (2022) showing that non-competes increase exploitative innovation (innovation that incrementally extends firms' existing capabilities), but not explorative innovation (innovation that extends the scope of firms' capabilities). In response, the Commission notes that, within this particular study, the net impact of non-competes on innovation was unclear. But the Commission does not believe the evidence overall is mixed, given that the three empirical studies of the effects of non-competes on innovation that use the most reliable empirical methods all find that non-competes reduce innovation.

Some commenters claimed that two studies cited in the NPRM—the Xiao and Conti studies—had findings that were omitted or misinterpreted: first, the Xiao finding that non-compete enforceability increases the rate of new discoveries of medical devices due to increases in the rate of exploitative innovation but not explorative innovation); and second, the Conti finding that greater non-compete enforceability leads to riskier innovation, which these commenters assert is a positive outcome.[581] In response, the Commission notes that the NPRM described both of these findings and did not omit or misinterpret them.[582] The Commission explains why it gives these studies little weight under ''Evidence of inhibited innovation.''

A commenter asserted that the He study is insufficient evidence to support a finding, and that the study examines the effects of non-compete enforceability on the value of patents, which the commenter asserts misses other aspects of innovation. In response, the Commission believes that the He study is methodologically robust and that, while no single metric can capture all aspects of innovation, the value of patents is a meaningful proxy. The Commission also notes that the effects observed in the He study are considerable, as the study finds that the value of patents, relative to the assets of the firm, increases by about 31% when non-compete enforceability decreases. In addition, the Commission notes that the comment record provides substantial qualitative support in line with the empirical findings. Furthermore, additional research, published since the release of the NPRM, helps confirm the Commission's finding regarding the effect of non-competes on innovation. As described under ''Evidence of inhibited innovation,'' this evidence moves beyond assessing the impact of non-competes on the value of patents or the number of patents to identify the quality of new innovation, as well as the mechanisms underlying these effects.

Many commenters referred to a law review article, which was also submitted as a comment itself, that critiques the literature on non-competes and innovation.[583] First, the authors argue that a measure of enforceability used in part of the economic literature is incorrect and that a more recently developed measure is imperfect but better.[584] The Commission agrees with the authors that the more recently developed measure of enforceability, the scale based on Bishara (2011), is stronger than other measures of enforceability due to its granularity. This metric is used in many studies cited in this final rule, including the Johnson, Lipsitz, and Pei study, which largely reinforces the conclusions in the He study, lending weight to the conclusions in these studies that non-competes suppress the overall level of innovation in the economy.

Second, the authors argue that a given non-compete may be governed by the laws of a State other than the State where the worker lives, which undermines the reliability of studies analyzing the effects of non-compete enforceability. The authors argue that cross-border enforcement of non-competes may be a difficult issue to properly address in empirical work and has not been accounted for in the work to date. In response, the Commission notes that if the State law that applied to a given non-compete were totally random—for example, if a non-compete in Oregon was no more likely to be governed by Oregon's law than any other State's law—we would expect to observe no effects on economic outcomes (such as earnings, innovation, and new business formation) from changes in State law. Instead, the empirical research shows that changes in State law have clear impacts on economic outcomes in particular States. This indicates that enough non-competes within a particular State are subject to that State's law for changes in that State's law to affect economic outcomes in that State.

Third, the authors argue that there is a lack of data on the use of non-competes and that such data are needed to completely assess the effects of non-competes. Although there is not comprehensive data on individual workers' employment agreements, the Commission believes the studies that examine changes in enforceability do so based on sufficient data to be reliable and are otherwise methodologically sound. These studies are also highly probative with respect to the effects of the final rule because what they are examining—how changes in the enforceability of non-competes affect various outcomes—matches closely with what the final rule does. The Commission also notes that there is considerable data regarding the prevalence of non-competes, which it discussed in Part I.B.2.

Fourth, the article argues that some studies of non-competes have small sample sizes, which may lead to measurement error. In response to concerns about small sample sizes, the Commission notes that the most recent studies use a greater breadth of variation in the legal environment surrounding non-competes, overcoming this obstacle. Fifth, the article expresses concern about certain studies that are based on legal changes in Michigan. The Commission takes this critique into account throughout this final rule and notes it when discussing the applicable studies that examine legal changes in Michigan, including under ''Evidence of inhibited innovation.''

In an ex parte communication included in the public record, the author of one of the studies of innovation stated that studies which examine multiple legal changes may be biased, since affected parties may anticipate the legal change and adjust their behavior prior to the date that the legal change is made. The author stated that examination of the legal change in Michigan was therefore preferable, since it was ''inadvertent'' and therefore not

[580] Comment of Mark Cohen, FTC–2023–0007–12064, at 12–13.

[581] Referring to Xiao, *supra* note 572 and Conti, *supra* note 571.

[582] NPRM at 3492–93.

[583] Barnett & Sichelman, *supra* note 389.

[584] The allegedly flawed measures use binary indicators for enforcement versus non-enforcement, or binary indicators for several facets of enforceability (Stuart and Sorenson, *supra* note 529; Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment,* 27 J. L., Econ., & Org. (2011)), and the more recent measure is more nuanced (Bishara, *supra* note 501).

subject to anticipation effects.[585] The Commission agrees that, in general, anticipation effects can bias the findings of empirical studies. However, empirical work shows that the legal changes used in much of the literature on non-competes are not subject to anticipation effects.[586] This may be because the vast majority are changes based on judicial decisions, rather than statutory changes, as hypothesized by researchers.[587] Moreover, even if anticipation effects occur in studies of non-compete enforceability, that would likely not change the measurable observed benefits of reducing non-compete enforceability, and may indeed lead to underestimation of observed benefits. Underestimation would occur if parties were adjusting their behavior in advance of the change in enforceability in the same direction as the effects observed after the change. This would occur if, for example, firms began to decrease use of non-competes in advance of a decrease in non-compete enforceability, knowing that those non-competes would soon be less enforceable. This ultimately would mean that the actual effects on labor mobility, earnings, new business formation, innovation, and other outcomes could be even greater. Additionally, the legal change in Michigan is subject to other criticism, as discussed under ''Evidence of inhibited innovation'' and by commenters.

iii. Non-Competes May Increase Concentration and Consumer Prices

Evidence of Increased Concentration and Consumer Prices

As described in Parts IV.B.3.b.i and ii, the Commission finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation and innovation, and have in fact done so. The Commission finds that these effects, standing alone, are sufficient to support its finding that non-competes tend to negatively affect competitive conditions in product and service markets.

However, the Commission notes that there is also evidence that non-competes increase industrial concentration more broadly, which in turn tends to raise consumer prices. The empirical literature on these effects is less developed than the empirical work documenting declines in new business formation and innovation; specifically, the empirical evidence on consumer prices relates only to healthcare markets (though the evidence on concentration spans all industries in the economy). For this reason, the Commission does not rest its finding that non-competes tend to negatively affect competitive conditions in product and service markets on a finding that non-competes increase concentration and consumer prices. However, there are several reliable studies finding that non-competes increase concentration and/or consumer prices, bolstering the Commission's finding that non-competes tend to negatively affect competitive conditions in product and service markets.

The Commission finds that non-competes reduce new business formation.[588] By doing so, non-competes may increase concentration. Non-competes may also stunt the growth of existing firms that would otherwise better challenge dominant firms, for example, by limiting potential competitors' access to talented workers.[589]

Non-competes may also affect prices in a variety of ways. By suppressing workers' earnings, non-competes decrease firms' costs, which firms may theoretically pass through to consumers in the form of lower prices. However, non-competes may also have several countervailing effects that would tend to increase prices. First, non-competes may increase concentration, which could lead to less competition between firms on price, and therefore higher prices for consumers. Second, by inhibiting efficient matching between workers and firms, non-competes may reduce the productivity of a firm's workforce, which may lead to higher prices. Third, by inhibiting innovation, non-competes may hinder the development of lower-cost products or more efficient manufacturing processes.

One study, by Hausman and Lavetti, focuses on physician markets. The study finds that as the enforceability of non-competes increases, these markets become more concentrated, and prices for consumers for physician services increase. The study finds that while non-competes allow physician practices to allocate clients more efficiently across physicians, this comes at the cost of greater concentration and higher consumer prices. This study examines several changes in non-compete enforceability measured continuously. The authors note that, in theory, if decreased non-compete enforceability decreases earnings, then the fall in prices may simply be due to pass-through of labor costs. However, empirical research shows that decreased non-compete enforceability increases earnings (as discussed in Part IV.B.3.a.ii). Even if that were not the case, Hausman and Lavetti show that labor cost pass-through cannot explain their findings.[590] This study satisfies all of the principles described in Part IV.A.2, and is accordingly weighted highly by the Commission.

Another study, by Lipsitz and Tremblay, examines all industries in the economy and shows empirically that increased enforceability of non-competes at the State level increases concentration.[591] Lipsitz and Tremblay theorize that non-competes inhibit entrepreneurial ventures that could otherwise enhance competition in goods and service markets. The authors show that the potential for harm is greatest in the industries in which non-competes are likely to be used at the highest rate.[592]

If the general causal link governing the relationship between enforceability of non-competes, concentration, and consumer prices acts similarly to that identified in the study by Hausman and Lavetti, then it is plausible that increases in concentration identified by Lipsitz and Tremblay would lead to higher prices in a broader set of industries than healthcare. Lipsitz and Tremblay use several changes in non-compete enforceability measured in a continuous fashion, but do not measure the impact on consumer prices or welfare. The Commission therefore finds the study's conclusion that non-competes increase concentration highly robust, but the study is not itself direct empirical evidence of a relationship between non-competes and prices.

Two additional studies assess the effects of non-competes on concentration and prices. However, the Commission gives these studies little weight.

A study of physician non-competes by Lavetti, Simon, and White finds that prices charged by physicians with non-competes are similar to those charged by physicians without non-competes.[593]

[585] Ex Parte Communication: Email from G. Carlino, *supra* note 558.

[586] Johnson, Lavetti & Lipsitz, *supra* note 388 at 12–14.

[587] *Id.* at 12.

[588] *See* Part IV.B.3.b.i.

[589] *See* Part IV.C.2.c.i (describing a study addressing how non-competes force firms to make inefficiently high buyout payments).

[590] Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes,* 13 Am Econ. J. Applied Econ. 278 (2021).

[591] Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers* 6 (2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864.* Concentration is measured by an employment-based Herfindahl-Hirschman Index (HHI).

[592] *Id.* at 3.

[593] *See* Lavetti, Simon, & White, *supra* note 82.

The Commission gives this study less weight because it merely analyzes differences between workers based on the use of non-competes.[594]

A study by Younge, Tong, and Fleming finds that non-competes contribute to economic concentration because non-compete enforceability increases the rate of mergers and acquisitions.[595] This study uses one change in non-compete enforceability—in Michigan—to generate its results. However, in addition to its use of a single legal change in a single State, the change to non-compete enforceability was accompanied by several other changes to Michigan's antitrust laws, so it is not possible to identify the effect of the change in non-compete enforceability standing alone.

Comments Pertaining to Increased Concentration and Consumer Prices and the Commission's Responses

Several commenters addressed the question of whether non-competes affect concentration and consumer prices. Some commenters asserted that the rule would lower consumer prices by improving matches between employers and workers, increasing productivity. Commenters also argued that locking up talent, particularly in specialized markets, prevents entrepreneurship and new business formation and can thus contribute to increased concentration.

Some commenters opposing the NPRM claimed that banning non-competes could increase concentration. These commenters argued that larger firms could discourage companies from expanding into new and underserved markets by poaching, or threatening to poach, their key employees, leading to increased costs that could force some firms out of business. These commenters also argued that non-competes protect small businesses from dominant consolidators, as high recruitment, retention, and other costs may induce small businesses to sell or larger businesses may hire away their workers. A medical trade organization stated that without non-competes, independent practices might not be able to afford to hire and thus may be unable to grow or compete.[596]

While these commenters theorize that prohibiting non-competes would increase concentration, the Commission notes that the available evidence indicates that non-competes increase concentration, rather than reducing it. The Commission further notes that these theories are inconsistent with the robust empirical literature finding that non-competes reduce new business formation, as well as with the hundreds of comments from small businesses, including physician practices, recounting how non-competes stymied their ability to enter markets or grow because they make it harder to hire talent.

Several commenters claimed that prohibiting non-competes would increase worker earnings and increase transaction costs related to hiring, which firms would pass through to consumers in the form of higher prices. However, the only study of how non-competes affect prices—the Hausman and Lavetti study—finds that decreased non-compete enforceability *decreases* prices in the healthcare market, rather than increasing them. Moreover, while it is theoretically possible that higher labor costs could be passed on to consumers in the form of higher prices, there are several countervailing effects from prohibiting non-competes that would tend to lower prices. Additionally, empirical research shows that labor cost pass-through cannot explain decreases in prices in healthcare markets associated with non-competes becoming less enforceable.[597]

An insurance company stated that insurance premiums would increase if the rule allows non-profit hospitals to dominate the hospital market and have more leverage in network negotiations. These commenters do not provide any empirical evidence to support this assertion. Moreover, for the reasons described in Part V.D.5, the Commission disagrees that the ability to use non-competes will provide a material competitive advantage to non-profit hospitals. Another commenter stated that if non-competes are prohibited, physicians will leave States with lower market reimbursement rates for those with higher rates, increasing healthcare costs and shortages. Commenters did not cite any empirical evidence that supports this hypothetical assertion that the final rule would increase healthcare costs or shortages due to physicians leaving States with lower reimbursement rates, and the Commission is aware of none. However, the Commission notes that it received many comments from doctors, nurses, and other healthcare professionals asserting that non-competes worsen healthcare shortages.[598]

Some commenters stated that non-competes may improve access to physicians due to non-compete-led consolidation or more efficient patient-sharing within practices, and that Hausman and Lavetti's study is unable to quantify these benefits. In response, the Commission notes that there is no empirical literature bearing out this theory, and that the commenters overwhelmingly stated that non-competes decrease patients' access to the physicians of their choice, increase healthcare shortages, and negatively affect the quality of health care.[599]

iv. Non-Competes May Reduce Product and Service Quality and Consumer Choice

The negative effects of non-competes on competition may also degrade product and service quality and consumer choice. Competition encourages firms to expand their product offerings and innovate in ways that lead to new and better products and services.[600] However, by inhibiting new business formation, increasing concentration, and reducing innovation, non-competes reduce competitive pressure in product and service markets, which may reduce product quality and consumer choice. In addition, poor working conditions and less optimal matching of workers and firms may lead to reductions in the quality of products and services. For these reasons, non-competes may tend to negatively affect competitive conditions in product and service markets by reducing product quality and consumers' options.

Such effects are less readily quantifiable than the other negative effects of non-competes on product and service markets—*i.e.,* the negative effects on new business formation, innovation, concentration, and consumer prices. It is thus unsurprising that there are not reliable empirical studies of these effects. However, the Commission received an outpouring of public comments on this issue. Hundreds of commenters, primarily from the healthcare field, described how

[594] *See* Part IV.A.2 (describing the shortcomings of such studies).

[595] Kenneth A. Younge, Tony W. Tong, & Lee Fleming, *How Anticipated Employee Mobility Affects Acquisition Likelihood: Evidence From a Natural Experiment,* 36 Strategic Mgmt. J. 686 (2015).

[596] *See also* Part XI.C.2, which addresses these types of comments in greater detail.

[597] Hausman & Lavetti, *supra* note 590.

[598] These comments are summarized in greater detail in Part IV.B.3.b.iv.

[599] *See* Part IV.B.3.b.iv.

[600] In the NPRM, the Commission noted that innovation and entrepreneurship can, in turn, have positive effects on product quality. *See* NPRM at 3492. The Commission did not make specific findings on the effect of non-competes on consumer choice. However, the Commission discussed the closely related questions of how non-competes affect new business formation, innovation, concentration, and consumer prices. *See id.* at 3490–93.

non-competes reduce product and service quality and consumer choice.

The large number of comments the Commission received on this issue, the wide variety of impacts commenters describe, and the fact that the impacts commenters describe are overwhelmingly negative, indicate that non-competes reduce product quality and consumer choice, further bolstering the Commission's finding that non-competes tend to negatively affect competitive conditions in product and service markets.[601]

The commenters who addressed the effects of non-competes on product quality and consumer choice primarily discussed the healthcare industry. The majority of these comments focused on how non-competes harm patient care. Hundreds of physicians and other commenters in the healthcare industry stated that non-competes negatively affect physicians' ability to provide quality care and limit patient access to care, including emergency care. Many of these commenters stated that non-competes restrict physicians from leaving practices and increase the risk of retaliation if physicians object to the practices' operations, poor care or services, workload demands, or corporate interference with their clinical judgment. Other commenters from the healthcare industry said that, like other industries, non-competes bar competitors from the market and prevent providers from moving to or starting competing firms, thus limiting access to care and patient choice. Physicians and physician organizations said non-competes contribute to burnout and job dissatisfaction, and said burnout negatively impacts patient care.

In addition, physicians and physician organizations stated that, to escape non-competes, physicians often leave the area, and that this severs many physician/patient relationships. These commenters stated that non-competes therefore cause patients to lose the knowledge, trust, and compatibility that comes with long-established relationships. These commenters also said that strong physician/patient relationships and continuity of care improve health outcomes, particularly for complex, chronic conditions or patients who need multiple surgeries. These commenters described how patients who lose their physicians to non-competes either travel long distances to see that physician, switch physicians, or lose access entirely if no other physicians are available. One physician argued that taking away a patient's ability to choose their provider violates the Patients' Bill of Rights.[602]

One medical society cited a 2022 survey of Louisiana surgeons in which 64.4% of the surgeons believed non-competes force patients to drive long distances to maintain continuity of care, and 76.7% believed they force surgeons to abandon their patients if they seek new employment.[603] This study had a small sample size and thus the Commission gives it limited weight, but the Commission notes that it accords with the many comments the Commission received describing how patients must drive long distances to maintain continuity of care—or are unable to do so, resulting in harms to their health. Illustrative comments on how non-competes affect the quality of patient care include the following:

- As a primary care physician I truly hope to see [the rule] move forward. I recently left my position at one company and for a year commuted an hour to be outside of my non-compete radius. I recently returned to my community and discovered I have more patients than I can count who simply didn't get care for over a year because they didn't want to find a new [primary care physician] but also couldn't make the hour drive to see me at my new location. The commute was annoying for me, but ultimately the only ones truly hurt were patients. Let's stop hurting our patients by restricting their ability to see their physicians.[604]
- My practice has operated since the 1990s in Danville, Kentucky. We are the only cardiology practice that has been present and has worked tirelessly to serve this rural community. The practice was a private practice originally. Unfortunately, just as most cardiac practices throughout the country have had to, our practice had to come under the control of these hospital systems to maintain its viability. . . . The CEO and the administration . . . have squeezed us out and forced us to leave the area with the employment contract non-compete in place. . . . I have spent the last 6 months hugging patients, medical staff, nursing who are stricken by the fact that we are being pushed out. Patients desperately ask me how they can maintain care if they have to travel up to an hour to see their doctors with this change. They worry how they can pay for the steep gas prices to see their doctors. . . . They are truly concerned for the health of their families. All the while all I can do is tell them that my non-compete does not allow me, their cardiologist for the past decade, to give them any advice on how to maintain their care.[605]
- As a Physician, I had a non compete clause in my contract that extended two counties wide (100 square miles). . . . [W]hen I would not sign a contract amendment regarding pay that was very unfavorable and nebulous I was called in and summarily dismissed 'no cause.' Because of that I had to work out of state and my patients were instantly without a physician. The community did not have enough physicians to be able to care for the patients who now had no medical provider. During COVID this lack of access to healthcare for patients most certainly led to increased unnecessary illness and death. . . . Patients are suffering with access to healthcare, and physician shortages are being exacerbated because every time a physician has to leave because of a non compete clause they start hiring and credentialing all over again and it can take months for them to be able to work again.[606]
- Being a therapist, non-competes are extremely scary when it comes to patient care. Some include date ranges in which we cannot communicate with our patients, some of whom have severe trauma histories or suicidal ideations. If a clinician changes companies but is unable to continue meeting a patient, who is at fault if there is an injury or death? . . . Some non-competes include mileage in which a clinician cannot create their own company or rent out an office within a certain radius—how is this a safe practice? How can clients continue to work on their mental health and desire to stay alive if they have to change clinicians due to a noncompete clause?[607]
- Due to mistreatment and to escape workplace toxicity, one of my colleagues left our practice in compliance to our non-compete conditions, even though they caused great hardship. I, too, wanted to leave, but could not because doing so would have harmed my family's well being. What I witnessed in the aftermath was unconscionable. There was a void in patient care and months later, there still is a void. Not only was this physician required to move quite a distance from the practice, he was forbidden to even inform his patients that he was leaving. The practice in turn, did not inform the patients, and when asked, just informed them that he was no longer with the practice. Consequently, wait times to treat cancers doubled and now have tripled.[608]
- I would like to open a new clinic in my town, but my noncompete would disallow that from happening immediately. Furthermore, I worry that my patients that need medical care wouldn't be able to access it at my current clinic because the providers

[601] As described in Parts IV.B.3.b.i and ii, the Commission finds that the effects of non-competes on new business formation and innovation, standing alone, are sufficient to sustain its finding that non-competes tend to negatively affect competitive conditions in product and service markets.

[602] *See* President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, *Consumer Bill of Rights and Responsibilities, Executive Summary* (1997), *https://govinfo.library.unt.edu/hcquality/cborr/index.htm.*

[603] *See* William F. Sherman et al., *The Impact of a Non-Compete Clause on Patient Care and Orthopaedic Surgeons in the State of Louisiana: Afraid of a Little Competition?*, 14 Orthopedic Revs. (Oct. 2022), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9569414/.*

[604] Individual commenter, FTC–2023–0007–19853.

[605] Individual commenter, FTC–2023–0007–4072.

[606] Individual commenter, FTC–2023–0007–4440.

[607] Individual commenter, FTC–2023–0007–4270.

[608] Individual commenter, FTC–2023–0007–2384.

are booked out 6+ months, and if one left that would make those immediately increase to nearly a year, which could potentially cause my patient lasting damage. If I could open my own clinic locally without the constraints of the noncompete, those patients would be able to continue care as necessary with me, and I wouldn't feel stuck with poor management worsening patient care for my patients.[609]

• As a veterinarian, I can personally assure the FTC that such restrictions have caused both death and permanent disability of pets. . . . In nearly every scenario I have heard of, the veterinary business that requires and enforces non-compete clauses is underserving the pet-owning public. This is the current situation for veterinary medicine on a national level. Hospitals are so overwhelmed that they are not accepting new patients, turning away emergency cases, and imposing extremely long (several months or more) waiting lists for appointments and/or scheduled procedures. If a hospital cannot accommodate the patients who require veterinary care, that hospital is not able to compete with the existing demand for services. . . . Is it fair for pet owners who cannot get their pets in to see a veterinarian (even on emergency situations) to have the veterinary hospitals who refuse to see their pets remove other options for care via non-compete clauses? These clauses are being blatantly abused by certain large veterinary businesses so that these organizations can maintain a pool of potential patients (on waiting lists) to draw from. Unfortunately, many of these dogs and cats die while waiting to be seen. At least in my profession, the non-compete concept has reached an epitome of unethical conduct. In addition, economic growth has been stunted due to self-serving greedy people in power. Please get rid of this horrible clause and lets make sure pets and their owners get what they need, when they need it.[610]

Some hospital associations argued that a study of physician markets[611] shows that non-competes improve patient care. According to these commenters, this research finds that non-competes make in-practice referrals more likely, increasing revenue and wages and providing patients with more integrated and better care. In response, the Commission notes that while the study finds that non-competes make physicians more likely to refer patients to other physicians within their practice—increasing revenue for the practice—it makes no findings on the impact on the quality of patient care. The Commission further notes that pecuniary benefits to a firm cannot justify an unfair method of competition.[612]

Some medical practices argued that within-group referrals allow physicians to coordinate care plans and simplify logistics, and that non-competes protect the stability of those care teams to patients' benefit. Some industry associations and hospitals argued that non-competes improve patient choice and continuity of care because they stop physicians from leaving a health provider, benefiting patients who cannot follow the provider due to geographic or insurance limitations. One physician association said physicians leaving jobs can be costly to patients, who must transfer records and reevaluate insurance coverage.

The Commission notes that the vast majority of comments from physicians and other stakeholders in the healthcare industry assert that non-competes result in worse patient care. The Commission further notes that the American Medical Association discourages the use of non-competes because they ''can disrupt continuity of care, and may limit access to care.''[613] In addition, there are alternatives for improving patient choice and quality of care, and for retaining physicians, that burden competition to a much less significant degree than non-competes.

A related issue frequently raised in the comments is the impact non-competes have on healthcare shortages. According to many commenters, non-competes contribute to shortages by preventing physicians from moving to areas where their skills and specialties are needed; forcing physicians out of such areas; or forcing them out of practice entirely due to contractual restrictions or burnout. Such shortages, according to these commenters, decrease access to care, increase wait times, lead to canceled procedures, and decrease the quality of care. Many commenters stated that these effects of non-competes are particularly acute in rural, underserved, and less affluent areas that already have difficulty attracting healthcare professionals. Some commenters argued that provider shortages can, in combination with non-competes, create monopolies.

A smaller number of commenters from the healthcare industry argued that non-competes alleviate healthcare shortages and prevent hospital or facility closures by keeping physicians from leaving underserved areas and reducing fluctuations in labor costs. Some of these commenters asserted that a ban on non-competes would upend healthcare labor markets, thereby exacerbating healthcare workforce shortages, especially in rural and underserved areas. A medical society argued that non-competes can allow groups to meet contractual obligations to hospitals, as physicians leaving can prevent the group from ensuring safe care. As the Commission notes, there are not reliable empirical studies of these effects, and these commenters do not provide any. However, the Commission notes that the rule will increase labor mobility generally, which makes it easier for firms to hire qualified workers.

Commenters in a variety of industries beyond healthcare markets also provided a wide range of examples of how non-competes diminish the quality of goods and services, including preventing businesses from hiring experienced staff and creating worker shortages. Commenters stated that, where firms in a market use non-competes, it can be difficult for other firms to remain in the market, and consumers thus lose the freedom to choose providers. Several comments pointed favorably to the American Bar Association's longstanding ban on non-competes for most lawyers to protect clients' freedom to choose their lawyer, in contrast with other highly paid and highly skilled professions such as physicians and their patients or clients.[614]

Commenters from outside the healthcare industry mainly focused on how non-competes increase concentration within industries, which reduces firms' incentive to innovate and results in consumers having fewer choices. Other commenters described how non-competes lock highly talented workers out of their fields or force them into jobs where they are less productive, depriving the marketplace of the products and services they would have developed. Illustrative examples of these comments include the following:

• As a software developer who often works under contracts containing sections stipulating non-compete agreements, I have observed first hand how they can harm the economy by bolstering monopolies, such as in sectors where clientele only have a single choice for meeting their engineering needs. Often, these clients have no other options and are forced to meet whatever arbitrary price point is set by the leading (sole)

[609] Individual commenter, FTC–2023–0007–1206.

[610] Individual commenter, FTC–2023–0007–0677.

[611] Lavetti, Simon, & White, *supra* note 82.

[612] *See supra* note 305 and accompanying text.

[613] *See, e.g.,* Comment of Am. Med. Ass'n, FTC–2023–0007–21017, at 4–5 (citing AMA *Code of Medical Ethics* Opinion 11.2.3.1). After the comment period closed, the AMA adopted a policy supporting banning non-competes for physicians in clinical practice who are employed by hospitals, hospital systems, or staffing companies, though not those employed by private practices. This policy change does not have legal effect. Andis Robeznieks, *AMA Backs Effort to Ban Many Physician Noncompete Provisions,* Am. Med. Ass'n (Jun. 13, 2023), *https://www.ama-assn.org/medical-residents/transition-resident-attending/ama-backs-effort-ban-many-physician-noncompete.*

[614] *See* Model Rule 5.6, *supra* note 532.

company, and that company may in turn operate howsoever they choose without feeling the need to adopt reasonable business practices that might exist were there competition.[615]

- As an aspiring tree care professional, non-compete agreements prevent me from switching employers/companies to access better work conditions or opportunities. No tree service company has ever invested in me. I learned to climb and saw while working for Federal agencies (USDA and NPS), and also through self-education and practice on my own. I believe that non-compete agreements have adversely limited competition in the tree service industry. This hurts employees who could do better if they were free to change their place of employment, and it hurts consumers who have fewer tree service providers to choose from.[616]
- I worked in a business supplying technology and materiel considered critical for national defense. I was labeled an expert in the field by my DoD customers and commended multiple times for solving logistical and technical problems with protective equipment during the previous two wars. I lead development contracts from the DoD to advance the state-of-the-art in warfighter protection, which set multiple records for figures of merit within my business, and which our program manager volunteered was the most exciting technology she had ever managed. When my business decided to discontinue that technology and transfer me, my noncompete agreement prevented me from continuing to support the DoD. I was removed from consideration at another firm in the third round of interviews because of my noncompete agreement—again, for a technology my business had decided to not pursue and had transferred me out of. So, instead of having the opportunity to advance my career into management in the service of protecting warfighters, I had to exit that industry and move laterally, into a different industry that cannot value 20 years of my expertise, and which will not further the defense of my country. If the FTC had nationalized a prohibition on noncompete clauses two years ago, this would not have happened, and I would have had the opportunity to advance my career, improve my family's economic fortune, and continue to contribute to our nation's defense.[617]

Overall, the Commission believes that the large number of comments it received on the issue of product quality and consumer choice and the wide variety of overwhelmingly negative impacts commenters describe further bolsters the Commission's finding that non-competes tend to negatively affect competitive conditions in product and service markets.

4. Prohibitions in Section 910.2(a)(1)

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission adopts § 910.2(a)(1), which defines unfair methods of competition related to non-competes with respect to workers other than senior executives. Section 910.2(a)(1) provides that, with respect to a worker other than a senior executive, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause; or represent that the worker is subject to a non-compete clause.

Part IV.A sets forth the Commission's determination that the foregoing practices are unfair methods of competition under section 5, and Parts IV.B.1 through IV.B.3 explain the findings that provide the basis for this determination. In this Part IV.B.4, the Commission explains the three prongs of § 910.2(a)(1) and addresses comments on proposed § 910.2(a).[618]

a. Entering Into or Attempting To Enter Into (§ 910.2(a)(1)(i))

Proposed § 910.2(a) would have provided that it is an unfair method of competition for an employer to, among other things, ''enter into or attempt to enter into a non-compete clause with a worker.'' The Commission adopts this same language in the final rule in § 910.2(a)(1)(i). As a result, the final rule prohibits persons from entering into or attempting to enter into non-competes with workers other than senior executives as of the effective date. (Section 910.2(a)(2)(i) separately prohibits persons from entering into or attempting to enter into non-competes with senior executives as of the effective date.)

A business commenter requested that the Commission remove ''attempt to enter into'' from § 910.2(a) on the basis that it may encourage workers to sue employers for contractual provisions that have no practical effect on the worker or which are not finalized in any employment agreement. The Commission disagrees that conduct that would be covered by the attempt provision—such as presenting the worker with a non-compete, even if the employer and worker do not ultimately execute the non-compete—has no practical effect on the worker. The Commission is concerned that such attempts to enter into non-competes still have *in terrorem* effects that deter competition. For example, workers presented with non-competes may not realize they are not bound by them. Such workers may therefore refrain from seeking or accepting other work or starting a business, yielding the same tendency of non-competes to negatively affect competitive conditions that motivate this final rule.

The Commission accordingly finalizes the language as proposed.

b. Enforcing or Attempting To Enforce (§ 910.2(a)(1)(ii))

Proposed § 910.2(a) would have provided that it is an unfair method of competition for an employer to, among other things, ''maintain with a worker a non-compete clause.'' In addition, proposed § 910.2(b)(1) would have provided that, to comply with this prohibition on maintaining a non-compete, an employer that entered into a non-compete with a worker prior to the compliance date must ''rescind the non-compete no later than the compliance date.''

As elaborated in Part IV.E, the Commission has decided not to finalize a rescission requirement. As a result, the Commission also removes ''maintain'' from the text of § 910.2(a), to avoid any ambiguity about whether the final rule contains a rescission requirement. Instead of a rescission requirement, the final rule focuses more narrowly on the future enforcement of existing non-competes with workers other than senior executives. It provides that, with respect to a worker other than a senior executive, it is an unfair method of competition for a person to enforce or attempt to enforce a non-compete clause. An employer attempts to enforce a non-compete where, for example, it takes steps toward initiating legal action to enforce the non-compete, even if the court does not enter a final order enforcing the non-compete.

For workers other than senior executives, this prohibition on enforcing a non-compete applies to all non-competes, but affects only enforcement or attempted enforcement conduct taken after the effective date of the rule. In so doing, the Commission reduces the burden on employers by eliminating the need to take steps to formally rescind provisions of existing contracts, instead simply requiring that employers refrain from enforcing or attempting to enforce in the future (after the effective date) non-competes that are rendered unenforceable by this provision of the rule.

As explained in Part IV.C, the Commission in the final rule does not prohibit the future enforcement or attempted enforcement of existing non-

[615] Individual commenter, FTC–2023–0007–5818.

[616] Individual commenter, FTC–2023–0007–1980.

[617] Individual commenter, FTC–2023–0007–4446.

[618] Several commenters requested changes to proposed § 910.2(a) to provide various exceptions to coverage under the final rule. The Commission addresses these comments in Part V.C.

competes with senior executives. The Commission considered whether to take this approach for workers other than senior executives, but based on the totality of the evidentiary record concludes that such non-competes should not remain in force after the effective date for three main reasons. First, existing non-competes with workers other than senior executives negatively affect competitive conditions to a significant degree, for the same reasons as new non-competes. The Commission believes that non-competes with such workers that were entered into before the effective date implicate the concerns described in Part IV.B.3—relating to the negative effects of non-competes on competitive conditions in labor, product, or service markets—to the same degree as non-competes entered into as of the effective date. Of course, the Commission notes that the empirical evidence quantifying the harms to competition from non-competes by definition relates to existing non-competes.

Second, for workers other than senior executives, existing non-competes not only impose acute, ongoing harms to competition, they also impose such harms on individual workers by restricting them from engaging in competitive activity by seeking or accepting work or starting their own business after their employment ends. As described in Part IV.B.2.b, the Commission received thousands of comments from workers that described non-competes as pernicious forces in their lives that forced them to make choices that were detrimental to their finances, their careers, and their families. These concerns are less present for senior executives, who are far more likely than other workers to have negotiated their non-compete and received compensation in return, thereby mitigating this kind of acute, ongoing harm.

Third, because the Commission finds that non-competes with workers other than senior executives generally are not bargained for and such workers generally do not receive meaningful, if any, compensation for non-competes, the practical considerations that are present with respect to existing non-competes for senior executives (discussed in Part IV.C.3) are far less likely to be present for other workers. For these reasons, the Commission concludes that, consistent with the proposed rule, existing non-competes with workers other than senior executives should not remain in force after the effective date.

Several commenters argued that the Commission should allow all existing non-competes to remain in effect. Some of these commenters argued that the rule would upset bargained-for agreements. Commenters asserted that workers who received benefits in exchange for agreeing to non-competes would receive a windfall if such clauses cannot be maintained and are no longer enforceable. A few of these commenters also argued that invalidating existing non-compete agreements will upset workers' economic interests because they will lose out on enhanced compensation that they have received or expect to receive in exchange for their non-competes. Some commenters contended that invalidating existing non-competes would be especially harmful to workers' interests in non-competes tied to particularly large amounts of compensation, complex compensation arrangements, or unique forms of compensation such as equity grants. Relatedly, some commenters expressed concern that the NPRM did not explain whether employers could recoup benefits already paid in exchange for non-competes. A few commenters suggested that they have given workers confidential and trade secret information in exchange for the worker agreeing to a non-compete that may no longer be enforceable.

The Commission is not persuaded by comments arguing that the rule would upset existing bargained-for agreements. As noted in Part IV.B and Part IV.C, the Commission finds that workers who are not senior executives are unlikely to negotiate non-competes or to receive compensation for them. Moreover, the Commission has also determined that non-competes with senior executives that predate the effective date may be enforced,[619] which will substantially reduce the number of workers with complex compensation arrangements whose non-competes are rendered unenforceable after the effective date.

Other commenters argued that employers relied on the expectation of a non-compete when deciding how much to invest in training their workers or the extent to which they share trade secrets with their workers. In response, the Commission notes that firms that are concerned about retention have tools other than non-competes for retaining workers, including fixed-duration employment contracts (*i.e.,* forgoing at-will employment and instead making a mutual contractual commitment to a period of employment) and providing improved pay and benefits (*i.e.,* competing on the merits to retain the worker's labor services). In addition, while some workers that have received training may leave a firm for a competitor, firms will also be able to attract highly trained workers *from* competitors, and this increased job-switching will likely lead to more efficient matching between workers and employers overall.[620]

The Commission is not persuaded by commenters who contended that invalidating existing non-competes would disturb employer expectations with respect to sharing trade secrets or other commercially sensitive information. As explained in Part IV.D.2, the Commission finds that employers have adequate alternatives to non-competes to protect these interests, including trade secret law and NDAs, and that these alternatives do not impose the same burden on competition as non-competes. Some commenters contended that employers may not have adequate alternatives in place for existing non-competes and that former workers may not agree to new NDAs. But the Commission finds that it is rare for an employer who entered into a non-compete agreement as a means of protecting trade secrets or commercially sensitive information to have not also entered into an NDA with the worker.[621] This is especially true given that non-competes are generally less enforceable than NDAs.[622] In any event, nothing in the final rule prevents employers from entering new NDAs with workers.

Some commenters contended that invalidating existing non-competes would enable new employers to "free ride" off former employers' investments in training. The Commission addresses comments about "free riding" and training investments in Part IV.D.2.

Several comments argued that a final rule should not invalidate existing non-competes because the economic impact is too unpredictable. These commenters maintained that the number of individual employment contracts that would be invalidated means that the economic impact would be exceptionally widespread, and likely impossible to accurately predict. In response, the Commission notes that it

[619] *See* Part IV.C.3.

[620] *See* Part IV.B.3.a.

[621] *See, e.g.,* Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 35 (finding that 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and 74.7% of workers with non-competes are subject to all three provisions).

[622] Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes,* 133 Yale L. J. 669, 676 (2024) ("Courts across jurisdictions routinely give confidentiality agreements 'more favorable treatment' than noncompetes. And confidentiality agreements are not typically subject to the same limitations that are applied to noncompetes. . . . Overall, courts tend to apply a default rule of enforceability.") (internal citations omitted).

has assessed the benefits and costs of the final rule and finds that the final rule has substantial benefits that clearly justify the costs (even in the absence of full monetization).[623]

c. Representing (§ 910.2(a)(1)(iii))

Proposed § 910.2(a) would have provided that it is an unfair method of competition for an employer to, among other things, ''represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.'' The Commission adopts the same language in the final rule. Pursuant to § 910.2(a)(1)(iii), it is an unfair method of competition for an employer to represent that a worker other than a senior executive is subject to a non-compete clause. The ''good faith'' language remains in the final rule but, for clarity, it has been moved to § 910.3, which contains exceptions to the final rule.[624]

Under this ''representation'' prong, the final rule prohibits an employer from, among other things, threatening to enforce a non-compete against the worker; advising the worker that, due to a non-compete, they should not pursue a particular job opportunity; or telling the worker that the worker is subject to a non-compete. The Commission believes that this prohibition on representation is important because workers often lack knowledge of whether employers may enforce non-competes.[625] In addition, the evidence indicates that employers frequently use non-competes even when they are unenforceable under State law, suggesting that employers may believe workers are unaware of or unable to vindicate their legal rights.[626] Employers can exploit the fact that many workers lack knowledge of whether non-competes are unenforceable under State law by representing to workers that they are subject to a non-compete when they are not or when the non-compete is unenforceable. Such misrepresentations can have *in terrorem* effects on workers, causing them to refrain from looking for work or taking another job, thereby furthering the adverse effects on competition that the Commission is concerned about.

In addition, threats to litigate against a worker—even where the worker is aware of the Commission's rule and believes the non-compete is unenforceable—may deter the worker from seeking or accepting work or starting their own business. As explained in Part IV.B.2.b.ii, many commenters—including highly paid workers—explained in their comments that they believed their non-compete was unenforceable, but they nevertheless refrained from seeking or accepting work or starting their own business because they could not afford to litigate against their employer for any length of time. For this reason, the Commission believes it is important for the final rule to prohibit employers not only from enforcing or attempting to enforce non-competes against workers other than senior executives, but also threatening to do so.

A commenter suggested limiting the ''representation'' prong to instances where the employer has no good-faith basis to believe the non-compete is valid ''under local or State law,'' even if the non-compete is invalid under the final rule. The Commission does not adopt this approach because representing to workers that they are subject to a non-compete, where the rule provides that the non-compete is unenforceable, would mislead the worker and would tend to deter them from competing against the employer by seeking or accepting work or starting a business.

C. Section 910.2(a)(2): Unfair Methods of Competition—Non-Competes With Senior Executives

In the NPRM, the Commission proposed to prohibit non-competes—including non-competes entered into before the effective date—with all workers.[627] The Commission preliminarily found that all non-competes, whether with senior executives or other workers, were restrictive conduct that negatively affected competitive conditions.[628] However, while the Commission preliminarily found that non-competes with workers other than senior executives were exploitative and coercive, the Commission stated that this finding did not apply to senior executives.[629] The Commission requested comment on that preliminary finding, as well as on whether non-competes with senior executives should be excluded from the rule or otherwise subject to a different standard. The NPRM did not define the term ''senior executive,'' but sought comment on potential approaches to defining the term.[630]

In the final rule, the Commission does not find that senior executives—specifically, highly paid workers with the highest levels of authority in an organization—are exploited or coerced in connection with non-competes, and it describes the record on this issue in Part IV.C.1. The Commission does, however, find that non-competes with senior executives are an unfair method of competition, based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that impair competitive conditions in the economy. Specifically, the Commission finds that such non-competes are restrictive and exclusionary conduct that tends to negatively affect competitive conditions in product and service markets and labor markets. Indeed, non-competes with senior executives may tend to negatively affect competitive conditions in product and service markets to an even greater degree than non-competes with other workers, given the outsized role senior executives play in forming new businesses and setting the strategic direction of firms with respect to innovation. The Commission explains the basis for these findings in Part IV.C.2.

Because non-competes with senior executives are not exploitative or coercive, however, this subset of workers is less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers subject to existing non-competes. In addition, commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives. For these reasons, as described in Part IV.C.3, the Commission allows existing non-competes with senior executives to remain in force—unlike existing non-competes with all other workers, which employers may not enforce after the effective date.

In Part IV.C.4, the Commission explains the final rule's definition of ''senior executive'' and the related definitions it is adopting.[631] The Commission finds that the final rule's definition of ''senior executive'' appropriately captures the workers that are more likely to have complex compensation packages that present practical challenges to untangle, and who are less likely to be exploited or coerced in connection with their non-competes. To capture this subset of

[623] *See* Part X.E.
[624] *See* Part V.C.
[625] *See* Prescott & Starr, *supra* note 413 at 10–11.
[626] *See* Starr, Prescott, & Bishara, *supra* note 68 at 81.
[627] NPRM, proposed § 910.2(a).
[628] *Id.* at 3500.
[629] *Id.* at 3502–04.
[630] *Id.* at 3520.
[631] *See* § 910.1.

workers for whom the Commission decides to leave existing non-competes unaffected, the final rule adopts a definition of senior executive that uses both an earnings test and a job duties test. Specifically, the final rule defines the term ''senior executive'' to refer to workers earning more than $151,164 who are in a ''policy-making position'' as defined in the final rule.[632]

Finally, in Part IV.C.5, the Commission explains the regulatory text it is adopting in § 910.2(a)(2), which defines unfair methods of competition related to non-competes with senior executives.

1. The Commission Does Not Find That Non-Competes With Senior Executives Are Exploitative or Coercive

The Commission stated in the NPRM that its preliminary finding that non-competes are exploitative and coercive did not apply to senior executives. The Commission stated that non-competes with senior executives are unlikely to be exploitative or coercive at the time of contracting, because senior executives are likely to negotiate the terms of their employment and may often do so with the assistance of counsel.[633] The Commission also stated that such non-competes are unlikely to be exploitative or coercive at the time of the executive's potential departure, because senior executives are likely to have bargained for a higher wage or more generous severance package in exchange for agreeing to the non-compete.[634] The Commission sought comment on whether there are other categories of highly paid or highly skilled workers (*i.e.,* other than senior executives) who are not exploited or coerced in connection with non-competes.[635]

Based on the totality of the record, including the many comments submitted on these questions, the Commission finds that senior executives—specifically, highly paid workers with the highest levels of authority in an organization—are substantially less likely than other workers to be exploited or coerced in connection with non-competes. For these reasons, the Commission does not find that non-competes with senior executives are exploitative or coercive.

There is little empirical evidence on the question of whether non-competes with senior executives are exploitative or coercive. A 2006 study of non-competes with CEOs finds that many of these workers negotiated a severance period as long or longer than their non-compete period, making it easier to sit out of the market.[636] However, this study was limited to very-high-earning CEOs at large public companies—the average total compensation of the CEOs studied was $1.65 million[637]—so its findings do not necessarily capture the experiences of other senior executives. Many Americans work in positions with ''senior executive'' classifications. According to BLS, there were almost 3.4 million ''top executives'' in the U.S. in 2022 at firms under private ownership, and the median income for these workers was $99,240.[638]

The comment record on whether senior executives experience exploitation and coercion in relation to their non-competes is mixed. Many commenters asserted that, because some senior executives negotiate their non-competes with the assistance of expert counsel, they are likely to have bargained for a higher wage or more generous severance package in exchange for agreeing to the non-compete, and thus their non-competes are not exploitative or coercive. Several commenters stated that senior executives frequently negotiate non-competes for valuable consideration and/or typically agree to non-competes only in exchange for compensation. Some senior executives said they were not exploited or coerced in connection with non-competes.[639] Several commenters agreed with the Commission's preliminary finding that senior executives often obtain the assistance of counsel with respect to non-competes. Some commenters stated that to the extent a non-compete is not exploitative or coercive at the time of contracting, it is also not exploitative or coercive at the time of departure. One CEO stated that non-competes should be permissible for senior executives when they are entered into in exchange for severance and when the senior executive leaves voluntarily.

The Commission notes that a relatively small number of self-identified senior executives submitted comments in their personal capacity. While the Commission did receive some comments from self-identified senior executives suggesting that their non-competes were exploitative and coercive, such comments were far less common than for other workers. However, some senior executives did report experiencing similar issues of exploitation and coercion. Several senior executives said that their non-competes were required and non-negotiable. Multiple senior executives described their own non-competes as ''one-sided'' in favor of the employer. Some senior executives said they were not given consideration for the non-compete, and even some who said they received consideration still said their non-competes were exploitative and coercive. For example, some senior executives said they: (1) were required to sign a non-compete under threat of losing their job or their earned compensation; (2) were forced into a stock share buyout that included a non-compete; or (3) could obtain long-term compensation only if they signed a non-compete. Two advocacy groups stated that many senior executives may lack power to avoid non-competes and that employers still hold most of the leverage in employment negotiations, even with respect to senior executives. An employment law firm stated that in its experience, it had not seen higher compensation for senior executives and other highly paid workers in jurisdictions where non-competes were allowed, and that employers rarely provide compensation for non-competes. The firm said that senior executives and other highly paid workers are more likely to receive severance payments, but such payments are paid only in some cases. It said that even when paid, the severance payments often do not fully compensate for what a senior executive could have otherwise earned during the non-compete period.

Furthermore, several self-identified senior executives said they felt unable to leave their company because of their non-competes. Many of these commenters said they feared being unemployed. Some senior executives said they feared or could not afford litigation, while two senior executives said that they could not afford to fight non-competes they believed were unenforceable. Several self-identified senior executives, having spent their careers in one industry, said they were forced to sit out of the market for long periods, forgoing earnings and the ability to work. Others reported struggling to find a job and suffering

[632] *Id.*

[633] NPRM at 3503.

[634] *Id.* at 3504.

[635] *Id.* at 3503–04.

[636] Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?,* 63 Wash. & Lee L. Rev. 231, 256–57 (2006).

[637] *Id.* at 244.

[638] BLS, Occupational Employment and Wage Statistics, *Tables Created by BLS, https://www.bls.gov/oes.tables.htm.* These data are from the May 2022 National XLS table for Top Executives under private ownership.

[639] For the sake of readability, the Commission refers to the commenters based on how they described themselves. For example, if a commenter said they were a senior executive, the Commission refers to them as a senior executive (rather than as a ''self-described senior executive'').

financially, including living on Social Security or nearing bankruptcy.

One law firm specializing in executive compensation said many senior executives may have achieved top roles at companies because they have spent decades in the same industry and would struggle to find work with firms other than competitors. Another law firm said senior executives blocked from an industry could lose their long-cultivated reputation in the industry and, as a result, time out of an industry could harm their careers. Worker advocacy organizations and a law firm said senior executives tend to be relatively older and, as older workers are forced out of the job market, they are likely to be losing out on increasingly scarce employment opportunities relative to their younger counterparts. Another advocacy group argued that the Commission did not provide sufficient evidence to support its preliminary finding that non-competes are not exploitative and coercive for senior executives. A few commenters suggested that senior executives from historically marginalized groups may be paid less and have less bargaining power than other senior executives.[640]

Critically, the Commission received an outpouring of comments indicating that highly paid workers who are *not* senior executives (*i.e.,* who are not workers with the highest levels of authority in an organization) are often coerced or exploited via non-competes. The Commission received many comments from workers in relatively higher-wage fields—such as medicine, engineering, finance and insurance, and technology—who stated that employers exploited and coerced them through the use of non-competes.[641] The vast majority of higher-wage workers who are not senior executives reported that they lacked bargaining power in relation to their employer; did not negotiate their non-compete or receive compensation for it; and/or were not informed of the non-compete until after they received the job offer. Many of these workers stated that their non-compete was hidden or obscured; that their employers misled them about the terms of a non-compete; and/or that the non-compete was confusingly worded or vague. In addition, many high-wage workers recounted how non-competes coerced them into refraining from competing against their employer by forcing them to stay in jobs they wanted to leave or forcing them to leave their profession, move their families far away, and/or commute long distances. And a large share of high-wage workers argued that even where their non-competes were overbroad and likely unenforceable, they were deterred from seeking or accepting other work or starting a business by the threat of a lawsuit from their employer, which they said would be ruinous to their finances and professional reputations.[642] The Commission accordingly finds that higher-wage workers who are not senior executives are often exploited and coerced through employers' use of non-competes.

In addition, the Commission believes it is appropriate to conclude that lower-earning workers, regardless of their job title or function in an organization, are more likely to be exploited or coerced in connection with non-competes. As noted, many workers classified as ''top executives'' make under $100,000. Commenters did not self-report their income, so the Commission cannot definitively determine that the self-identified senior executives who reported exploitation and coercion are lower-wage senior executives. Because of their incomes, however, lower-wage senior executives are likely subject to many of the same exploitative and coercive factors that affect other workers, such as the inability to afford a non-compete lawsuit, forgo work for a lengthy period, leave the field, or relocate.[643] Comments from some senior executives confirmed that they did not have sufficient bargaining power to negotiate the non-compete or consideration for it, suffered serious financial harm from non-competes, and could not afford to litigate their non-competes. Accordingly, the Commission finds that a mere job title alone is insufficient to confer bargaining power on a worker, and lower-wage senior executives can be subject to the same exploitation and coercion that other workers face.

However, having considered the comments and the available empirical evidence on this question, the Commission does not find that non-competes with highly paid workers who are also senior executives are likely to be exploitative or coercive. The Commission stresses that it is not affirmatively finding that such non-competes can never be exploitative or coercive. The Commission has simply determined the record before it is insufficient to support such a finding at this time.

2. The Use of Non-Competes With Senior Executives is an Unfair Method of Competition Under Section 5

While the Commission does not find that non-competes with senior executives are exploitative and coercive, the Commission determines that these non-competes are nonetheless unfair methods of competition, for the reasons described herein.

To determine whether conduct is an unfair method of competition under section 5, the Commission assesses two elements: (1) whether the conduct is a method of competition, as opposed to a condition of the marketplace and (2) whether it is unfair, meaning that it goes beyond competition on the merits. The latter inquiry has two components: (a) whether the conduct has indicia of unfairness and (b) whether the conduct tends to negatively affect competitive conditions. These two components are weighed according to a sliding scale.[644]

Non-competes with senior executives satisfy all the elements of the section 5 inquiry. As described in Part IV.C.2.a, these non-competes are methods of competition. As described in Part IV.C.2.b, these non-competes are facially unfair conduct because they are restrictive and exclusionary. And as described in Part IV.C.2.c, these non-competes tend to negatively affect competitive conditions in product and service markets and in labor markets. Because the Commission finds that non-competes with senior executives are unfair methods of competition, the Commission declines to exclude them from the final rule. However, as described in Part IV.C.3, the final rule allows existing non-competes with senior executives to remain in effect, due to the considerations described therein.

[640] One of those commenters cited two *USA Today* articles that examined Federal workforce records for 88 companies in the S&P 100 to assess the number of Asian and Latina women in executive positions. The articles did not include the underlying data used for the evaluation. *See* Jessica Guynn & Jayme Fraser, *Asian Women Are Shut Out of Leadership at America's Top Companies. Our Data Shows Why,* USA Today (Apr. 25, 2022), *https://www.usatoday.//money/2022/04/25/asian-women-executives-discrimination-us-companies/7308310001/?gnt-cfr=1;* Jessica Guynn & Jayme Fraser, *Only Two Latinas Have Been CEOs at a Fortune 500 Company: Why So Few Hispanics Make It to the Top,* USA Today (Aug. 2, 2022), *https://www.usatoday.com/story/money/2022/08/02/hispanic-latina-business-demographics-executive//?gnt-cfr=1.* These news reports find a disparity in the number of Asian and Latina women in senior executive roles at these companies but make no specific findings on bargaining power. While lack of representation and other factors may impact bargaining power, the Commission believes that these two articles (with no underlying data provided) are insufficient evidence at this time to find exploitation and coercion with respect to this subset of senior executives.

[641] *See* Part IV.B.2.b.i–ii.

[642] *See* Part IV.B.2.b.ii.

[643] *See id.*

[644] *See* Part II.F.

a. The Commission Finds That Non-Competes With Senior Executives are a Method of Competition, Not a Condition of the Marketplace

With respect to the first element—whether conduct is a method of competition—the Commission finds that non-competes with senior executives are a method of competition for the same reasons as non-competes with other workers.[645]

b. Non-Competes With Senior Executives are Facially Unfair Conduct Because They are Restrictive and Exclusionary

In Part IV.B.2.a, the Commission finds that non-competes with workers other than senior executives are facially unfair conduct because they are restrictive and exclusionary. The Commission finds that non-competes with senior executives are facially unfair conduct for the same reasons.

Like non-competes for all other workers, the restrictive nature of non-competes with senior executives is evident from their name and function: non-competes restrict competitive activity. They prevent senior executives from seeking or accepting other work or starting a business after leaving their job. And like non-competes for all other workers, non-competes with senior executives are exclusionary because they impair the opportunities of rivals. Where a worker is subject to a non-compete, the ability of a rival firm to hire that worker is impaired. In addition, where many workers in a market are subject to non-competes, the ability of firms to expand into that market, or entrepreneurs to start new businesses in that market, is impaired. While non-competes may impair the opportunities of rivals in all labor markets, non-competes for senior executives are especially pernicious in this regard. Senior executives are relatively few in number, are bound by non-competes at high rates,[646] and have highly specialized knowledge and skills. Therefore, it can be extremely difficult for existing firms and potential new entrants to hire executive talent and to form the most productive matches.

Because senior executives are often compensated in return for their promise not to compete, some commenters argue that non-competes with senior executives are not unfair methods of competition. However, agreements can present concerns under the antitrust laws even when both parties benefit. Here, non-competes with senior executives are not unfair methods of competition under section 5 because they are unfair to the individual executive, but because they tend to negatively impact competitive conditions—*i.e.,* harm competition in product and service markets, as well as in labor markets—by imposing serious negative externalities on other workers, rivals, and consumers.[647]

c. Non-Competes With Senior Executives Tend To Negatively Affect Competitive Conditions

The Commission finds non-competes with senior executives tend to negatively affect competitive conditions in product and service markets and in labor markets. As explained in Part II.F, the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions. The inquiry does not turn on whether the conduct directly caused actual harm in a specific instance. Here, the tendency of non-competes to impair competition is obvious from their nature and function, as it is for non-competes with workers who are not senior executives. And even if this tendency were not facially obvious, the evidence confirms that non-competes with senior executives do in fact negatively affect competitive conditions.

i. Non-Competes With Senior Executives Tend To Negatively Affect Competitive Conditions in Product and Service Markets

In the NPRM, the Commission stated that non-competes with senior executives may harm competition in product and service markets in unique ways.[648] The Commission stated that non-competes with senior executives may contribute more to negative effects on new business formation and innovation than non-competes with other workers, to the extent that senior executives may be likely to start competing businesses, be hired by potential entrants or competitors, or develop innovative products and services.[649] The Commission also stated that non-competes with senior executives may also block potential entrants, or raise their costs, to a high degree, because such workers are likely to be in high demand by potential entrants.[650] The Commission preliminarily concluded that, as a result, prohibiting non-competes for senior executives may have relatively greater benefits for consumers than prohibiting non-competes for other workers.[651]

Based on the Commission's expertise and after careful review of the rulemaking record, including the empirical research and the public comments, the Commission finds that non-competes with senior executives tend to negatively affect competitive conditions in markets for products and services, inhibiting new business formation and innovation.

Non-Competes With Senior Executives Inhibit New Business Formation and Innovation

In Part IV.B.3.b, the Commission described the extensive empirical evidence indicating that non-competes inhibit new business formation and innovation. The Commission's finding in Part IV.B.3.b that non-competes inhibit new business formation and innovation does not examine non-competes with senior executives specifically. However, the Commission finds that non-competes with senior executives inhibit new business formation and innovation at least as much as non-competes with other workers and likely to a greater extent, given the outsized role of senior executives in forming new businesses, serving on new businesses' executive teams, and setting the strategic direction of businesses with respect to innovation.

Specifically, non-competes with senior executives tend to negatively affect competitive conditions in product and service markets in three ways. First, non-competes with senior executives inhibit new business formation. In Part IV.B.3.b.i, the Commission finds that non-competes with workers other than senior executives inhibit new business formation. The Commission finds that non-competes with senior executives inhibit new business formation as much as non-competes with other workers and likely to a greater extent, due to the important role senior executives play in new business formation.

Senior executives are particularly well-positioned to form new businesses because of their strategic expertise and business acumen; knowledge of multiple facets of their industries; experience making policy decisions for businesses; and ability to secure financing. Senior executives are also often crucial to the formation of startups, because startups often begin by

[645] *See* Part IV.B.1.

[646] *See* Part I.B.2 (noting studies estimating that about two-thirds of senior executives work under non-competes).

[647] *See* Part IV.C.2.i–ii (describing the negative effects of non-competes with senior executives on markets for products and services and labor markets).

[648] NPRM at 3502.

[649] *Id.* at 3513.

[650] *Id.*

[651] *Id.*

forming a leadership team, which is often comprised of experienced and knowledgeable executives from elsewhere in the industry.[652] Empirical research shows that when startups hire top management teams from other firms, they are more likely to grow beyond their initial stages [653] and that top managers' experience in an industry allows startups to grow more quickly.[654] Additionally, empirical research finds that startups that hire top management teams with experience are more likely to become successful businesses.[655] Empirical research also finds that, in addition to experience, top management teams that have worked together in the past are more successful than those that have not.[656] For these reasons, non-competes with senior executives not only inhibit new business formation by blocking the executives from forming new businesses; they also prevent other potential founders from forming new businesses, because potential founders are less likely to start new businesses when they are unable to assemble the executive team they need because so many executives in the industry are tied up by non-competes. By inhibiting new business formation, these non-competes deprive product and service markets of beneficial competition from new entrants—competition that in turn tends to benefit consumers through lower prices or better product quality.

Second, non-competes with senior executives inhibit innovation. In Part IV.B.3.b.ii, the Commission finds that non-competes with workers other than senior executives inhibit innovation. The Commission finds that non-competes with senior executives inhibit innovation at least as much as non-competes with other workers and likely to a greater extent, because senior executives play a crucial role in setting the strategic direction of firms with respect to innovation.

Non-competes with senior executives inhibit innovation by impeding efficient matching between workers and firms. As described in Part IV.B.3.a, labor markets function by matching workers and employers. The same is true for senior executives. Executives compete for roles at firms, and firms compete to attract (often highly sought-after) executives; executives choose the role that best meets their objectives, and firms choose the executive who best meets theirs. Non-competes impede this competitive process by blocking executives from pursuing new opportunities (*i.e.,* positions that are within the scope of their non-compete) and by preventing firms from competing to attract their talent. Thus, because non-competes are prevalent, the quality of the matches between executives and firms suffers.

By inhibiting efficient matching between firms and executives, non-competes frustrate the ability of firms to hire executives who can best maximize the firm's capacity for innovation. Senior executives play an important role in advancing innovation at firms.[657] Senior executives are often a fundamental part of the innovative process, guiding the strategic direction of the firm in terms of topics of new research and the depth of new research; determining the allocation of R&D funding; and making the decision to develop (and supervising the development of) new products and services.[658]

Research shows that labor mobility among senior executives may tend to foster innovation. Empirical research finds that executives with shorter job tenures tend to engage in more innovation than those who are longer tenured at firms.[659] In addition, empirical research shows that the strength of executives' external networks—which are likely stronger among executives hired externally—increase the rate of innovation.[660] Finally, when senior executives are hired by new companies, they bring their experience and understanding of the industry, which may cross-pollinate with the capabilities of the new company, cultivating new research which would not otherwise be achieved.[661] By inhibiting efficient matching between executives and firms, non-competes impede the ability of firms to develop innovative products and services that benefit consumers.

Furthermore, empirical research shows that better matching among executives and firms drives productivity as well as innovation. When firms and executives have a higher quality match, the firm as a whole is more productive.[662] By inhibiting efficient matching between firms and executives, non-competes tend to reduce the productivity of firms.

In theory, firms that seek to hire an executive could just pay the executive's employer (or former employer) to escape the non-compete. However, research by Liyan Shi describes how non-competes with senior executives force firms to make inefficiently high buyout payments. Shi ultimately concludes that "imposing a complete ban on noncompete clauses would be close to implementing the social optimum." [663]

Shi explains that firms and executives jointly create market power by entering into non-competes and excluding rivals from hiring experienced labor in a competitive labor market. The existence of a non-compete forces rivals to make an inefficiently high buyout payment, where the inefficiency arises due to the market power of the incumbent firm created by the non-compete. Rival firms must either make these payments, which therefore lead to deadweight economic loss, or forgo the payment—and, consequently, the ability to hire a talented executive (and perhaps the ability to enter the market at all, for potential new firms).[664] New and small businesses in particular might be unable to afford these buyouts. By calibrating

[652] *See, e.g.,* Leslie Crowe, *How to Hire Your First Leadership Team* (Oct. 24, 2023), *https://baincapitalventures.com/insight/how-to-hire-your-first-leadership-team-as-a-startup-founder/.*

[653] Bradley Hendricks, Travis Howell, & Christopher Bingham, *How Much Do Top Management Teams Matter in Founder-Led Firms?,* 40 Strategic Mgmt. J. 959 (2019).

[654] Yasemin Y. Kor, *Experience-Based Top Management Team Competence and Sustained Growth,* 14 Org. Sci. 707 (2003).

[655] Agnieszka Kurczewska & Michał Mackiewicz, *Are Jacks-of-All-Trades Successful Entrepreneurs? Revisiting Lazear's Theory of Entrepreneurship,* 15 Baltic J. of Mgmt. 411 (2020).

[656] Kathleen M. Eisenhardt, *Top Management Teams and the Performance of Entrepreneurial Firms,* 40 Small Bus. Econ. 805 (2013).

[657] *See, e.g.,* Jean-Philippe Deschamps, *Innovation Leaders: How Senior Executives Stimulate, Steer and Sustain Innovation* (John Wiley & Sons, 2009); Jean-Philippe Deschamps & Beebe Nelson, *Innovation Governance: How Top Management Organizes and Mobilizes For Innovation* (John Wiley & Sons, 2014).

[658] Christopher Kurzhals, Lorenz Graf-Vlachy, & Andreas König, *Strategic Leadership and Technological Innovation: A Comprehensive Review and Research Agenda,* 28 Corp. Governance: An Int'l Review 437 (2020); Pascal Back & Andreas Bausch, *Not If, But How CEOs Affect Product Innovation: A Systematic Review and Research Agenda,* 16 Int'l J. of Innovation and Tech. Mgmt. 1930001 (2019); Vassilis Papadakis & Dimitris Bourantas, *The Chief Executive Officer as Corporate Champion of Technological Innovation: An Empirical Investigation,* 10 Tech. Analysis & Strategic Mgmt. 89 (1998) (finding that CEO characteristics significantly influence technological innovation, and that the influence is particularly powerful for new product introductions).

[659] Vincent L. Barker III & George C. Mueller, *CEO Characteristics and Firm R&D Spending,* 48 Mgmt. Sci. 782 (2002).

[660] Qing Cao, Zeki Simsek, & Hongping Zhang, *Modelling the Joint Impact of the CEO and the TMT on Organizational Ambidexterity,* 47 J. of Mgmt. Stud. 1272 (2010); Olubunmi Faleye, Tunde Kovacs, & Anand Venkateswaran, *Do Better-Connected CEOs Innovate More?,* 49 J. of Fin. And Quant. Analysis 1201 (2014).

[661] *See, e.g.,* Orly Lobel, *Talent Wants to Be Free* (Yale Univ. Press, 2013).

[662] Yihui Pan, *The Determinants and Impact of Executive-Firm Matches,* 63 Mgmt. Sci. 185 (2017); Matthew Ma, Jing Pan, & Xue Wang, *An Examination of Firm-Manager Match Quality in the Executive Labor Market* (2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067808.*

[663] Shi, *supra* note 84 at 427.

[664] *Id.*

this theoretical model to data on executive non-competes and executive compensation, the study shows that banning non-competes would result in nearly optimal social welfare gains.

Shi notes that such a mechanism could be tempered by the ability of a labor market to provide viable alternative workers for new or competing businesses. However, when a particular type of labor is somewhat scarce, when on-the-job experience matters significantly, or when frictions prevent workers from moving to new jobs—all of which tend to be the case for senior executives—there is no way for the market to fill the gap created by non-competes.

Some of the evidence in this study arises from analysis of non-compete use coupled with non-compete enforceability. Other evidence in the study, including the finding that a ban on non-competes is close to optimal, relies not on use at the individual level, but on prevalence of non-competes across a labor market. The latter approach does not rely, therefore, on comparing individuals with and without non-competes, and is therefore not subject to the estimation bias that leads the Commission to give less weight to evidence based on the use of non-competes.

Relevant Comments and Commission Responses

Many commenters stated that non-competes with senior executives reduce new business formation and innovation, confirming the Commission's findings. Several senior executives recounted personal experiences in which a non-compete prevented them from starting a business. A tech executive stated that they knew many tech executives who would have left their roles to start within-industry spinoffs if not for their non-competes. A senior executive stated that they had planned to start a small business that would not have harmed the former employer but had signed a non-compete that prevented them from doing so. A former executive stated that they were sued after starting a new business despite confirming with the CEO of their former employer that doing so would not violate the non-compete. Another senior executive said their non-compete prevented them from taking a job at a smaller, more innovative company in their industry. Some commenters warned that permitting non-competes for senior executives would reinforce dominant positions for industry incumbents who can foreclose new entrants from access to critical talent and expertise. An advocate for startups stated that small businesses significantly benefit from mentorship from experienced founders, which can be inhibited by non-competes.

Other commenters argued that the Commission should exclude senior executives from coverage under the final rule because doing so would benefit competition in product and service markets. These commenters generally stated that non-competes may promote innovation by encouraging firms to make productivity-enhancing investments, such as investments in developing trade secrets. The Commission does not believe that non-competes are needed to protect valuable firm investments. As discussed in Part IV.D, the Commission finds that employers have less restrictive alternatives for protecting valuable investments and that these alternatives are available for senior executives as well as for other workers.

In addition, when assessing how non-competes with senior executives affect competition in product and service markets, the Commission believes it is important to consider the net impact. It is possible that the effects described by these commenters and the effects described by the Commission earlier in this Part IV.C.2.c.i can be occurring at the same time. That is, a non-compete with a senior executive might in some instances be protecting a firm's investments in a manner that is productivity-enhancing, holding all else equal. At the same time, however, that same non-compete may restrict the executive's ability to start a new business after leaving the firm. And even that same non-compete can—and certainly non-competes in the aggregate do—prevent the most efficient match between senior executives and the firms that can make the highest and best use of their talents, and decrease knowledge flow between firms, which limits the cross-pollination of innovative ideas. What the empirical evidence shows is that overall, *i.e.,* in net effect, non-competes reduce new business formation and innovation,[665] indicating that the tendency of non-competes to inhibit new business formation and innovation more than counteracts any effect of non-competes on promoting new business formation and innovation by protecting a firm's investments.

A commenter—referencing the Shi study—argued that banning buyout clauses in non-competes would enhance economic efficiency relative to banning non-competes altogether. Other commenters, including Shi, the author of the study, disagreed with this claim.[666] In response to these comments, the Commission finds that prohibiting buyout clauses would not enhance efficiency relative to prohibiting non-competes altogether. The Commission does not believe prohibiting buyout clauses would address the tendency of non-competes for senior executives to negatively affect competitive conditions, because it would mean that fewer executives could escape their non-competes, reducing labor mobility and efficient matching between executives and firms even further.

Some commenters disputed the Commission's legal rationale for prohibiting non-competes with senior executives. One comment stated that the NPRM did not cite any case law where a non-compete for a senior executive violated antitrust law and argued that there is no widespread case law to support a *per se* ban. In response, the Commission notes that it is determining that non-competes are an unfair method of competition under section 5, not a *per se* violation of the Sherman Act. For the reasons described in this Part IV.C.2, the Commission finds that non-competes are restrictive and exclusionary and that, based on the totality of the evidence, they tend to negatively affect competitive conditions at least as much as non-competes with other workers, and likely even more so, given the outsize role of senior executives in new business formation and innovation. For these reasons, the Commission finds that these non-competes are an unfair method of competition under section 5.

Another commenter stated that the NPRM did not satisfy the standard for finding a tendency to negatively affect competitive conditions for senior executives as set forth in the Commission's section 5 Policy Statement.[667] The commenter stated that a *per se* ban on non-competes considers neither the size, power, or purpose of the firm nor how non-competes interact with individual markets. The commenter argued that the evidence cannot justify an economy-wide ban.

The Commission finds that non-competes for senior executives are an unfair method of competition under section 5 for all the reasons described in this Part IV.C.2. The Commission states the applicable legal standard under section 5 in Part II.F, which is consistent with the standard set forth in the Policy Statement. As noted in Part

[665] *See* Part IV.B.3.b.i–ii.

[666] Comment of Liyan Shi, FTC–2023–0007–19810.

[667] *See* FTC Policy Statement, *supra* note 286.

II.F, the Commission need not make a separate showing of market power or market definition. Nor must the Commission show that the conduct directly caused actual harm in the specific instance at issue. Instead, the inquiry under section 5 focuses on the nature and tendency of the conduct. Moreover, as noted in Part II.F, the Commission may consider the aggregate effect of conduct as well. The language in the Policy Statement stating that the size, power, and purpose of the respondent may be relevant is not limiting, but instead provides guidance regarding factors the Commission may consider in evaluating potentially unfair methods of competition. This guidance may be especially relevant in individual cases and less so in section 5 rulemakings. Finally, as described in Part II.F, a finding that conduct is an unfair method of competition does not require definition of a market or consideration of individual markets. Moreover, as described in Part V.D, the Commission considered and finds no basis for excluding particular industries or workers.

ii. Non-Competes With Senior Executives Tend to Negatively Affect Competitive Conditions in Labor Markets

The effects of non-competes with senior executives on product and service markets are the primary reason why the Commission finds that non-competes with senior executives are an unfair method of competition. However, non-competes also tend to negatively affect competitive conditions in labor markets.

Non-Competes With Senior Executives Suppress Labor Mobility and Earnings

In Part IV.B.3.a, the Commission describes extensive empirical evidence that non-competes reduce labor mobility and worker earnings. The Commission's finding in Part IV.B.3.a that non-competes suppress labor mobility and earnings does not examine non-competes with senior executives specifically. However, the evidence cited by the Commission is also probative with respect to non-competes with senior executives.

Non-competes reduce labor mobility for senior executives for the same reasons they reduce labor mobility for other workers—they directly restrict workers from seeking or accepting other work or starting a business after they leave their job. In Part IV.B.3.a.i, the Commission cites empirical evidence that non-competes reduce labor mobility. This evidence shows that non-competes reduce labor mobility for all subgroups of workers that have been studied, including inventors, high-tech workers, low-wage workers, and workers across the labor force. The impact of non-competes on labor mobility is direct, since non-competes directly prohibit certain types of mobility. Therefore, the Commission finds the non-competes restrict the labor mobility of senior executives as well.

This finding is supported by Mark Garmaise's study of the relationship between non-compete enforceability and the labor mobility and earnings of executives.[668] Garmaise finds that stricter non-compete enforceability reduces within-industry executive mobility by 47% and across-industry executive mobility by 25%. The study, which is limited to senior executives, uses multiple legal changes in non-compete enforceability, measured along multiple dimensions in a binary fashion. The Shi study qualitatively confirms these results—that executives experience greater labor mobility in the absence of non-competes.[669] However, that study examines use, and not just enforceability, of non-competes, so the Commission gives it less weight.

Furthermore, by inhibiting efficient matching between executives and firms—through a similar mechanism as for all other workers[670]—non-competes reduce executives' earnings. Like non-competes for other workers, non-competes block senior executives from switching to a job in which they would be better paid. And by doing so, non-competes decrease opportunities (and earnings) for senior executives who are not subject to non-competes—as well as for workers who are not senior executives, but who would otherwise move into one of those roles.

As described in Part IV.B.3.a.ii, the empirical research indicates that non-competes suppress wages for a wide range of subgroups of workers across the spectrum of income and job function, including workers who are not subject to non-competes. Importantly, an empirical study that does focus on senior executives finds that non-competes suppress earnings of senior executives. The Garmaise study finds that decreased enforceability of non-competes increases executives' earnings by 12.7%.[671] Garmaise also finds that decreased enforceability of non-competes increases earnings growth for CEOs by 8.2%. Since much of the increase in earnings is attributable to an increase in earnings growth (as opposed to earnings at the start of the employment relationship), Garmaise hypothesizes that earnings increase because CEOs are more likely to invest in their own human capital when they have no non-compete.[672] However, Garmaise also notes that while non-competes may offer benefits to firms which use them, there may be negative impacts across the labor markets in which they are used.[673] This is the only study of executive earnings that does not examine the use of non-competes: it examines multiple legal changes in non-compete enforceability, measured along multiple dimensions (though in a binary fashion).

As noted in Part IV.C.1, many senior executives negotiate valuable consideration for non-competes. However, the evidence suggests that non-competes still have a net negative effect on senior executives' earnings, because the suppression of earnings through reduced labor market competition more than cancels out the compensation that some of these executives individually receive for their non-competes.

A second study, by Kini, Williams, and Yin,[674] simultaneously estimates the impact of non-compete enforceability and non-compete use on earnings and finds a positive correlation. The Commission gives this study less weight because it analyzes the use of non-competes. As described in Part IV.A.2, such studies cannot easily differentiate between correlation and causation. Kini, Williams, and Yin use an enforceability measure to generate their estimates, but do not estimate models that omit use of non-competes, meaning that the Commission does not interpret the findings as representing a causal relationship.

Relevant Comments and Commission Responses

Many commenters addressed negative effects of non-competes with senior executives on competition in labor markets. Non-competes, these commenters stated, can negatively affect a senior executive's career when they leave their field or sit out of the workforce for a period, causing their skills and knowledge (particularly in fast-paced fields) to stagnate and affecting their reputations. Like other workers, some senior executives said their non-compete limited their options and earnings in their specialized field.

[668] Garmaise, *supra* note 584.

[669] Shi, *supra* note 84.

[670] *See* Part IV.B.3.a.

[671] Garmaise, *supra* note 584 at 403. The reduction in earnings is calculated as $e^{-1.3575*0.1} - 1$, where −1.3575 is taken from Table 4.

[672] *Id.* at 402.

[673] *Id.* at 379.

[674] Kini, Williams, & Yin, *supra* note 83.

Other commenters argued the Commission should exclude senior executives from the rule because they earn more compensation, including higher wages, for non-competes than they would gain under the final rule. Many of these commenters argued that because senior executives have bargaining power, any findings on decreased wages would not apply to them. Some employers stated they compensated their senior executives for non-competes. Some industry organizations stated that some additional compensation and bonuses might not be offered if non-competes are banned. One business stated the compensation it pays executives takes their non-competes into account. Another business stated it provides severance benefits in exchange for non-competes that fully compensate the executive for the duration of the non-compete.

In response to these comments, the Commission notes the Garmaise study indicates that non-competes have a net negative effect on earnings for senior executives in the aggregate because they suppress competition, even if individual senior executives receive some amount of compensation for their personal non-compete. Garmaise's analysis accounts for any compensation the executive receives for the non-compete.

An industry trade organization stated that non-competes create job opportunities for executives and other highly skilled workers, rather than restricting them, because, without non-competes to protect confidential information, employers will often be reluctant to expand their executive teams. The Commission notes this assertion is unsupported by empirical evidence, and the Commission finds that firms have less restrictive alternatives for protecting confidential information.[675]

An investment industry organization stated that the Commission cannot assume senior executives will be equally or more effective at new firms compared to their old firms. In response, the Commission notes that voluntary labor mobility—for senior executives and all workers—typically reflects a mutually beneficial outcome. To the extent a firm is willing to pay more to attract a particular worker to come work for them, it is typically because the firm places a higher value on the worker's productivity than the worker's current employer. In addition, the Commission notes that many commenters stated that non-competes often force senior executives to sit out of the workforce, causing them to lose valuable knowledge and skills. In general, senior executives are more likely to be effective when they can remain in the industry in which they have experience and expertise, rather than starting over in a new industry because of a non-compete.

An industry trade organization stated that the Commission's assertion that wages are reduced across the labor market is inconsistent with the NPRM's preliminary finding that non-competes are not coercive or exploitative for senior executives, because when more issues are left for negotiation, the job market is increasingly competitive, as workers can differentiate themselves through their terms and tailor their terms to each employer. The Commission does not believe these findings are in tension. Agreements do not need to be exploitative or coercive to inhibit efficient matching between workers and firms or to negatively affect competitive conditions. Furthermore, the Commission believes that executives have many other ways to differentiate themselves other than based on non-compete terms.

One commenter argued that the findings in the Kini, Williams, and Yin study should not be interpreted as representing a causal relationship. Upon further consideration, the Commission agrees with this comment and does not interpret this study causally, as described in this Part IV.C.2.c.ii.

For these reasons, the Commission finds that non-competes with senior executives are an unfair method of competition. As a result, the Commission declines to exclude senior executives from the final rule altogether.

3. The Final Rule Allows Existing Non-Competes With Senior Executives To Remain in Effect

The final rule prohibits employers from, among other things, entering into or enforcing new non-competes with senior executives—*i.e.,* non-competes entered into on or after the effective date.[676] However, the Commission decides to allow existing non-competes with senior executives—*i.e.,* non-competes entered into before the effective date—to remain in effect. The Commission describes the basis for this determination in this Part IV.C.3.

The Commission believes the evidence could provide a basis for prohibiting employers from enforcing existing non-competes with senior executives, as the final rule does for all other workers, given the tendency of such agreements to negatively affect competitive conditions.[677] However, the Commission has decided to allow existing non-competes for senior executives to remain in effect, based on two practical considerations that are far more likely to be present for senior executives than other workers. First, as described in Part IV.C.1, senior executives are substantially less likely than other workers to be exploited or coerced in connection with non-competes. As a result, this subset of workers is substantially less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers with existing non-competes (even if senior executive's existing non-competes are still harming competitive conditions in the economy overall). Second, commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives, as described in this Part IV.C.3.[678]

Numerous businesses and trade associations argued that, if the final rule were to invalidate existing non-competes for senior executives, that would present practical challenges for employers, because many such non-competes were exchanged for substantial consideration. According to commenters, consideration exchanged for non-competes includes long-term incentive plans, bonuses, stock awards, options, or severance payments, among other arrangements.

Some commenters were concerned about a potential windfall for workers. They argued that if the non-compete portion of the contract were rescinded or otherwise invalidated, the worker may be left with any benefits already received in exchange for the non-compete, such as equity or bonuses, and could also compete. An industry association stated that some of its members' workers have already received thousands or hundreds of thousands of dollars in additional compensation alongside non-competes, though it was unclear what each worker received. Some business associations said businesses do not have a clear way to recover those payments or benefits. A commenter asked whether a worker who forfeited equity for competing could get the equity back or if executives who were compensated by their new

[675] *See* Part IV.D.2.

[676] § 910.2(a)(2).

[677] *See* Part IV.C.2

[678] Because the Commission proposed to require employers to rescind existing non-competes—*see* NPRM, proposed § 910.2(b)(1)—many of these comments addressed the proposed rescission requirement specifically. Comments that pertain only to the issue of rescission, and that do not apply to whether existing non-competes for senior executives may remain in effect generally, are addressed in Part IV.E.

employers for the non-compete would be paid twice.

The Commission views the problem as more complex than these commenters suggest. First, the empirical evidence and comments illustrate that in many cases, non-competes are currently trapping workers, including senior executives, in their jobs, meaning the employer is getting not only the benefit of trapping that individual worker, but also the benefit of non-competition.[679] In such circumstances, employers may have already received part or all of the benefit they sought from entering a non-compete, though the value would be difficult if not impossible to quantitatively assess. Moreover, it is impracticable for the Commission to untangle whether, to the extent some workers received compensation that was denominated consideration for a non-compete, that non-compete simultaneously suppressed other compensation to the worker such as wages. For example, some commenters who described negotiating their non-competes stated the employer used it as a tactic to drive down wages.

In addition, most workers subject to a non-compete are subject to other restrictive covenants,[680] both mitigating any purported harm and complicating any quantitative valuation of a non-compete.

The Commission also notes that, to the extent equity was provided as consideration, owning a share in the prior employer may induce workers not to risk lowering the value of that equity by competing. However, the concern about workers seeking already-forfeited compensation is misplaced, as the final rule will not impact workers who forfeited compensation for competing under a then-valid non-compete.

Overall, however, where an employer has provided meaningful consideration in exchange for a non-compete, the comments indicate that being unable to enforce that non-compete may complicate that exchange in a way that would be difficult to value and untangle. These difficult practical assessments indicate that the final rule should contain a limited, easily administrable exception for existing non-competes with senior executives, who are considerably more likely than other workers to have negotiated non-competes and received substantial consideration in return.

[679] *See* Part IV.B.2.b.

[680] *See* Balasubramanian, Starr, & Yamaguchi, *supra* note 74 (finding that 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or non-recruitment agreement, and 74.7% of workers with non-competes are also subject to all three other types of provisions).

In addition, an employment attorney suggested that employers may suspend any mid-stream benefits and terminate unvested options and stock and cancel bonuses. One commenter suggested employers may seek refunds from workers, which could create uncertainty. Similarly, an industry association said senior workers who signed a non-compete as part of a severance agreement might see their severance payments taken away, as employers would need to decide whether to continue paying despite the elimination of non-competes or, to the extent they legally can, attempt to renegotiate any outstanding severance agreements. Finally, a business said executives in the middle of their contracts might need to renegotiate those contracts. The Commission shares these concerns about the practicalities of untangling non-competes that are more likely to have been bargained for. Senior executives who engaged in a fair bargaining process may have obtained significant consideration and planned accordingly, as have their employers. While employers' ability to stop payments or claw back consideration is uncertain, any efforts to do so could be disruptive.

Other commenters stated that they believed rescission could result in litigation against workers. An employment lawyer said litigation was difficult to predict but that there could be litigation seeking declarations from courts on how the rule impacts existing contracts. A group of commenters stated that rescinding or invalidating agreements would lead to increased litigation against workers who received the benefit of the bargain but were no longer bound by a non-compete in exchange, and that such litigation would seek to nullify severance agreements, employment agreements, clawback agreements, and others.

One business said the NPRM was silent on how to address specially taxed arrangements, but the business did not provide additional details on any such arrangements. A law firm said workers who received consideration in a prior year would have paid taxes on it and would now need to amend their prior tax return to get a refund if they have to pay back that consideration, while employers might have to amend their return to reflect the loss of a deduction. That law firm also said some executives and other workers use and plan for non-competes to reduce their ''golden parachute'' tax burden.

Finally, an accountant explained that valuations of senior executive non-competes are conducted during many merger and acquisition transactions. Similarly, an industry association said acquisition prices may include the value of non-competes that ensure the buyer retains certain talent, so if non-competes were rescinded or invalidated the buyer would lose the value of what they paid for with no way to recoup the costs. The commenter stated that the bargained-for value of such sales may decrease if existing senior executive non-competes cannot be enforced. The exemption for existing non-competes addresses this concern. Moreover, this concern does not exist for future transactions in any event, since they would not account for non-competes that have been banned.

In response to the foregoing comments, the Commission finds it plausible that rendering existing non-competes with senior executives enforceable could create some of these practical implementation challenges. The Commission accordingly elects to exclude existing non-competes with senior executives from the rule, reducing the burden of implementation of the final rule.

The Commission also understands that some of these practical concerns could arise for workers other than senior executives if they received substantial consideration in exchange for a non-compete. However, the evidence indicates that any such agreements with workers other than senior executives are very rare, and that such workers are more likely to experience exploitation and coercion in connection with non-competes. Therefore, allowing only existing non-competes with senior executives to remain in force will significantly reduce these practical concerns for employers. In contrast, a wider exemption for all existing agreements would leave in place a large number of non-competes that tend to harm competitive conditions, including a large number of exploitative and coercive non-competes for which no meaningful consideration was received.

Some commenters suggested the Commission exempt from the final rule non-competes in exchange for which the worker received consideration. One business asked for an exception to the final rule for paid non-competes, asserting that such an exception would allow workers to receive guaranteed payments while accessing information and training and would allow workers to start their own businesses after the non-compete period. Another business recommended allowing non-competes that provide severance equal to a worker's salary for the non-compete period. An employment attorney suggested an exception from the rule for non-competes that are part of a severance agreement or where the

worker receives a paid non-compete period or garden leave, which the attorney says do not align with the Commission's concerns about non-competes and represent a balanced trade-off.

The Commission declines to adopt an exception for non-competes in exchange for which the worker received consideration (whether under an existing or future non-compete). The fact that a worker received compensation for a non-compete does not mean the worker received fair compensation, *i.e.,* compensation commensurate with earnings that would be received in a competitive labor market. In addition, such an exception would raise significant administrability concerns. For example, a rule that exempts non-competes exchanged for ''substantial consideration'' or ''meaningful consideration'' would not provide sufficient clarity to employers and workers to avoid significant compliance costs and litigation risks. Requiring a brighter-line specific amount (or standard) of compensation would be unlikely to appropriately capture highly fact-specific, varying financial circumstances of workers and firms. Moreover, it would be difficult to prevent employers from suppressing compensation or benefits along other dimensions (*e.g.,* a requirement for severance equal to the worker's salary during the non-compete period as one commenter suggested could lead to the salary being suppressed). The Commission also notes, however, that while it is not adopting a blanket exemption from the final rule for non-competes in exchange for which the worker received consideration, it is satisfying this request to some extent by adopting an exemption for existing non-competes for senior executives, which are the non-competes most likely to have been exchanged for consideration.

Finally, the Commission concludes that allowing existing non-competes for senior executives to remain in effect is appropriate despite the significant negative effects of such non-competes on competition described in Part IV.C.2. The Commission took into consideration that non-competes with senior executives are less likely to be causing ongoing harm to individuals by preventing them from seeking or accepting other work or starting their own business, because such non-competes were likely to have been negotiated or exchanged for consideration. In addition, the negative effects of these non-competes on competitive conditions will subside over time as these non-competes expire.

4. Defining Senior Executives

As noted earlier, the Commission did not define the term ''senior executive'' in the NPRM. Instead, the Commission requested comment on how the term should be defined.[681] In this final rule, the Commission adopts a definition of ''senior executive'' to isolate the workers who are least likely to have experienced exploitation and coercion and most likely to have bargained for meaningful compensation for their non-compete. Workers for whom exploitation and coercion concerns are likely most relevant and who are unlikely to have bargained for or received meaningful consideration for a non-compete—namely, lower-earning workers, and relatively higher paid or highly skilled workers who lack policy-making authority in an organization—do not fall within this final definition.

This definition is relevant because, as explained in Part IV.C.2, the basis for the Commission's findings that non-competes with senior executives are unfair methods of competition differs in some ways from the evidence and rationales underpinning its findings that non-competes with other workers are unfair methods of competition. Furthermore, as explained in Part IV.C.3, the final rule allows existing non-competes with senior executives to remain in force, while prohibiting employers from enforcing existing non-competes with other workers after the effective date.

The Commission defines ''senior executives'' based on an earnings test and a job duties test. In general, the term ''senior executives'' refers to workers earning more than $151,164 [682] who are in a ''policy-making position'' as defined in the final rule. The Commission adopted this definition after considering the many comments on who senior executives are and how to define them. Notably, the Commission concluded that, unlike highly paid senior executives, highly paid workers other than senior executives and lower-wage workers with senior executive titles as a formal matter likely experience exploitation and coercion and are unlikely to have engaged in bargaining in connection with non-competes, much like lower-wage workers.[683] In other words, the Commission finds that the only group of workers that is likely to have bargained for meaningful compensation in exchange for their non-compete is senior executives who are both highly paid and, as a functional matter, exercise the highest levels of authority in an organization.[684] The Commission estimates that approximately 0.75% of workers are such senior executives.[685]

a. Definition of ''Senior Executive''

The NPRM requested comment on how to define senior executives while providing sufficient clarity to employers and workers.[686] The NPRM stated that there is no generally accepted legal definition of ''senior executive'' and that the term is challenging to define given the variety of organizational structures used by employers.[687] The NPRM raised the possibility of looking to existing Securities and Exchange Commission (''SEC'') definitions; adopting a definition closely based on a definition in an existing Federal regulation; adopting a new definition; defining the category according to a worker's earnings; using some combination of these approaches; or using a different approach.[688] Commenters proposed a wide variety of definitions, largely focused on two types: an exception based on a worker's job duties or title, and an exception based on a compensation threshold. Upon review of the full record, the Commission determines that a test that combines both of these criteria best captures the subset of workers who are likely to have bargained for meaningful compensation in exchange for their non-compete in a readily administrable manner.

i. The Need for a Two-Part Test

Many commenters suggested combining a compensation threshold with a job duties test. For example, one business supported excepting workers who met a combination of tests based on a compensation threshold, FLSA exemption status, and access to trade secrets. A law firm suggested the final rule should account for both pay, exempting only low-wage hourly workers, and job duties in determining an exception. One commenter suggested defining ''senior executive'' based on total compensation, job title, and job duties. Though the Commission does not adopt these specific duties and wage combinations, the Commission agrees that a combined approach is necessary.

The Commission has determined that the definition of ''senior executive'' should include both a compensation threshold and job duties test, similar to

[681] NPRM at 3520.

[682] This threshold is based on the 85th percentile of earnings of full-time salaried workers nationally. *See* Part IV.C.4.b.

[683] *See* Part IV.C.1.

[684] *See id.*

[685] *See* Part X.F.11.

[686] NPRM at 3520.

[687] *Id.*

[688] *Id.*

the DOL regulations that define and delimit the FLSA's exemption for executive employees.[689] The key advantage of a compensation threshold, as one industry organization commenter stated, is that compensation thresholds are objective and easily understood by all stakeholders—yielding significant administrability benefits. However, since not all workers above any given compensation threshold are senior executives, a job duties test is also needed to identify senior executives.

The two-part test isolates the workers most likely to have bargaining power to negotiate meaningful consideration for a non-compete and least likely to experience exploitation and coercion in connection with non-competes. A compensation threshold ensures that stakeholders do not need to spend time assessing the job duties of workers below the threshold—minimizing the amount of detailed analysis stakeholders must undertake. A compensation threshold also helps ensure that workers who work in positions with ''senior executive'' classifications but likely lack meaningful bargaining power due to their relatively low incomes and who likely did not receive meaningful consideration for a non-compete are excluded from the definition. The job duties test ensures that the definition identifies the individuals most likely to have bespoke, negotiated agreements—those with the highest level of authority over the organization—while also ensuring that high-earning workers who are not senior executives, who likely experience exploitation and coercion from non-competes and do not generally bargain over them, are not captured by the definition.[690]

Clarity from a compensation threshold is essential, as without clarity workers and employers would often be uncertain about a non-compete's enforceability (absent adjudication), and such uncertainty often fosters *in terrorem* effects.[691] For example, an attorney commenter stated that an exception for executive, management, and professional employees and those with access to trade secrets would inherently lack clarity. A lack of clarity could also facilitate evasion by employers, as one law firm commented.

While there may be some workers other than senior executives as defined here who may have bargained for consideration for a non-compete, the benefits to workers and employers of a clear and administrable definition outweigh the risk that some bargained-for non-competes are invalidated. In Part IV, the Commission finds even bargained-for non-competes tend to negatively affect competitive conditions. The Commission finds that the need to avoid an overinclusive exception that increases those harms to competitive conditions outweighs the risk that in rare instances private parties with non-competes other than with senior executives may need to restructure their employment agreements to utilize less restrictive alternatives that burden competition to a lesser degree.

Many commenters sought an exception for senior executives and/or highly paid and highly skilled workers based on justifications such as access to trade secrets or confidential information, rather than compensation thresholds. Some argued that compensation thresholds do not align with or allow individualized assessments of which workers meet a given justification such as access to confidential information. One law firm commented that a bright-line compensation threshold would eliminate non-competes for lower wage workers while allowing non-competes for what the commenter viewed as legitimate business purposes. Some commenters opposed an exception for senior executives because they believed ''senior executive'' would be too difficult to define. In Part V.D.2, the Commission explains why it is not adopting an exception for workers based on their access to trade secrets and other intellectual property. Further, in the Commission's view, eliminating the need for individualized assessments for most workers is the primary advantage of a compensation threshold, not a drawback (although the Commission declines to adopt a compensation threshold alone for reasons stated previously and in Part V.D.1). However, the evidence indicates that an exception for existing senior executive non-competes is appropriate, which the Commission defines here.

Commenters, both those supporting and opposing the rule, pointed out several issues with compensation thresholds standing alone. Some commenters were concerned a compensation threshold would exclude some workers, such as many physicians, from the final rule's benefits based on their income level. Two commenters said an exception would penalize the advancement of workers near a threshold and those workers may have to choose between higher wages or being free from a non-compete. Including the job duties tests alongside the compensation threshold mitigates the risk of such cliff effects, assuming they exist (which is far from clear).

Some commenters asserted a threshold would need to be updated for inflation, while one law firm commented that frequent updates would make the final rule more difficult to understand and implement. Commenters also pointed out the need to explain when the threshold would be measured. While adjusting for inflation could be important to ensure the final rule continues serving its intended function if the compensation threshold governed a total exemption from the rule (as these commenters assume), it is unnecessary to the final rule because the exception adopted applies only to existing non-competes (*i.e.,* it has only one-time application). The Commission explains in Part IV.C.4.b its reasons for declining to adopt a locality adjustment.

ii. The Final Rule's Definition of ''Senior Executive''

Based on the considerations described in Part IV.C.4.a.i, the Commission adopts a two-pronged definition of ''senior executive'' in § 910.1. Under § 910.1, a senior executive is a worker who was in a policy-making position and who received from a person for the employment:

- Total annual compensation of at least $151,164 in the preceding year (under paragraph (2)(i)); or
- Total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year (under paragraph (2)(ii)); or
- Total compensation of at least $151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete (under paragraph (2)(iii)).

Paragraph (2)(ii) applies to workers who were in a policy-making position during only part of the preceding year, which includes workers who were hired or who left a business entity within the preceding year as well as workers who were promoted to or demoted from a policy-making position in the preceding year. Paragraph (2)(iii) ensures that the exception applies to senior executives who departed from the employer more than one year before the effective date but are still subject to a non-compete (*e.g.,* a worker who left more than a year ago and has a non-compete term of 18 months). To account for those senior executives, paragraph (2)(iii) considers total annual compensation in the year preceding their departure.

[689] The FLSA is the Federal statute establishing minimum wage, overtime, recordkeeping, and youth employment standards. *See* 29 U.S.C. 201 *et seq.*

[690] *See* Part IV.C.1.

[691] *See* Part IX.C.

To clarify the definition's compensation threshold, the final rule includes definitions of ''total annual compensation'' and ''preceding year.'' To clarify the job duties test, the final rule includes definitions of ''policy-making position'' as well as two additional terms that are in the definition of ''policy-making position'': ''officer'' and ''policy-making authority.'' These definitions are described in Parts IV.C.4.b and IV.C.4.c.

b. Defining the Compensation Threshold

Pursuant to § 910.1, the senior executive exception applies only to workers who received total annual compensation of at least $151,164 from a person for employment in a policy-making position in the most relevant preceding year. Section 910.1 further defines ''total annual compensation'' and ''preceding year,'' respectively. This threshold is based on the 85th percentile of earnings of full-time salaried workers nationally.[692]

The Commission draws this line between more highly paid and less highly paid workers based on its assessment of which workers are more likely to experience exploitation and coercion and less likely to have engaged in bargaining in connection with non-competes and the need to implement a two-part test. As commenters noted, there is no single compensation threshold above which zero workers will have been coerced and exploited and below which zero workers will have been uncompensated for the non-compete that binds them. Based on the Commission's expertise and after careful review of the rulemaking record, including relevant data, the empirical research, and the public comments, the Commission concludes $151,164 in total annual compensation reflects a compensation threshold under which workers are likely to experience such exploitation and coercion and are less likely to have bargained for their non-competes, while providing employers a readily administrable line. With this line, market participants can easily know that workers below the line cannot be subject to non-competes, minimizing both *in terrorem* effects and eliminating the administrative burden of conducting a job duties test for those workers.

The Commission looked to several sources and suggestions from the comments in selecting a threshold. Numerous commenters suggested the Commission should look to the FLSA, and some specifically recommended the FLSA regulations' threshold for highly compensated employees.[693] DOL sets the compensation threshold for highly compensated employees in its overtime regulations under the FLSA based on earnings of full-time salaried workers. Since January 2020, based on a regulation adopted in 2019, that threshold is $107,432 and reflects the 80th percentile of full-time salaried workers nationally using combined 2018 and 2019 data.[694] In September 2023, DOL proposed raising that threshold to the 85th percentile of full-time salaried workers nationally and, *inter alia,* updating the amount to reflect more current earnings data. For 2023, the 85th percentile of full-time salaried workers nationally is $151,164.[695] The Commission recognizes DOL's expertise in determining who qualifies as a highly compensated worker and employers' likely familiarity with DOL regulations. Given this familiarity, the Commission borrows from DOL's definition of compensation to minimize compliance burdens on employers.

Another Federal regulatory threshold for high wage workers noted by commenters also aligns with the 85th percentile of full-time salaried workers nationally in 2023 or approximately $150,000. In the retirement context, the IRS sets a threshold for highly compensated employees at $150,000 for 2023 and $155,000 for 2024.[696] Additionally, the District of Columbia bans non-competes for workers making less than $150,000.[697]

The Commission analyzed occupational wage data to identify a threshold that would capture more highly paid senior executives, who are likely to have bespoke, negotiated non-competes. BLS's most recent wage data indicates that workers in the ''chief executive'' category have a median wage of $209,810.[698] Thus, most ''chief executives,'' most if not all of whom would meet the duties component of the two-part test in this final rule, earn well above the $151,164 compensation threshold, ensuring that the threshold is likely not underinclusive. The Commission notes that some very high-wage occupations have a median wage above $151,164, including: physicians; surgeons; computer and information systems managers; and dentists.[699] To qualify for the exemptions, these workers would have to also meet the job duties portion of the senior executive test, which is appropriate because the Commission finds that workers in these professions are often subject to coercion and exploitation and rarely have bespoke, negotiated non-competes.

The Commission also considered a lower wage threshold of approximately $100,000, which would be closer in range to the DOL highly compensated employee threshold of $107,432 that DOL adopted in 2019. According to 2022 BLS data, the median wage for ''top executives'' in the U.S. is $99,240.[700] Workers in the ''top executive'' category include ''chief executives,'' but also include officials with less authority like ''general and operations managers.'' The latter have an annual median wage of $97,030 with their earnings at the 75th percentile being $154,440.[701] The Commission believes that a significant number of general and operations managers (some of whom may be in a policy-making position) likely do not have bespoke, negotiated non-competes. For example, a vice president of operations of a local retail chain with only a few locations would likely be in this category. The same vice president—unlike the vice president of a multinational

[692] BLS, Labor Force Statistics from the Current Population Survey, *https://www.bls.gov/cps///nonhourly-workers.htm* (based on the data from the table ''Annual average 2023'').

[693] However, at the time of commenting the highly compensated employee threshold was $107,432 and the Department had not proposed a new threshold.

[694] 29 CFR 541.601; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, NPRM, 88 FR 62152, 62157 (Sept. 8, 2023) (hereinafter ''2023 FLSA NPRM'').

[695] *See* Bur. Of Labor Stats., Research Series on Percentiles of Usual Weekly Earnings of Nonhourly Full-Time Workers, at *https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm* (based on the table ''Annual average 2023''); 2023 FLSA NPRM at 62153. The DOL proposed a threshold at $143,998, the 85th percentile of full-time salaried workers at the time the 2023 FLSA NPRM was proposed. When the highly compensated employee test was originally created in 2004, its $100,000 threshold exceeded the annual earnings of 93.7% of salaried workers. *Id.* at 62159.

[696] IRS, *Definitions,* (Aug. 29, 2023) (Highly Compensated Employees), *https://www.irs.gov/retirement-plans/plan-participant-employee/definitions;* IRS, *COLA Increases for Dollar Limitations on Benefits and Contributions,* (updated Nov. 7, 2023), *https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions.*

[697] DC Code sec. 32–581.02(a)(1) (effective Oct. 1, 2022) (where the employee's compensation is less than $150,000, or less than $250,000 if the employee is a medical specialist, employers may not require or request that the employee sign an agreement or comply with a workplace policy that includes a non-compete).

[698] BLS Occupational Employment and Wage Statistics, *supra* note 49. These data are from the May 2022 National XLS table for Chief Executives under private ownership.

[699] *See id.* These data are from the May 2022 National XLS table for private ownership.

[700] *Id.* These data are from the May 2022 National XLS table for Top Executives under private ownership.

[701] *Id.* These data are from the May 2022 National XLS table for General and Operations Managers under private ownership.

corporation—is unlikely to possess the same bargaining power or to have a bespoke, negotiated employment agreement. Moreover, to the extent an individual's total compensation is under $151,164, in the unlikely event the individual received consideration for their non-compete, such consideration is unlikely to represent a significant part of their compensation.

Similarly, the Commission believes a $107,432 (or thereabouts) threshold would be overinclusive and individuals who likely do not have bespoke, negotiated non-competes—and who were likely to be exploited and coerced—could meet the threshold test. The $107,432 threshold was adopted based on earnings in 2018 and 2019. Adjusting for inflation, $107,432 in June 2019 is the equivalent of $130,158 in February 2024. Moreover, as noted previously, BLS data reflect that chief executives generally earn significantly more than $130,158. In contrast, occupations with a median wage below $151,164 but above $107,432 include: advertising, marketing, promotions, public relations, purchasing, and sales managers; financial managers; software developers; physician assistants; optometrists; nurse practitioners; and pharmacists.[702] These are occupations that the comment record reflects often experience coercion and exploitation with respect to non-competes and rarely have negotiated or compensated non-competes. A civic organization commenter also argued that the DOL regulations' ''highly compensated employee'' definition's $107,432 threshold was close to the median wage in some industries and areas and cited several cases that it said demonstrate that adopting this threshold would exclude workers who are vulnerable to exploitation and coercion.

Accordingly, the Commission adopts a threshold of $151,164. This threshold, combined with the duties test, reflects highly compensated individuals who are most likely to have the bespoke, complex non-competes that the Commission elects to leave undisturbed, and who the Commission finds are less likely to experience coercion and exploitation. This threshold also has significant administrability benefits, as it is calculated in accord with definitions used in FLSA compliance, with which employers are generally familiar. This alignment will yield efficiency benefits that reduce compliance burdens on employers.

After careful review, the Commission decided not to choose a threshold higher or lower in part because as the compensation threshold in the rule increased, fewer small businesses and firms in areas with lower wages and costs of living would have senior executives with non-competes who would qualify for the exception as compared to larger businesses. Similarly, the lower a threshold is, the more workers who live in areas with higher wages and costs of living would fall above the threshold.[703]

The Commission also declines to adopt a locality adjustment. Some commenters said that a uniform national threshold could lead to geographic disparities because of the different cost of living and average incomes in different areas. Geographic disparities are difficult to resolve, as disparities often exist not just between States, but, for example, between urban and rural areas within a State. The Commission considered this factor in selecting the $151,164 threshold compared to other options. Tailoring a compensation threshold to every locality or even State or region would be burdensome and generate significant confusion for workers and employers. The Commission finds that the importance of a uniform threshold to avoid confusion and for administrability outweighs the drawbacks of any geographic disparities, particularly in light of comments from employers stating that the existing patchwork of State laws is burdensome to navigate. The Commission notes that neither DOL nor IRS have adopted thresholds for highly compensated individuals that vary geographically. Given the rise in remote work, applying geographic variation to employers and workers would also prove burdensome. Moreover, total annual compensation under § 910.1 includes traditional bonuses or compensation a senior executive might receive, such as a bonus tied to performance that is paid pursuant to any prior contract, agreement, or promise. The rule also allows for the entire amount of such bonuses to be credited to total annual compensation, thus, increasing the likelihood of capturing highly compensated policy-making individuals across the nation.

The Commission estimates that approximately 92% of workers will fall below this compensation threshold, ensuring that existing non-competes will be unenforceable for the vast majority of workers most likely to experience exploitation and coercion in connection with non-competes.[704] The Commission also estimates that approximately 0.75% of workers are likely to be considered senior executives.[705] The compensation threshold reflects the Commission's finding that non-competes are very rarely bargained for, and to the extent they are, below $151,164 such bargaining is almost non-existent and consideration for a non-compete, if any, is likely to be relatively small. Pairing the compensation threshold with the duties test will also minimize compliance costs, as employers and the Commission will not need to conduct job duties tests for those workers whose compensation fall below the threshold.

i. Definition of ''Total Annual Compensation''

Section 910.1 provides that ''total annual compensation'' is based on the worker's earnings over the preceding year. It is based on DOL's regulation defining ''total annual compensation'' for highly compensated employees in 29 CFR 541.601(b)(1) and matches DOL's determination of what types of compensation can count towards total annual compensation for highly compensated employees.

Section 910.1, like DOL's definition, states that total annual compensation may include salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during that 52-week period. Nondiscretionary bonuses and compensation includes compensation paid pursuant to any prior contract, agreement, or promise, including performance bonuses the terms of which the worker knows and can expect.[706] The definition further states that total annual compensation does not include board, lodging and other facilities as defined in 29 CFR 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other similar fringe benefits. Section 541.606 is part of DOL's regulations concerning salary requirements for employees employed in a bona fide executive, administrative, or professional capacity, and applies to

[702] *Id.*

[703] *See also* 2023 FLSA NPRM at 62176.

[704] *See* Steven Ruggles, Sarah Flood, Matthew Sobek, Daniel Backman, Annie Chen, Grace Cooper, Stephanie Richards, Renae Rodgers, & Megan Schouweiler. IPUMS USA: Version 15.0 [dataset]. Minneapolis, MN: IPUMS, 2024. *https://doi.org/10.18128/D010.V15.0* (American Community Survey 2022 data, adjusted to 2023 dollars and excluding government and non-profit workers).

[705] *See* Part X.F.11.

[706] 29 CFR 778.211(c); *see also* U.S. DOL, Fact Sheet #56C: Bonuses under the Fair Labor Standards Act (FLSA) (Dec. 2019), *https://www.dol.gov/agencies/whd/fact-sheets/56c-bonuses.*

highly compensated employees.[707] That regulation cross-references DOL's regulations on wage payments under the FLSA in 29 CFR part 531, including the term ''other facilities'' defined in 29 CFR 531.32.

This regulatory text makes one modification to the DOL approach to correspond to the final rule's purposes and the non-compete context. Based on comments received, the Commission decided not to adopt DOL's base salary requirement for highly compensated employees in its definition of compensation, which serves a different purpose than the definition adopted here. The 2019 DOL regulation requires that a portion of the worker's total annual compensation must be paid on a salary or fee basis in order to qualify as a highly compensated employee, to ensure that the worker receives at least a base salary and to guard against potential abuses.[708] In contrast, the exception in § 910.2(a)(2) applies only to senior executives. The Commission understands that compensation for senior executives can be structured in many different ways. A law firm commented that senior executive compensation can be particularly complex, as base salary may be 20% or less of a senior executive's annual pay, and much of their pay is variable and does not vest until the end of the year. One comment said some CEOs receive only a $1 salary and receive the rest of their compensation in other forms. The definition of total annual compensation in the final rule is designed to allow for different forms of nondiscretionary compensation without requiring employers to pay a particular amount as salary.

ii. Definition of ''Preceding Year''

The definitions of ''senior executive'' and ''total annual compensation'' in § 910.1 use the term ''preceding year.'' To provide clarity and facilitate compliance, the Commission defines the term ''preceding year'' in § 910.1 as a person's choice among the following time periods: the most recent 52-week year, the most recent calendar year, the most recent fiscal year, or the most recent anniversary of hire year. The term ''preceding year'' is drawn from DOL's FLSA regulations in 29 CFR 541.601(b)(4), which states that ''[t]he employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.'' Here, the Commission similarly gives employers flexibility to minimize compliance costs, as many employers may have compensation more readily available based on the last calendar year, their fiscal year, or the anniversary of a worker's hire as part of tax and other reporting requirements.

iii. Other Proposed Compensation Thresholds

In seeking to exempt senior executives and highly paid workers from the rule altogether, commenters suggested several possible wage-related thresholds, including specific dollar thresholds (*e.g.,* $100,000) not tied to any existing metric or standard; whether the worker is an hourly worker; annual compensation at or above some multiple of the Federal poverty level or minimum wage, as in New Hampshire, Maine, and Rhode Island statutes; State average wages or ten times the local median wage; and $330,000, the IRS annual compensation limit for 401(k) retirement contributions.[709]

As explained in Part V.D, the Commission declines to exempt workers from the rule altogether based on their earnings. With respect to defining the workers whose *existing* non-competes the Commission exempts, the Commission also declines to use these thresholds or standards. For the reasons described in this Part IV.C.4.b, the Commission believes the compensation threshold it is adopting—in combination with the job duties test it is adopting—most effectively isolates the workers (namely, senior executives) who are likely to bargain with employers and receive compensation for their non-competes and who are unlikely to be exploited or coerced in connection with non-competes. While thresholds based on State lines or metrics would reflect differences in wages and costs of living among States, they would not reflect differences between, for example, urban and rural areas within a State and could generate confusion where the threshold varies between States, in addition to increasing compliance burdens by requiring employers to assess which State adjustment applies—a particularly challenging task in increasingly cross-border and remote work environments. Using the local median wage would generate too much unpredictability for employers and workers and would face the same administrability and confusion challenges to an even higher degree. In contrast, a uniform national compensation threshold as part of the test provides clarity that reduces the risks of *in terrorem* effects and increases ease of compliance. Finally, the $330,000 threshold is an annual compensation limit, while the IRS has a different test to identify highly compensated employees. A $330,000 threshold would be too high for employers in areas with lower average incomes and costs of living and would likely exclude from the definition many senior executives who bargained for their non-compete in exchange for consideration.

One business recommended an exception for individuals in the top 10% income tier at their respective employers to exempt workers at start-ups that might not be able to compensate their workers at a high level but whose workers may still be exposed to trade secrets. Another proposed using Internal Revenue Code section 414(q), defining highly compensated employee as the highest paid 1% or 250 employees in the corporation. A percentage threshold, however, has significant practical issues including workers entering and exiting, earnings changes, and factoring in independent contractors, workers at subsidiaries, or workers at parent companies. It would also lead to disparities between large and small firms, as large firms could use non-competes for far more workers than could small firms.

Other commenters pointed to State laws setting a compensation threshold to support excluding highly paid workers from the final rule or suggested the Commission look to those States as an example. A public policy organization that supported a categorical ban said any threshold should be at least higher than $100,000, citing research on Washington's non-compete reforms that indicated employers did not value non-competes up to that threshold.[710] The compensation threshold the

[707] 29 CFR 541.601(a)(1) (''[A]n employee with total annual compensation of at least $107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.'').

[708] 29 CFR 541.601(b)(1); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 FR 22122, 22175 (Apr. 23, 2004) (''This change will ensure that highly compensated employees will receive at least the same base salary throughout the year as required for exempt employees under the standard tests, while still allowing highly compensated employees to receive additional income in the form of commissions and nondiscretionary bonuses.'').

[709] IRS, *COLA Increases for Dollar Limitations on Benefits and Contributions,* (updated Nov. 7, 2023), *https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions;* Treas. Reg. sec. 1.401(a)(17)–1.

[710] Hiraiwa, Lipsitz & Starr, *supra* note 502.

Commission is adopting is higher than this amount.

c. Defining the Job Duties Component

i. Definitions of ''Officer,'' ''Policy-Making Authority,'' and ''Policy-Making Position''

In NPRM, the Commission suggested that the final rule's definition of senior executive could be based on SEC Rule 3b–7.[711] The Commission did not receive comments specifically addressing this option, but the Commission carefully considered arguments for and against job duties or job title distinctions as well as numerous comments on potential job duties tests, alone or in combination with compensation thresholds, before determining that a modified version of SEC Rule 3b–7's job duties requirements would best meet the exception's goals. The duties test adopted by the Commission is precise and more tailored than the other definitions proposed by commenters[712] and minimizes the risk that workers who likely experienced exploitation and coercion are included in the definition of senior executive. The test focuses primarily on job duties, rather than solely on job titles, because businesses do not all use the same job titles, and a job title might not reflect the worker's actual level of authority in an organization, which is a key indicator of whether a worker is likely to face exploitation and coercion or to have bargained in connection with non-competes.

Section 910.1 defines ''policy-making position'' as a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. The definition of ''policy-making position'' further states that an officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for the business entity for purposes of this paragraph. Finally, the definition of ''policy-making position'' states that a natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise.

Section 910.1 also defines terms used in the definition of ''policy-making position.'' Section 910.1 defines ''officer'' as a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any natural person routinely performing corresponding functions with respect to any business entity whether incorporated or unincorporated. To account for differences in the way business entities may use and define job titles, the definition includes workers in equivalent roles. By incorporating this definition of ''officer,'' ''senior executive'' applies to workers at the highest levels of a business entity.

This definition is nearly verbatim of the SEC definition of ''officer'' in 17 CFR 240.3b–2. That term ''officer'' is used in SEC Rule 3b–7.[713] To maintain consistency with the SEC regulations by ensuring that ''officer'' has the same meaning, and to utilize the SEC's expertise in this area, the Commission adopts the SEC's definition of ''officer.''

Section 910.1 defines ''policy-making authority'' as final authority to make policy decisions that control significant aspects of a business entity or a common enterprise. The definition further states that policy-making authority does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.

Accordingly, for a worker to be a senior executive, in addition to meeting the compensation threshold, the worker must be at the level of a president, chief executive officer or the equivalent, officer (defined in § 910.1), or in a position that has similar authority to a president or officer. Further, an officer or other qualifying person must have policy-making authority. Presidents, chief executive officers, and their equivalents are presumed to be senior executives (*i.e.,* employers do not need to consider the further element of ''policy-making authority''). The term ''chief executive officer or the equivalent'' was added to the definition of ''policy-making position'' to increase clarity on who was included and to reflect the wider range of businesses with various structures that are subject to the final rule (as compared to SEC Rule 3b–7). The definition of ''policy-making position'' includes workers with equivalent authority because job titles and specific duties may vary between companies. This ensures that the term ''senior executive'' is broad enough to cover more than just a president or chief executive officer, especially for larger companies, as others may have final policy-making authority over significant aspects of a business entity.

For example, many executives in what is often called the ''C-suite'' will likely be senior executives if they are making decisions that have a significant impact on the business, such as important policies that affect most or all of the business. Partners in a business, such as physician partners of an independent physician practice, would also generally qualify as senior executives under the duties prong, assuming the partners have authority to make policy decisions about the business. The Commission notes that such partners would also likely fall under the sale of business exception in § 910.3 if the partner leaves the practice and sells their shares of the practice. In contrast, a physician who works within a hospital system but does not have policymaking authority over the organization as a whole would not qualify.

The Commission changed some aspects of SEC Rule 3b–7 to fit the context of this rulemaking. First, because § 910.2(a)(2) will extend to non-public companies, unlike SEC regulations, the final rule's definition of ''policy-making position'' does not include the phrase ''any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance)'' in the definition of ''executive officer.''[714] The Commission believes that in the context of this final rule, in which the definition is relevant to a broader array of entities than public companies, that phrase would encompass workers who, despite their titles, are among those who are likely to be coerced or exploited by non-competes. For example, this aspect of the definition can be too easily applied to managers of small departments, who the Commission finds

[711] 17 CFR 240.3b–7; NPRM at 3520.

[712] *See* Part IV.C.4.c.ii.

[713] 17 CFR 240.3b–7 (''The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.''); 17 CFR 240.3b–2 (''The term officer means a president, vice president, secretary, treasury or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.'').

[714] 17 CFR 240.3b–7.

are unlikely to have bargained for their non-competes. At the same time, a manager who does in fact have policy-making authority would meet the definition of ''officer'' in § 910.1 and thus be included in the definition of senior executives (if the manager also meets the compensation threshold). Similarly, depending on the organization, a vice president may have final policy-making authority over significant aspects of a business entity. The adapted definition is based on functional job duties rather than formal job titles.

Second, SEC Rule 3b–7 uses the term ''policy making function'' as part of its definition of the types of job duties that could classify a person as an ''executive officer.'' [715] While the term ''policy making function'' is undefined in SEC Rule 3b–7 and other SEC regulations, the Commission believes that defining the term ''policy-making authority'' in § 910.1 would provide greater clarity and facilitate compliance with the final rule. The final rule applies to a wider range of business entities than SEC rules, and the Commission seeks to minimize the need to consult with counsel about the meaning of this term. The Commission is also concerned that if the term is left undefined, employers could, inadvertently or otherwise, label too many workers who have any involvement in the employer's policy making as senior executives, especially workers without bargaining power.

In defining this term, the Commission seeks to broadly align with the SEC's definition of ''executive officer'' while focusing on senior executives in a wider variety of entities, who are less likely to experience exploitation and coercion. As explained in Part IV.C.4.b with respect to the compensation threshold, there is no job duties test that will exclude every worker who experiences exploitation and coercion with respect to non-competes while including every worker who does not. Building on the SEC definition provides firms and workers with a more administrable definition that isolates workers at the most senior level of an organization.

To ensure that the final rule's job duties test for senior executives broadly aligns with the SEC definition, the Commission looked to case law interpreting that SEC definition. Few courts have interpreted SEC Rule 3b–7's ''policy making function'' language, though some courts view it as an officer test.[716] In the most in-depth discussion, the U.S. District Court for DC considered a defendant who was a member of a corporate body that discussed important policy decisions and made recommendations to the CEO, and supervised and had ''substantial influence'' over a major aspect of the company's business. However, the court held that only the CEO, and not the defendant, had authority to make company policy and ultimate decisions on significant issues.[717] The court conducted a fact-intensive analysis of the defendant's duties and held that the defendant did not have the authority to make policy. The court also held that the term did not include individuals solely ''involved in discussing company strategy and policy.'' [718]

The Commission finds this case law instructive and thus defines ''policy-making authority'' in the final rule as ''final authority to make policy decisions that control significant aspects of a business entity and does not include authority limited to advising or exerting influence over such policy decisions.'' Adding this definition provides stakeholders with additional clarity as to what type of authority meets the definition of ''senior executive'' and prevents overbroad application of the definition. It expressly does not include workers who merely advise on or influence policy, as a wide range of workers in an organization can advise on or influence policy without being a senior executive.

In order to ensure that lower-level workers, whom the Commission finds likely experience exploitation and coercion, are not included in the definition of senior executive, policy-making authority is assessed based on the business as a whole, not a particular office, department, or other sublevel. It considers the authority a worker has to make policy decisions that control a significant aspect of a business entity without needing a higher-level worker's approval. For example, if the head of a marketing division in a manufacturing firm only makes policy decisions for the marketing division, and those decisions do not control significant aspects of the business (which would likely be decisions that impact the business outside the marketing division), that worker would not be considered a senior executive. Similarly, in the medical context, neither the head of a hospital's surgery practice nor a physician who runs an internal medical practice that is part of a hospital system would be senior executives, assuming they are decision-makers only for their particular division. The definition is limited to the workers with sufficient pay and authority such that they are more likely to have meaningful bargaining power and actually negotiated their non-competes.

For the same reason, the Commission added language to the definitions of ''policy-making authority'' and ''policy-making position'' to exclude from the definition of ''senior executives'' workers with policy-making authority over only a subsidiary or affiliate of a common enterprise who do not have policy-making authority over the common enterprise. One commenter argued that the proposed definition of ''business entity'' would allow firms to divide themselves into separate entities to evade the final rule. In addition to sharing this concern, the Commission is concerned that executives of subsidiaries or affiliates of a common enterprise [719] could rely on their final authority to make policy decisions for only that subsidiary or affiliate to classify the head of each office as a senior executive even though that individual only has authority over one component of a coordinated common enterprise. Rather, the worker must have policy-making authority with respect to the common enterprise as a whole, not just a segment of it, to be a senior executive. Workers who head a subsidiary or affiliate of a common enterprise are similar to department heads; the senior executives controlling the entire common enterprise control those individual subsidiaries and affiliates. As the Commission has explained, the Commission finds that department heads and other highly paid non-senior executives do not have sufficient bargaining power to avoid exploitation and coercion and are unlikely to have bargained in connection with non-competes. The job duties test identifies the workers with the highest levels of authority in an organization, *i.e.,* the workers most likely to have bargaining power and a bespoke, negotiated agreement, and a

[715] *Id.*

[716] *See, e.g., SEC* v. *Enters. Solutions,* 142 F. Supp. 2d 561, 570, 574 (S.D.N.Y. 2001) (finding that a so-called consultant's role was ''sufficiently similar to the duties of an officer or director of the company that his involvement, along with his history of criminal and regulatory violations, ought to have been disclosed'' where the consultant controlled the company, including hiring the CEO, arranging loans from companies controlled by the consultant, negotiating acquisitions, and putting his daughter on the board in his place); *In re Weeks,* SEC Release No. 8313 at *9 (Oct. 23, 2003) (finding a consultant was *de facto* in charge of the company while the officers and directors were figureheads who lacked authority and influence over the company).

[717] *SEC* v. *Prince,* 942 F. Supp. 2d 108, 133–36 (D.D.C. 2013).

[718] *Id.* at 136.

[719] *FTC* v. *WV Universal Mgmt., LLC,* 877 F.3d 1234, 1240 (11th Cir. 2017) (''[C]ourts have justly imposed joint and several liability where a common enterprise exists'').

common enterprise is effectively a single organization. Such workers may have a senior executive job title, but they are unlikely to meet the job duties test.

To be considered a ''common enterprise'' for the purposes of defining policy-making authority and policy-making position, the Commission looks beyond legal corporate entities to whether there is a common enterprise of ''integrated business entities.'' [720] This means that the various components of the common enterprise have, for example, one or more of the following characteristics: maintain officers, directors, and workers in common; operate under common control; share offices; commingle funds; and share advertising and marketing.[721] Therefore, the definitions of policy-making authority and policy-making position include provisions whose purpose is to exclude those executives of a subsidiary or affiliate of a common enterprise from being considered senior executives. For example, if a business operates in several States and its operations in each State are organized as their own corporation, assuming these businesses and the parent company meet the criteria for a common enterprise, the head of each State corporation would not be a senior executive. Rather, only the senior executives of the parent company (or whichever company is making policy decisions for the common enterprise) could qualify as senior executives for purposes of this final rule, because they are the workers with the highest level of authority in the organization and most likely to have bargaining power and a bespoke, negotiated agreement. However, a worker could qualify as a senior executive even if they were an executive of one or more subsidiaries or affiliates of the common enterprise, so long as that senior executive exercised policy-making authority over the common enterprise in its entirety. These provisions are consistent with the approach taken elsewhere in this final rule to focus on real-world implications and authority rather than formal titles, labels, or designations. This exclusion from the definitions of ''policy-making authority'' and ''policy-making position'' applies only to common enterprises; for subsidiaries or affiliates that are not part of a common enterprise, a worker could qualify as a senior executive if they have policy-making authority over that subsidiary or affiliate and meet all of the requirements.

The Commission has also substituted ''business entity'' in the definitions of ''officer'' and ''policy-making position'' where SEC Rule 3b–7 uses the word ''registrant'' and 17 CFR 240.3b–2 uses ''organization,'' because ''registrant'' has a specific meaning in the SEC context that is inapplicable to the wider array of business entities covered by this final rule and because ''business entity'' is defined in § 910.1 and is used throughout this final rule. The Commission substituted ''natural person'' where SEC Rule 3b–7 and 17 CFR 240.3b–2 use ''person'' because ''person'' is separately defined for purposes of this final rule in § 910.1.

ii. Other Proposed Job Duties Tests

The FLSA

Numerous commenters suggested basing a job duties test on the categories of occupations that are exempt from requirements under the FLSA. Some commenters suggested using only some of the exemptions such as executive employees,[722] administrative employees, learned or creative professionals, or workers in the practice of medicine.[723] DOL's regulations also set a salary threshold at not less than $684 per week ($35,568 annually),[724] though other commenters suggested using a higher compensation threshold.

One civic organization opposed applying any FLSA exemptions, stating that the FLSA provides numerous exemptions that do not relate to any non-compete policy considerations, and an exception or more lenient standards for FLSA-exempt workers would not solve the problems caused by non-competes. It opposed using the FLSA's executive, administrative, or professional exemptions, arguing that updates to the FLSA's salary threshold are often delayed and outdated, often falling below the poverty threshold, and the duties test serves as a loophole for wage and hour protections.

Commenters offered several reasons for adopting the FLSA exemptions: these categories are already well-established in Federal law; nonexempt workers under the FLSA tend not to have access to trade secrets or be able to take an employer's goodwill and are thus less likely to harm the employer; the exemptions would capture both wage and job duties tests; some States use a similar standard to the FLSA in their non-compete statutes; and the exemptions would ban non-competes for low-skilled workers for whom there are insufficient justifications for non-competes. An employment attorney also pushed back on the NPRM's concerns that the FLSA exemptions could enable misclassification,[725] asserting that misclassification under the FLSA is unlawful and penalized, and thus usually inadvertent.

The Commission does not adopt the FLSA exemptions for purposes of this final rule because it would exempt millions of non-competes that harm competition and workers. For example, the FLSA exempts most highly paid and highly skilled workers,[726] who the Commission finds experience exploitation and coercion (except where those workers are also senior executives).[727] The Commission also adopts brighter-line rules than the FLSA to ease compliance burdens and address *in terrorem* effects that result from uncertainty about whether a non-compete is unenforceable.[728] Although the Commission does not believe that the FLSA job duties tests are appropriate for this final rule, it does view the FLSA wage threshold methodology for ''highly compensated employees'' as a useful benchmark.[729]

Trade Secret and Confidential Information Exceptions

Numerous commenters urged the Commission not to ban non-competes for workers who have access to trade secrets and confidential information, often noting this justification is commonly used for highly paid and highly skilled workers, including senior executives. One comment expressly stated that this exception should apply regardless of earnings, though many

[720] *See FTC* v. *E.M.A. Nationwide, Inc.,* 767 F.3d 611, 636–37 (6th Cir. 2014).

[721] *See id.* ('''If the structure, organization, and pattern of a business venture reveal a 'common enterprise' or a 'maze' of integrated business entities, the FTC Act disregards corporateness. Courts generally find that a common enterprise exists 'if, for example, businesses (1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing.''') (quoting *FTC* v. *Wash. Data. Res.,* 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012)). In assessing a common enterprise, ''no one factor is controlling,'' and ''federal courts routinely consider a variety of factors.'' *FTC* v. *Wyndham Worldwide Corp.,* No. CIV.A. 13–1887 ES, 2014 WL 2812049, at *7 (D.N.J. Jun. 23, 2014); *see also Del. Watch Co.* v. *FTC,* 332 F.2d 745, 746 (2d Cir. 1964) (''[T]he pattern and frame-work of the whole enterprise must be taken into consideration.'')

[722] *See* 29 CFR 541.100(a).

[723] *See* DOL, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA) (revised Sept. 2019), *https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime.*

[724] *Id.*

[725] *See* NPRM at 3511.

[726] *See* 2023 FLSA NPRM at 62190 (estimating that 36.4 million salaried, white-collar employees currently qualify as FLSA-exempt executive, administrative, or professional employees).

[727] *See* Part IV.C.1.

[728] *See* Part IX.C.

[729] *See* Part IV.C.4.b.

others did not mention compensation thresholds. One business suggested a bright-line rule for the types of confidential business information that can be protected by a non-compete based on existing State statutes, to increase certainty about what is allowed. Commenters suggested exceptions based on a variety of job types they viewed as more likely to be exposed to trade secrets and confidential information, including all highly skilled workers; key scientific, technical, R&D, or sales workers; or workers with highly detailed knowledge of business and marketing plans. The Commission explains why it is not adopting exceptions based on access to trade secrets or other intellectual property in Parts V.D.1 and V.D.2.

Additional Proposed Job Duties and Job Title Tests

The Commission carefully considered several other proposed tests. The NPRM stated that the Commission could base the definition of senior executive on SEC Regulation S–K's definition of senior executives.[730] Commenters did not discuss this potential option. The Commission is not adopting this approach because it bears little relation to the likelihood that a senior executive bargained for a non-compete, and because it would designate roughly seven individuals per company as ''senior executives'' regardless of their compensation level or the size of the company, meaning it would not apply equally among employers or workers.[731] For example, a ten-person company could potentially use non-competes for most of its workforce irrespective of whether they are senior executives, whereas a company with ten thousand employees would be limited to the same number.[732]

One commenter proposed adopting a definition similar to the tax code provision on ''golden parachute payments.'' [733] Several commenters drafted their own definition of senior executive based on job duties, titles, or ownership status, such as C-suite executives and their immediate subordinates, partners and equity holders, managers, workers involved in strategic decision-making, and more.

The Commission carefully considered each proposed definition and how it would operate in practice before selecting the two-part test. Elements of some of these proposals, such as strategy development or decision-making, are also similar to the job duties test the Commission is finalizing. The Commission believes that definitions based on job titles alone would be inadequate because, as one industry association commented, employers define job titles differently, and a title might not accurately reflect a worker's job duties. The other definitions proposed by commenters, such as the provision on golden parachute payments, would generally require a more fact-intensive analysis than the job duties test the Commission is adopting. Market participants would need to conduct the analysis for more workers, including workers who are exploited and coerced by non-competes. A more fact-intensive analysis would require more resources for litigation and is thus likely to have *in terrorem* effects for lower-wage workers.[734] Moreover, many of these proposals would exempt more workers than the Commission's definition, such as managers, even though workers in such roles and occupations are often coerced and exploited by non-competes.

As explained in this Part, the Commission pairs a relatively easy-to-apply job duties test with a compensation threshold to maximize administrability and clarity while identifying those senior executives most likely to have bargained for non-competes. In addition, proposals to except partners, shareholders, and similar groups are likely covered by the sale of business exception if they sell their share of the business upon leaving.

5. Prohibitions in Section 910.2(a)(2)

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission adopts § 910.2(a)(2), which defines unfair methods of competition related to non-competes with respect to senior executives. Section 910.2(a)(2) provides that, with respect to a senior executive, it is an unfair method of competition for a person: (i) to enter into or attempt to enter into a non-compete clause; (ii) to enforce or attempt to enforce a non-compete clause entered into after the effective date; or (iii) to represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date. Part IV.A.1 sets forth the Commission's determination that the foregoing practices are unfair methods of competition under section 5, and Part IV.C.2 explains the findings that provide the basis for this determination.

Section 910.2(a)(2) uses similar language as § 910.2(a)(1); however, there are two key differences. First, the prohibition in § 910.2(a)(2)(ii) on enforcing or attempting to enforce a non-compete applies only to non-competes entered into after the effective date. Second, the prohibition in § 910.2(a)(2)(iii) on representing that a senior executive is subject to a non-compete applies only where the non-compete was entered into after the effective date. Sections 910.2(a)(2)(ii) and (iii) include this language because, for the reasons described in Part IV.C.3, the Commission has determined not to prohibit existing non-competes with senior executives—*i.e.,* non-competes entered into before the effective date—from remaining in effect.

Otherwise, the explanation of the three prongs of § 910.2(a)(1) in Part IV.B.4—relating to issues such as, for example, what ''attempt to enter into'' and ''attempt to enforce'' mean, and what conduct the ''representation'' prong applies to—is applicable to the corresponding language in § 910.2(a)(2). The good-faith exception in § 910.3 is also applicable to the relevant prohibitions with respect to senior executives and is explained in Part V.C.

D. Claimed Justifications for Non-Competes Do Not Alter the Commission's Finding That Non-Competes Are an Unfair Method of Competition

For the reasons described in Parts IV.B and IV.C, the Commission determines that certain practices related to non-competes are unfair methods of competition under section 5. In this Part IV.D, the Commission finds the claimed justifications for non-competes do not alter the Commission's determination that non-competes are an unfair method of competition.

As noted in Part II.F, some courts have declined to consider justifications altogether and the Commission and courts have consistently held that pecuniary benefit to the party responsible for the conduct in question

[730] *See* NPRM at 3520 (citing 17 CFR 229.402(a)(3)).

[731] *See* 17 CFR 229.402(a)(3).

[732] Additionally, while the reporting obligations of public companies may provide them with an incentive to avoid generating a profusion of ''senior executives,'' privately held companies would not face a similar constraint and could potentially avoid any ''per-company'' limitations through corporate restructuring.

[733] This provision determines who is an ''officer'' ''on the basis of all the facts and circumstances in the particular case (such as the source of the individual's authority, the term for which the individual is elected or appointed, and the nature and extent of the individual's duties) . . . .'' Treas. Reg. sec. 1.280G–1, Q/A–18.

[734] *See* Part IX.C.

is not cognizable as a justification.[735] However, where defendants raise justifications as an affirmative defense, they must be legally cognizable,[736] and non-pretextual,[737] and any restriction used to bring about the benefit must be narrowly tailored to limit any adverse impact on competitive conditions.[738]

In the NPRM, the Commission considered the commonly cited business justifications for non-competes and preliminarily found they did not alter the Commission's determination that non-competes are an unfair method of competition.[739] The Commission has reviewed and considered the comments on its analysis of the justifications for non-competes. For two reasons, the claimed justifications for non-competes do not alter the Commission's determination that non-competes are an unfair method of competition. First, employers have more narrowly tailored alternatives to non-competes for protecting valuable investments that tend to negatively affect competitive conditions to a lesser degree. Second, the asserted benefits from the claimed business justifications from non-competes do not justify the considerable harm from non-competes.

1. Claimed Business Justifications for Non-Competes and Empirical Evidence

Claimed business justifications for non-competes relate to increasing employers' incentives to make productive investments, such as investments in worker human capital (worker training), client and customer attraction and retention, or in creating or sharing trade secrets or other confidential information with workers. According to these asserted justifications, without non-competes, employment relationships are subject to an investment hold-up problem. Investment hold-up would occur where an employer—faced with the possibility that a worker may depart after receiving some sort of valuable investment or obtaining valuable information—opts not to make that investment in the first place, thereby decreasing the firm's productivity and overall social welfare. For example, according to this claimed justification, an employer may be more reticent to make capital investments or invest in workers' human capital by training its workers if it knows the worker may depart for or may establish a competing firm. Similarly, commenters argued that employers may decrease investments or experience harm if a worker takes a trade secret or other confidential information to a competitor.

Courts have cited these justifications when upholding non-competes under State common law and in cases challenging non-competes under the Sherman Act.[740] However, courts have not considered non-competes' aggregate harms, and neither legislatures nor courts have had occasion to consider these justifications in the context of section 5. The Commission has considered them and found them unavailing in cases in which it has successfully obtained consent decrees against non-competes alleged to be an unfair method of competition in violation of section 5.[741]

There is some empirical evidence that non-competes increase investment in human capital of workers, capital investment, and R&D investment. However, the Commission also finds that there are alternatives that burden competition to a lesser degree,[742] and, in any event, these claimed benefits do not justify the harms from non-competes.[743]

As explained in the NPRM, a study by Evan Starr finds that moving from mean non-compete enforceability to no non-compete enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-competes at a high rate (relative to a control group of occupations that use non-competes at a low rate).[744] The study further finds that changes in training are primarily due to changes in firm-sponsored, rather than employee-sponsored, training.[745]

Firm-sponsored training is the type of investment in human capital that non-competes are often theorized to protect, as the firm may be unwilling to make an unprotected investment. However, the study does not distinguish between core training, *i.e.,* training required to perform job duties, and advanced training, *i.e.,* training with potential to increase productivity beyond the baseline requirements for job performance. When non-competes are more enforceable, workers may receive additional core training rather than advanced training, but this may actually reflect a reduction in efficiency. When non-competes are more enforceable, labor mobility decreases and workers may also move to new industries to avoid potentially triggering non-compete clause violations (as discussed in Part IV.B.2.b.ii), both of which make experienced workers less often available for hire. Firms therefore may need to train workers at a greater rate because they will hire inexperienced workers who require more core training. On the other hand, advanced training can be associated with productivity gains, and firms using non-competes may increase rates of advanced training for experienced workers because non-competes increase the likelihood that firms receive a return on the training investment. The study does not distinguish between these types of training, and thus leaves unclear whether the observed increases in training reflect productivity gains or losses (or neither in net).

Additionally, the Starr study uses data on the use of non-competes, comparing high- and low-use occupations, rather than changes in enforceability; however, the study does not examine differences between individuals who are bound by non-

[735] *Atl. Refin. Co.,* 381 U.S. at 371 (considering that defendant's distribution contracts at issue ''may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers'' and holding that the ''Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves''); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the ''anticompetitive tendencies of such system [were] clear''); *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 15 (7th Cir. 1971) (''While it is relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice.''). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through section 5.

[736] *See, e.g., FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 463 (1986); *Fashion Originators' Guild of Am.* v. *FTC,* 312 U.S. 457, 467–68 (1941); *FTC* v. *Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 423–24 (1990).

[737] *See, e.g., Ind. Fed'n of Dentists,* 476 U.S. at 464. *See also United States* v. *Microsoft Corp.,* 253 F.3d 35, 62–64, 74 (D.C. Cir. 2001); *Eastman Kodak Co.* v. *Image Tech. Svcs.,* 504 U.S. 451, 484–85 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585, 608–10 (1985).

[738] *NCAA* v. *Alston,* 594 U.S. 69, 99–104 (2021); *Polygram Holding, Inc.* v. *FTC,* 416 F.3d 29, 38 (D.C. Cir. 2005); 2000 Collaboration Guidelines, sec. 3.36b. *See also Union Circulation Co.* v. *FTC,* 241 F.2d 652, 658 (2d Cir. 1957) (''The agreements here went beyond what was necessary to curtail and eliminate fraudulent practices.'').

[739] NPRM at 3504–08.

[740] *See, e.g., United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 281 (6th Cir. 1898); *Polk Bros., Inc.* v. *Forest City Enters.,* 776 F.2d 185, 189 (7th Cir. 1985).

[741] *See* FTC, *In the Matter of O–I Glass, Inc and In the Matter of Ardagh Group S.A., Ardagh Glass Inc., and Ardagh Glass Packaging Inc.,* Analysis of Agreements Containing Consent Order to Aid Public Comment, FTC File No. 2110182 (Jan. 4, 2023) at 6–7; FTC, *In the Matter of Prudential Security, Inc., et al.,* Analysis of Agreement Containing Consent Order to Aid Public Comment, FTC File No. 2210026 (Jan. 4, 2023) at 7; FTC, *In the Matter of Anchor Glass Container Corp. et al.,* FTC File No. 2210182 Analysis of Agreement Containing Consent Order to Aid Public Comment (Mar. 15, 2023) at 6.

[742] *See* Part IV.D.2.

[743] *See* Part IV.D.3.

[744] Starr, *supra* note 445 at 796–97.

[745] *Id.* at 797.

competes and individuals who are not. This study is the only study that attempts to identify the causal link between non-competes and worker human capital investment, and the Commission gives it some weight, though not as much weight as it would receive if it examined changes in non-compete enforceability. The Commission also weights it less highly because it does not distinguish between core and advanced training.

The second study, by Jessica Jeffers, finds knowledge-intensive firms invest substantially less in capital equipment following decreases in the enforceability of non-competes, though the effect is much more muted (and statistically insignificant) when considering all industries.[746] While firms may invest in capital equipment for many different reasons, Jeffers examines this outcome (as opposed to labor-focused outcomes) to avoid looking at R&D expenditure as a whole, which is in large part composed of labor expenses. This allows the study to isolate the effects of non-compete enforceability on investment from other effects of non-competes, such as reduced worker earnings.

Jeffers finds that there are likely two mechanisms driving these effects: first, that firms may be more likely to invest in capital when they train their workers because worker training and capital expenditure are complementary (*i.e.,* the return on investment in capital equipment is greater when workers are more highly trained); and second, that non-competes reduce competition, and firms' returns to capital expenditure are greater when competition is lower, incentivizing firms to invest more in capital.[747] Jeffers does not find any impact of non-compete enforceability on R&D expenditure (intangible investment). The sample in this study's examination of capital investment is limited to incumbent firms, and the study also finds decreases in new firm entry due to increases in non-compete enforceability. The study therefore does not offer clear insights into the overall net effect on capital investment (which includes investment by incumbent firms as well as investment by entering firms). Additionally, the Commission notes that if Jeffers' hypothesis—that firms increase investment in capital because of decreased competition—is correct, then this increased capital investment may not necessarily reflect increased economic efficiency. Jeffers uses multiple changes in non-compete enforceability, measured in a binary fashion, and the Commission therefore gives this study substantial weight, but less weight than studies which additionally measure enforceability in a non-binary fashion.

Two studies published after the release of the NPRM also assess the effects of non-competes on firm investments. A study by Johnson, Lipsitz, and Pei revisits the form of the regressions used by Jeffers. The authors find that greater non-compete enforceability increases R&D expenditure.[748] This is consistent with the NPRM's preliminary finding, and the finding of the Jeffers study, that there is evidence that non-competes increase employee human capital investment and other forms of investment. The Commission gives this study substantial weight because it examines multiple changes in non-compete enforceability measured in a non-binary fashion.

Similarly, a study by Liyan Shi examines the relationship between non-compete enforceability, the use of non-competes among executives, and firm investment.[749] Shi finds that intangible capital (expenditure on R&D) is positively associated with use of non-competes, especially in States that enforce non-competes more strictly. However, Shi finds that—unlike in the Jeffers study—physical capital expenditure has no relationship with the use of non-competes, even in high enforceability States. The Commission notes that this evidence pertains specifically to non-competes with highly paid senior executives: the executives in Shi's study earned $770,000 in cash compensation, on average. The Commission also notes that this evidence arises from analysis of non-compete use coupled with non-compete enforceability. The Commission therefore gives less weight to these empirical findings.

As the NPRM described, there are also two studies examining the impact of non-compete use (as opposed to non-compete enforceability) on investment. However, these studies simply compare differences between samples of workers that do and do not use non-competes, a methodology the Commission gives less weight to.[750] The first is a study by Starr, Prescott, and Bishara using their 2014 survey of non-compete use. They find no statistically significant association with either training or the sharing of trade secrets (after inclusion of control variables) but do not examine other investment outcomes.[751] The second study, by Johnson and Lipsitz, examines investment in the hair salon industry. That study finds that firms that use non-competes train their employees at a higher rate and invest in customer attraction through the use of digital coupons (on so-called "deal sites") to attract customers at a higher rate, both by 11 percentage points.[752]

As the Commission stated in the NPRM, it gives these two studies (the 2021 Starr, Prescott, and Bishara studies and the 2021 Johnson and Lipsitz studies) minimal weight, because they do not necessarily represent causal relationships, a point recognized by the authors of both of these studies.[753] Similar to other studies of non-compete use—as opposed to changes in non-compete enforceability—these studies are less reliable because the use of non-competes and the decision to invest may be jointly determined by other characteristics of the firms, labor markets, or product markets.[754]

One additional study, by Younge and Marx, finds that the value of publicly traded firms increased by 9% due to an increase in non-compete enforceability.[755] As the Commission noted in the NPRM, the authors attribute this increase to the value of retaining employees, which comes with the negative effects to parties other than the firm (employees, competitors, and consumers) described in Parts IV.B and IV.C. As the NPRM stated, if the benefits to the firm arise primarily from reductions in labor costs, then the increase in the value of firms is in part a transfer from workers to firms and is therefore not necessarily a benefit of non-competes. However, the authors do not explore the extent to which increases in firm value arise from decreases in labor costs. The authors additionally note that since the time frame used in the study is short, "there may be deleterious effects of non-competes in the long run" which are absent in their findings.[756] This study

[746] Jeffers, *supra* note 450 at 28. Jeffers reports 34%–39% increases in capital investment due to increases in non-compete enforceability at knowledge-intensive firms in the 2024 version of the study, and the Commission calculates increases of 7.9% across all sectors (see Part X.F.9.a.i).

[747] *Id.* at 29.

[748] Johnson, Lipsitz, and Pei, *supra* note 526.

[749] Shi, *supra* note 84.

[750] *See* Part IV.A.2.

[751] Starr, Prescott, & Bishara, *supra* note 68 at 76.

[752] Johnson & Lipsitz, *supra* note 80 at 711.

[753] Starr, Prescott, & Bishara, *supra* note 68 at 73; Johnson & Lipsitz, *supra* note 80 at 711.

[754] *See* Part IV.A.2 (describing the analytical framework the Commission is applying to weigh the empirical studies, including why it assigns greater weight to studies assessing changes in non-compete enforceability than to studies of non-compete use).

[755] Kenneth A. Younge & Matt Marx, *The Value of Employee Retention: Evidence from a Natural Experiment,* 25 J. Econ. & Mgmt. Strategy 652 (2016).

[756] *Id.* at 674.

does not address the effects of non-competes on firm investments specifically.

As the Commission stated in the NPRM, it is unaware of any evidence of a relationship between the enforceability of non-competes and the rate at which companies invest in creating or sharing trade secrets.[757] Similarly, the Commission is unaware of any evidence non-competes reduce trade secret misappropriation or the loss of other types of confidential information, difficult areas for researchers to study given the lack of reliable data on firms' trade secrets and confidential information.[758] As explained in Part IV.D.2, even assuming non-competes do reduce misappropriation or information loss, the Commission finds that there are alternatives to protect these investments that burden competition to a lesser degree.

2. Employers Have Alternatives to Non-Competes for Protecting Valuable Investments

a. The Proposed Rule

In the NPRM, the Commission preliminarily found that employers have alternatives to non-competes for protecting valuable investments.[759] The Commission stated that these alternatives may not be as protective as employers would like, but they reasonably accomplish the same purposes as non-competes while burdening competition to a less significant degree.[760]

The Commission stated that trade secret law—a form of intellectual property law that protects confidential business information—already provides significant legal protections for an employer's trade secrets.[761] The Commission also stated that employers that seek to protect valuable investments are able to enter into NDAs with their workers. NDAs, which are also commonly known as confidentiality agreements, are contracts in which a party agrees not to disclose or use information designated as confidential.[762] The Commission further stated that, if an employer wants to prevent a worker from leaving right after receiving valuable investment in their human capital, the employer can sign the worker to an employment contract with a fixed duration.[763] In addition, the Commission stated that employers that wish to retain their workers can also pay their workers more, offer them better hours or better working conditions, or otherwise improve the conditions of their employment—*i.e.,* compete to retain their labor services.[764]

The Commission also noted that in three States—California, North Dakota, and Oklahoma—employers generally cannot enforce non-competes, so they must protect their investments using one or more of these less restrictive alternatives.[765] The Commission stated that the economic success in these three States of industries that are highly dependent on trade secrets and other confidential information illustrates that companies have viable alternatives to non-competes for protecting valuable investments.[766]

b. The Commission's Final Findings

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission in this final rule finds that the asserted business justifications for non-competes do not alter the Commission's determination that non-competes are an unfair method of competition. Employers have alternatives to non-competes for protecting valuable investments that burden competition to a less significant degree. Rather than restraining a broad scope of beneficial competitive activity—by barring workers altogether from leaving work with the employer or starting a business and by barring competing employers and businesses from hiring those workers—these alternatives are much more narrowly tailored to limit impacts on competitive conditions.

For the protection of trade secrets and other confidential information, these alternatives include enforcement of intellectual property rights under trade secret and patent law, NDAs, and invention assignment agreements. Employers also have alternative mechanisms to protect their investments in worker human capital, including fixed duration contracts, and competing on the merits to retain workers by providing better pay and working conditions.

The experiences of certain States in banning non-competes bolster this conclusion. Non-competes have been void in California, North Dakota, and Oklahoma since the 1800s.[767] In these three States, employers generally cannot enforce non-competes, so they must protect their investments using one or more less restrictive alternatives. There is no evidence that employers in these States have been unable to protect their investments (whether in human capital, physical capital, intangible assets, or otherwise) or have been disincentivized from making them to any discernible degree. Rather, in each of these States, industries that depend on highly trained workers and trade secrets and other confidential information have flourished. California, for example, is home to four of the world's ten largest companies by market capitalization, and it also maintains a vibrant startup culture.[768] Technology firms are highly dependent on highly-trained and skilled workers as well as protecting trade secrets and other confidential information—and, since the 1980s, California has become the epicenter of the global technology sector, even though employers cannot enforce non-competes.[769] Indeed, researchers have posited that high-tech clusters in California may have been aided by increased labor mobility due to the unenforceability of non-competes.[770] In

[757] Recent evidence suggests that trade secret litigation does not increase following bans on non-competes. Brad N. Greenwood, Bruce Kobayashi, Evan Starr, *Can You Keep a Secret? Banning Noncompetes Does Not Increase Trade Secret Litigation* (2024), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4771171.* The Commission does not rely on this study to support the findings described in this Part IV.D.

[758] *See, e.g.,* David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act,* 53 Wake Forest L. Rev. 106, 120–22 (2018).

[759] NPRM at 3505–07.

[760] *Id.*

[761] *Id.* at 3505–06.

[762] *Id.* at 3506–07.

[763] *Id.* at 3507.

[764] *Id.*

[765] Since the NPRM was issued, Minnesota has become the fourth State to make non-competes unenforceable. *See* Minn. Stat. Ann. sec. 181.988 (effective July 1, 2023).

[766] NPRM at 3507.

[767] Non-competes have been void in California since 1872, in North Dakota since 1865, and in Oklahoma since 1890. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Non-Compete Clauses,* 74 N.Y.U. L. Rev. 575, 616 (1999) (California); *Werlinger* v. *Mut. Serv. Casualty Ins. Co.,* 496 NW2d 26, 30 (N.D. 1993) (North Dakota); Brandon Kemp, *Noncompetes in Oklahoma Mergers and Acquisitions,* 88 Okla. Bar J. 128 (2017) (Oklahoma). Minnesota also recently prohibited non-competes, through a law that took effect in July 2023. *See* Minn. Stat. sec. 181.988. However, Minnesota's experience is too new to draw conclusions about the ability of industries that depend on trade secrets to thrive where non-competes are unenforceable.

[768] Josh Dylan, *What Is Market Cap In Stocks?,* Nasdaq.com (Aug, 12, 2022), *https://www.nasdaq.com/articles/what*marketcap-in-stocks; Ewing Marion Kauffman Found., *State Entrepreneurship Rankings, https://www..com/public_affairs//02/25/_foundation_state_entrepreneurship_rankings.html.*

[769] *See, e.g.,* Gilson, *supra* note 767 at 594–95.

[770] *See, e.g., id.* at 585–86, 590–97; Bruce Fallick, Charles A. Fleischman, & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster,* 88 Rev. Econ. & Statistics 472, 477 (2006).

North Dakota and Oklahoma, the energy industry has thrived, and firms in the energy industry depend on highly-trained workers as well as the ability to protect trade secrets and other confidential information.

The Commission finds that the economic success in these three States of industries that are highly dependent on highly trained workers, trade secrets, and other confidential information illustrates that non-competes are not necessary to protect employers' legitimate interests in trained workers or securing their intellectual property and confidential information. These alternatives are available to employers and viable both with respect to senior executives and to workers other than senior executives. The Commission addresses these alternatives in this Part IV.D.2.b and summarizes and responds to the comments on these alternatives in Part IV.D.2.c.

i. Trade Secret Law

The Commission finds that trade secret law provides employers with a viable, well-established means of protecting investments in trade secrets, without the need to resort to the use of non-competes with their attendant harms to competition. Trade secret law is a form of intellectual property law that is specifically focused on providing employers with the ability to protect their investments in trade secrets.[771]

Forty-seven States and DC have adopted the Uniform Trade Secrets Act (''UTSA'').[772] The UTSA provides a civil cause of action for trade secret misappropriation, which refers to disclosure or use of a trade secret by a former employee without express or implied consent.[773] The UTSA also provides for injunctive and monetary relief, including compensatory damages, punitive damages, and attorney's fees.[774]

In addition, in 2016, Congress enacted the Defend Trade Secrets Act of 2016 (''DTSA''), which established a civil cause of action under Federal law for trade secret misappropriation.[775] The DTSA brought the rights of trade secret owners ''into alignment with those long enjoyed by owners of other forms of intellectual property, including copyrights, patents, and trademarks.'' [776] Similar to State laws modeled on the UTSA, the DTSA authorizes civil remedies for trade secret misappropriation, including injunctive relief, damages (including punitive damages), and attorney's fees.[777] The DTSA also authorizes a court, in ''extraordinary circumstances,'' to issue civil ex parte orders for the ''seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.'' [778] There is thus a clear Federal statutory protection that specifically governs protection of trade secrets.

Trade secret theft is also a Federal crime. The Economic Espionage Act of 1996 (''EEA'') makes it a Federal crime to steal a trade secret for either (1) the benefit of a foreign entity (''economic espionage'') or (2) the economic benefit of anyone other than the owner (''theft of trade secrets'').[779] The EEA authorizes substantial criminal fines and penalties for these crimes.[780] The EEA further authorizes criminal or civil forfeiture, including of ''any property constituting or derived from any proceeds obtained directly or indirectly as a result of'' an EEA offense.[781] The EEA also requires offenders to pay restitution to victims of trade secret theft.[782]

Under the UTSA, DTSA, and EEA, the term ''trade secret'' is defined expansively and includes a wide range of confidential information.[783] The viability of trade secret law as a means for redressing trade secret theft is illustrated by the fact that firms regularly bring claims under trade secret law. A recent analysis by the legal analytics firm Lex Machina finds that 1,156 trade secret lawsuits were filed in Federal court in 2022.[784] In addition, an analysis by the law firm Morrison Foerster finds that 1,103 trade secret cases were filed in State courts in 2019.[785] The number of cases filed in State court has held steady since 2015, when 1,161 cases were filed.[786] The fact that a considerable number of trade secret lawsuits are filed in Federal and State courts—over 2,200 cases per year—and the fact that this number has held relatively steady for several years suggests that many employers themselves view trade secret law as a viable means of obtaining redress for trade secret theft.

The use of trade secret law burdens competition to a lesser degree than the use of non-competes. Trade secret law provides firms with a viable means of redressing trade secret misappropriation—and deterring trade secret misappropriation by workers—without blocking beneficial competitive activity, such as workers switching to jobs in which they can be more productive or starting their own businesses.

ii. NDAs

NDAs provide employers with another well-established, viable means for protecting valuable investments.[787]

[771] Brian T. Yeh, *Protection of Trade Secrets: Overview of Current Law and Legislation,* Cong. Rsch. Serv. 4 (Apr. 22, 2016) (Report R43714), *https://sgp.fas.org/crs/secrecy/R43714.pdf.*

[772] *See* Levine & Seaman, *supra* note 758 at 113. The three States that have not adopted the UTSA offer protection to trade secrets under a different statute or under common law. Yeh, *supra* note 771 at 6 n.37.

[773] Uniform Trade Secrets Act with 1985 Amendments (Feb. 11, 1986) at sec. 1(2).

[774] *Id.* at secs. 2–4.

[775] Defend Trade Secrets Act of 2016, Public Law 114–153, 130 Stat. 376, 379 (2016).

[776] U.S. Senate, Report to Accompany S. 1890, the Defend Trade Secrets Act of 2016, S. Rep. No. 114–220 at 3 (2016).

[777] 18 U.S.C. 1836(b)(3).

[778] 18 U.S.C. 1836(b)(2).

[779] 18 U.S.C. 1831 (economic espionage); 18 U.S.C. 1832 (theft of trade secrets).

[780] 18 U.S.C. 1831 through 1832.

[781] 18 U.S.C. 1834, 2323.

[782] 18 U.S.C. 1834, 2323.

[783] The UTSA generally defines a ''trade secret'' as information that (1) derives independent economic value from not being generally known to other persons who can obtain economic value from its disclosure or use and (2) is the subject of reasonable efforts to maintain its secrecy. UTSA, *supra* note 773 at sec. 1(4). The DTSA and EEA use a similar definition. 18 U.S.C. 1839(3). The Supreme Court has held that ''some novelty'' is required for information to be a trade secret, because ''that which does not possess novelty is usually known.'' *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 476 (1974). As the high court of one State noted in applying a State statute based on the UTSA, ''business information may . . . fall within the definition of a trade secret, including such matters as maintenance of data on customer lists and needs, source of supplies, confidential costs, price data and figures.'' *U.S. West Commc'ns, Inc.* v. *Off. of Consumer Advoc.,* 498 NW2d 711, 714 (Iowa 1993). *See also Confold Pac., Inc.* v. *Polaris Indus., Inc.,* 433 F.3d 952, 959 (7th Cir. 2006) (''A trade secret is really just a piece of information (such as a customer list, or a method of production, or a secret formula for a soft drink) that the holder tries to keep secret by executing confidentiality agreements with employees and others and by hiding the information from outsiders by means of fences, safes, encryption, and other means of concealment, so that the only way the secret can be unmasked is by a breach of contract or a tort.'').

[784] Gloria Huang, *Lex Machina Releases its 2023 Trade Secret Litigation Report,* Lex Machina (Jul. 13, 2023), https://.com/blog/lex-machina-releases-its-2023-trade-secret-litigation-report/.

[785] Kenneth A. Kuwayti & John R. Lanham, Morrison Foerster, Client Alert, *Happy Anniversary, DTSA: The Defend Trade Secrets Act at Five* (May 25, 2021), *https://www.mofo.com///210525-defend-trade-secrets-act-dtsa.*

[786] *Id.* at n.5.

[787] The Commission uses the term ''NDA'' to refer to contractual provisions that are designed to protect trade secrets or other business information that has economic value. Employers may also seek to use NDAs to protect other kinds of information, such as information about discrimination, harassment, sexual assault, corporate wrongdoing, or information that may disparage the company or its executives or employees. These types of NDAs have been widely criticized for, among other things, their pernicious effects on workers. *See, e.g.,* Rachel S. Arnow-Richman et al., *Supporting Market Accountability, Workplace Equity, and Fair Competition by Reining In Non-Disclosure Agreements,* UC-Hastings Research Paper 2–6 (Jan. 2022), *https://papers.ssrn.com/sol3/.?abstract_=.*

NDAs are contracts in which a party agrees not to disclose and/or use information designated as confidential. If a worker violates an NDA, the worker may be liable for breach of contract.[788] Employers regularly use NDAs to protect trade secrets and other confidential business information. Researchers estimate that between 33% and 57% of U.S. workers are subject to at least one NDA.[789] One study finds that 95.6% of workers with non-competes are also subject to an NDA; 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement; and 74.7% of workers with non-competes are subject to all three provisions.[790] In most States, NDAs are more enforceable than non-competes.[791] While some commenters argued that NDAs would not be an adequate alternative to non-competes because of the NPRM's proposed functional definition of ''non-compete clause,'' the final rule will not prevent employers from adopting garden-variety NDAs; rather, it prohibits only NDAs that are so overbroad as to function to prevent a worker from seeking or accepting employment or operating a business.[792]

Appropriately tailored NDAs burden competition to a lesser degree than non-competes. Such NDAs may prevent workers from disclosing or using certain information, but they generally do not prevent workers from seeking or accepting other work, or starting their own business, after their employment ends. As the Tenth Circuit has stated, workers subject to NDAs, unlike workers subject to non-competes, ''remain free to work for whomever they wish, wherever they wish, and at whatever they wish,'' subject only to the terms that prohibit them from disclosing or using certain information.[793]

iii. Other Means of Protecting Valuable Investments

The Commission finds that employers have additional well-established means of protecting valuable investments in addition to trade secret law and NDAs. For the protection of trade secrets and other confidential information, the Commission finds that these additional means include patent law and invention assignment agreements. Patent law provides inventors with the right, for a certain period of time, to exclude others from making, using, offering for sale, or selling an invention or importing it into the U.S.[794] During the period when patent protection is effective, patents grant the patent holder these exclusive rights, while other firms may use trade secrets if they are independently developed, reverse-engineered, or inadvertently disclosed.[795] In some cases, however, firms may choose to keep their invention a trade secret rather than seeking a patent because patent protection only lasts a certain number of years, after which the invention becomes part of the public domain.[796] Where a technology, process, design, or formula is able to meet the rigorous standards for patentability, patent law provides companies with a less restrictive alternative than non-competes for protecting it.[797]

Employers can further protect their property interests in these forms of intellectual property through appropriately tailored invention assignment agreements. These are agreements that give the employer certain rights to inventions created by the employee during their employment with a firm.[798] Like patent law, this tool, when appropriately tailored, provides employers with additional protection for some of their most valuable intellectual property interests.

With respect to investments in worker human capital, the Commission finds that these less restrictive alternatives include fixed duration contracts and competing on the merits to retain workers. If an employer wants to prevent a worker from leaving right after receiving valuable training, the employer can sign the worker to an employment contract with a fixed duration. An employer can establish a term that is long enough for the employer to recoup its human capital investment, without restricting who the worker can work for, or their ability to start a business, after their employment ends. In doing so, the employer makes a commitment to the worker and vice versa.

Finally, instead of using non-competes to lock in workers, the Commission finds that employers that wish to retain their workers can also compete on the merits for the worker's labor services—*i.e.,* they can provide a better job than competing employers by paying their workers more, offering them better hours or better working conditions, or otherwise improving the conditions or desirability of their employment. These are all viable tools for protecting human capital investments and other investments an employer may make that do not rely on suppressing competition.

c. Comments and Responses to Comments

Many commenters agreed with the Commission's preliminary finding that employers have less restrictive alternatives to non-competes. These commenters asserted that trade secret law, combined with NDAs, creates a powerful deterrent to post-employment disclosures of trade secrets and confidential information, and that these tools adequately protect valuable investments in the absence of non-competes. The Commission agrees with these commenters. Other commenters asserted that the alternatives to non-competes identified in the NPRM are inadequate for protecting employer investments. The Commission summarizes and responds to the comments it received on less restrictive alternatives in this Part IV.D.2.c.

i. Comments and Responses to Comments on Trade Secrets and Other Confidential Information

Several commenters who generally supported the proposed rule stated that trade secret law and NDAs offer meaningful enforcement advantages to employers compared with non-competes. A few commenters stated that, unlike non-competes, trade secret law and NDAs are broadly enforceable in all fifty States. A few commenters stated that, while monetary penalties for breaching non-competes are ordinarily difficult to obtain, employers can obtain substantial monetary recovery for trade secret law and NDA violations. The Commission agrees with these comments.

Several commenters stated that the scope of trade secret law is limited in various respects. Several commenters stated, for example, that customer lists, pricing, and bid development information are typically excluded from the definition of ''trade secret'' under the DTSA and the law of many States.

[788] *See* Chris Montville, *Reforming the Law of Proprietary Information,* 56 Duke L.J. 1159, 1168 (2007).

[789] Arnow-Richman, *supra* note 787 at 2–3.

[790] Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 44. The value 97.5% is calculated as (1 − 0.6%/24.2%), where 0.6% represents the proportion of workers with only a non-compete (see Table 1 on page 36), and no other post-employment restriction, and 24.2% represents the proportion of workers with a non-compete, regardless of what other post-employment restrictions they have.

[791] Montville, *supra* note 788 at 1179–83.

[792] *See* Part III.D.2.b.

[793] *MAI Basic Four, Inc.* v. *Basis, Inc.,* 880 F.2d 286, 288 (10th Cir. 1989).

[794] 35 U.S.C. 271.

[795] Yeh, *supra* note 771 at 3–4.

[796] *Id.* at 4–5. *See also United States* v. *Dubilier Condenser Corp.,* 289 U.S. 178, 186 (1933) (rather than seeking a patent, an inventor ''may keep his invention secret and reap its fruits indefinitely.'').

[797] Yeh, *supra* note 771 at 4–5.

[798] *See, e.g., Milliken & Co.* v. *Morin,* 731 SE2d 288, 294–95 (S.C. 2012); *Revere Transducers, Inc.* v. *Deere & Co.,* 595 NW2d 751, 759–60 (Iowa 1999); *Ingersoll-Rand Co.* v. *Ciavatta,* 542 A.2d 879, 886–87 (N.J. 1988).

In response to these comments, the Commission notes that customer information may be classified as trade secrets under certain circumstances, such as when the information is not generally known or not otherwise easy to obtain and when a firm has taken measures to protect the confidentiality of the information.[799] Employers may also use NDAs to protect such information. NDAs broadly protect all information defined as confidential, regardless of whether such information constitutes a ''trade secret'' under State or Federal law.[800]

Some commenters argued that other tools under intellectual property law, such as patent and trademark law, are inadequate to protect employers' investments. These commenters misinterpret the Commission's findings. The Commission did not find in the NPRM, nor does it find in this final rule, that patent law standing alone or trademark law standing alone provide employers benefits equal to the benefits they may reap from an unfair method of competition, namely the use of non-competes. Rather, the Commission finds that patent law can be used, together with the other tools the Commission cites, including NDAs and fixed-term employment contracts, to protect legitimate investments in intellectual property and worker human capital investment and therefore that these tools, taken together, are viable alternatives to non-competes.

A number of commenters stated that there are enforceability disadvantages to trade secret law and NDAs compared to non-competes. Several commenters stated that trade secret law and NDAs are inadequate to protect employer investments prophylactically because employers can enforce them only after the trade secrets or other confidential information have already been disclosed. These commenters stated that trade secrets and confidential information can be highly valuable, and its value could be destroyed as soon as a worker discloses such information to a competing employer. Additionally, some commenters argued that trade secret law and NDAs are inadequate to protect employers' investments because enforcement outcomes for trade secrets and NDAs are less predictable and certain than with non-competes. Some comments suggested that this purported clarity of non-competes benefits workers, arguing that non-competes offer bright lines workers can follow to ensure against unintended violations. Other commenters assert that non-competes themselves are not necessarily effective as a prophylactic remedy, because it is often unclear whether a particular non-compete is enforceable, and non-competes are difficult to enforce in many jurisdictions. A few commenters stated that prophylactic remedies are already available under trade secret law in almost half of U.S. States where the doctrine of inevitable disclosure is recognized, while other commenters were concerned that not all States recognize the doctrine. Other commenters argued the inevitable disclosure doctrine may be worse for workers, and one commenter argued that the final rule would increase the use of the inevitable disclosure doctrine and thus reduce worker mobility.

Some commenters stated that prophylactic remedies are necessary to adequately protect trade secrets and confidential information because workers can exploit their former employers' trade secrets and confidential information without ever disclosing the information themselves, thus leaving aggrieved employers with no recourse under trade secret law or an NDA. Specifically, these commenters argued that when workers take new roles, they will inevitably use their knowledge of former employers' confidential information. For example, where a worker has experience with attempts and failures to develop new ideas or products with a former employer, they will likely use this knowledge to prevent a new employer from making similar mistakes, thus free riding off the former employer's development efforts, costs, and time. A commenter argued that preventing non-competes from restricting this type of misappropriation would discourage investment and harm innovation in the long run.

The Commission believes that what some commenters describe as the ''prophylactic'' benefits of non-competes—that an employer can block a worker from taking another job, without respect to any alleged misconduct—is also the source of their overbreadth because it enables employers to restrict competition in both labor markets and product and service markets, as detailed in Parts IV.B and IV.C. That employers prefer to wield non-competes as a blunt instrument on top of or in lieu of the specific legal tools designed to protect legitimate investments in intellectual property and other investments cannot justify an unfair method of competition. The Commission also disagrees that banning non-competes would discourage investment and would harm innovation in the long run. As discussed in Part IV.B.3.b.ii, the Commission finds that the weight of the evidence indicates that non-competes reduce innovation by preventing workers from starting businesses in which they can pursue innovative new ideas; inhibiting efficient matching between workers and firms (making it less likely that workers match with firms that can maximize their talent and productivity); and decreasing the cross-pollination of ideas.

Additionally, the Commission notes that non-compete agreements themselves cannot be said to provide ironclad ''prophylactic'' protections against disclosure of trade secrets and other confidential information. As other commenters point out, in the absence of this rule, it is often unclear whether and to what extent a specific non-compete is enforceable, and they are difficult to enforce in many jurisdictions. Moreover, non-competes do not prevent the worker from disclosing trade secrets or confidential information after the end of the non-compete period or outside of the clause's geographic restriction. The Commission also notes that, as a few commenters stated, prophylactic remedies are already available under trade secret law in almost half of U.S. States where the doctrine of inevitable disclosure is recognized.[801]

Several commenters argued that detecting and proving violations of NDAs and trade secret law is more

[799] *See U.S. West Commc'ns, Inc.* v. *Off. of Consumer Advoc.*, 498 NW2d 711, 714 (Iowa 1993) (''business information may . . . fall within the definition of a trade secret, including such matters as maintenance of data on customer lists and needs . . .''); *Guy Carpenter & Co.* v. *Provenzale*, 334 F.3d 459, 467 (5th Cir. 2003) (''A customer list may be a trade secret, but not all customer lists are trade secrets under Texas law. The broader rule of trade secrets, that they must be *secret*, applies to customer lists''); *Home Paramount Pest Control Cos.* v. *FMC Corporation/Agricultural Prods. Group*, 107 F. Supp. 2d 684, 692 (D. Md. 2000) (''There is no question that a customer list can constitute a trade secret.''); *Liebert Corp.* v. *Mazur*, 827 NE2d 909, 922 (2005) (''[W]hether customer lists are trade secrets depends on the facts of each case.'').

[800] *See, e.g., Tendeka, Inc.* v. *Glover*, No. CIV.A. H–13–1764, 2015 WL 2212601 at *14 (S.D. Tex. May 11, 2015).

[801] In some States, under the ''inevitable disclosure doctrine,'' courts may enjoin a worker from working for a competitor of the worker's employer where it is ''inevitable'' the worker will disclose trade secrets in the performance of the worker's job duties. *See, e.g., PepsiCo, Inc.* v. *Redmond*, 54 F.3d 1262, 1269, 1272 (7th Cir. 1995). The inevitable disclosure doctrine is controversial. Several States have declined to adopt it altogether, citing the doctrine's harsh effects on worker mobility. *See Bayer Corp.* v. *Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999); *LeJeune* v. *Coin Acceptors, Inc.*, 849 A.2d 451, 470–71 (Md. 2004). Other States have required employers to meet high evidentiary burdens related to inevitability, irreparable harm, and bad faith before issuing an injunction pursuant to the doctrine. *See generally* Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility* v. *Employer Rights*, 3. J. High Tech. L. 161 (2004).

difficult than for non-competes, and that enforcement is accordingly more expensive, because it is more difficult to detect and obtain evidence of the disclosure or use of confidential information than it is to determine that a former worker has moved to a competitor. Some commenters asserted that trade secret litigation is expensive because the cases are fact-intensive and involve litigating multiple challenging issues. Some commenters argued that as a result, the proposed rule conflicted with Congressional intent underlying the DTSA. A few commenters similarly argued that breaches of non-solicitation agreements are difficult to detect and can be enforced only after the solicitation has occurred. While the Commission recognizes that trade secrets litigation and NDA and non-solicitation enforcement may be more costly than non-compete enforcement in some instances, the Commission is not persuaded that higher costs associated with alternative tools make those tools inadequate. The comments do not establish that pursuing remedies through trade secrets litigation or NDA enforcement are prohibitively expensive. In any event, the Commission and courts have consistently held that pecuniary benefit to the party responsible for the conduct in question is not cognizable as a justification.[802] While employers may find that protecting trade secrets and confidential information or customer relationships by using non-competes to restrict worker mobility, regardless of whether that worker would misappropriate confidential information or solicit customers, is easier for them, the Commission finds that same overbreadth of non-competes imposes significant negative externalities on workers, consumers, businesses, and competition as a whole.[803] This overbreadth that employers benefit from wielding is what causes the harms from non-competes relative to more narrowly-tailored alternatives.

Some commenters contended that higher burdens for establishing violations of trade secret and IP laws will harm employer incentives to share trade secrets with workers and to invest in valuable skills training. The Commission is not persuaded that higher evidentiary burdens render trade secret law and NDAs inadequate for protecting employers' valuable investments. Heightened standards are a valuable mechanism to filter out overbroad restrictions on beneficial competitive activity. The comment record is replete with examples of workers bound by non-competes who lacked knowledge of trade secrets or whose employment with a competitor never threatened their previous employer's investments. To the extent trade secret law and NDAs require higher evidentiary showings, that makes these alternatives more tailored tools for protecting employers' valuable investments without unduly restricting a worker from engaging in competitive activity.

Some commenters argued that, without non-competes, employers would limit access to valuable trade secrets within the workplace because trade secret law requires employers to show reasonable efforts to maintain the secrecy of an alleged trade secret to prove a violation, and that reduced rates of intrafirm trade secrets sharing will ultimately harm innovation as well as workers. In response, the Commission notes that the empirical evidence indicates otherwise: when non-competes are more enforceable, the overall level of innovation decreases.[804] Furthermore, these comments seem to overstate the burden of reasonable efforts to keep information secret. Under the DTSA, courts have found that employers meet this requirement by sharing information at issue only among workers bound by NDAs or maintaining such information in password-protected digital spaces.[805] Accordingly, assertions that employers will need to take extraordinary precautions to maintain secrecy over trade secrets and confidential information are inconsistent with standards courts typically recognize for determining whether reasonable efforts were taken to keep such information confidential. The Commission is not persuaded that requirements in trade secret law to show reasonable efforts to maintain secrecy will deter intrafirm information sharing, or otherwise make alternative tools inadequate.

Several commenters argued that the Commission should not find that employers have adequate alternatives to protecting their valuable investments because there is a lack of empirical evidence specifically showing that trade secret law and NDAs are effective for the purpose of protecting trade secrets and confidential information. In response, the Commission notes that trade secret law is a body of law that is specifically designed to protect the interests being asserted; employers consistently bring cases under this body of law; and a preference among firms for a blunter instrument for protecting trade secrets and confidential information cannot justify an unfair method of competition that imposes significant negative externalities on workers, other firms, consumers, and the economy.[806] An industry trade organization commenter stated that neither fixed-duration employment contracts nor improved pay, benefits, or working conditions specifically protect against the disclosure of confidential information. In response, the Commission notes that firms can protect against the disclosure of confidential information using trade secret law and NDAs, and, where applicable, patent law and invention assignment agreements. And in response to these commenters, the Commission notes that companies in California, North Dakota, and Oklahoma have been able to protect their trade secrets and other confidential information adequately using tools other than non-competes since the late nineteenth century. Industries that are highly dependent on trade secrets and other confidential information have flourished in those States even though non-competes have been unenforceable.

A few commenters disputed the NPRM's contention that the rate at which employers pursue trade secrets litigation is evidence of the viability of trade secret law as a means for redressing trade secret theft or protecting confidential information, in part because those employers were not necessarily relying exclusively on trade secret law. The Commission does not assert that these data, alone, conclusively establish trade secret law is a perfect vehicle for redressing trade secret theft. Rather, the data show trade secret litigation is more than a mere theoretical possibility—it is an avenue many companies choose to redress trade secret theft and indeed it is the body of law designed and developed for this very purpose. Accordingly, the Commission believes that the fact that many companies bring claims under the well-established body of State and Federal law on trade secrets is relevant evidence that trade secret law provides a viable means for redressing trade secret theft.

Some commenters suggested a higher volume of trade secrets litigation in California may reflect a higher rate of trade secret disclosure due to the State's policy against enforcing non-competes. However, these commenters did not

[802] *See supra* note 305 and accompanying text.

[803] *See* Parts IV.B and IV.C.

[804] *See* Part IV.B.3.b.ii.

[805] *See e.g., In re Adegoke,* 632 B.R. 154, 167 (Bankr. N.D. Ill. 2021); *Houser* v. *Feldman,* 569 F. Supp. 3d 216, 230 n.7 (E.D. Pa. 2021); *AvidAir Helicopter Supply, Inc.* v. *Rolls-Royce Corp.,* 663 F.3d 966, 974 (8th Cir. 2011).

[806] *See* Parts IV.B. and IV.C (describing the negative externalities from non-competes).

provide evidence to support this hypothesis. The Commission also notes industries in California that depend on protecting trade secrets have thrived despite the inability to enforce non-competes; indeed, the State is the capital of the global technology industry. Therefore, regardless of whether there is a higher rate of trade secret litigation in California, the less restrictive alternatives identified in this Part IV.D have provided sufficient protection to enable these companies to grow, thrive, and innovate. Furthermore, the rate of trade secret litigation in California may result from factors unique to California's economy, such as California's high concentration of technology companies relative to other States. As such, the Commission does not believe there is credible evidence to suggest trade secrets are disclosed at a higher rate in California than in other jurisdictions.[807]

Many commenters agreed with the Commission's preliminary conclusion that the economic success in California, North Dakota, and Oklahoma of industries highly dependent on trade secrets and other confidential information illustrates that companies have viable alternatives to non-competes for protecting valuable investments. In contrast, a few commenters argued that the Commission mischaracterized California's non-compete ban because they claim that California permits non-competes to protect trade secrets, citing dicta from the 1965 California Supreme Court case *Muggill* v. *Reuben H. Donnelley Corp.*[808] However, the Commission is unaware of any cases in which a California court has actually upheld a non-compete agreement under California law based on the dicta in this opinion, and commenters do not point to any.[809] To the contrary, California courts have consistently refused to enforce non-competes even where employers alleged they were needed to protect trade secrets.[810]

Another commenter argued that California's experience does not necessarily demonstrate anything about the effect of banning non-competes because California employers impose non-competes at rates comparable to other States. In response, the Commission notes that while Starr, Prescott, and Bishara state that workers are covered by non-competes at ''roughly the same rate'' in States where non-competes are unenforceable and enforceable,[811] when the authors control for employee characteristics to compare ''observationally equivalent employees,'' they find that non-competes are less common (by 4–5 percentage points) in nonenforcing States compared to States that permit vigorous enforcement of non-competes.[812] Additionally, California, North Dakota, and Oklahoma are still distinct from other States because employers may not actually enforce non-competes, even if employers in those States continue to enter into them.

A commenter argued that the Commission misattributes California's success in the technology industry and North Dakota's and Oklahoma's success in the energy industry to their non-compete laws, rather than the presence of top universities and venture capital firms in the State (in the case of California) or of abundant natural resources in the State (in the case of North Dakota and Oklahoma). The Commission believes that this commenter mischaracterizes its analysis. The Commission does not attribute California's success in the technology industry and North Dakota's and Oklahoma's success in the energy industry to their non-compete laws. The Commission merely notes that these industries are highly dependent on protecting trade secrets and having highly trained workers, and that these industries have thrived in these States despite the inability of employers to enforce non-competes.

One commenter argued that there are no alternatives that adequately protect employers' legitimate interests because other restrictive employment agreements do not sweep as broadly as non-competes. In this Part IV.D, the Commission concludes that less restrictive alternatives such as trade secret law, IP law, and NDAs are adequate to protect trade secrets and other confidential information even where they do not sweep as broadly as non-competes. Indeed, the Commission believes that non-competes are overbroad with respect to protecting trade secrets and other confidential information, because they enable employers to restrict a wide swath of beneficial competitive activity without respect to any alleged misconduct. That employers prefer to wield non-competes as a blunt instrument on top of or in lieu of the specific legal tools designed to protect legitimate investments in intellectual property and other investments cannot justify an unfair method of competition.

ii. Comments and Responses to Comments on Human and Physical Capital Investment

Several commenters addressed the evidence concerning the effects of non-competes on human capital investment and other investment. Several commenters asserted that, even if non-competes increased human capital investment, they still left workers worse off because they suppressed workers' mobility and wages overall. Workers and worker advocates also argued that workers lose the value of their skills and human capital investment when non-competes force them to sit out of the workforce, and non-competes can decrease their incentive to engage in human capital investment since they cannot capitalize on their skills and knowledge. These commenters stated that many workers, particularly highly skilled workers, have had some form of education prior to working for their employer, diminishing any potential need for non-competes to protect the employers' human capital investment. For example, many physicians pointed out that they had to go through medical school, residency, internships, and/or fellowships—significant investments that they made, not their employers.

Some commenters questioned the link between increased human capital investment and non-compete enforcement, arguing that employer human capital investment will still be provided without non-competes. Other commenters also stated that prohibiting non-competes would make it easier for firms to hire trained workers, because it would be easier for them to switch jobs. More generally, one advocacy organization said that employers frequently make investments that do not work out and should not place the risk of that investment onto their workers. A commenter who discussed physician non-competes argued that investment-based justifications for non-competes overestimate the value added by employers while failing to recognize the value physicians bring to employers.

Some businesses and trade organizations argued that employers invest significant time and money into training workers who lack the specific skills needed for the job. These commenters stated that, without non-competes, employers risk the worker taking that investment to a competitor. Some commenters state that this risk is

[807] *See* NPRM at 3507.

[808] 62 Cal. 2d 239, 242 (Cal. 1965).

[809] *See generally* David R. Trossen, Edwards *and Covenants Not to Compete in California: Leave Well Enough Alone,* 24 Berkeley Tech. L.J. 539, 546 (2009).

[810] *See, e.g., D'sa* v. *Playhut, Inc.,* 102 Cal. Rptr. 2nd 495, 497–501 (Cal. Ct. App. 2nd 2000); *Dowell* v. *Biosense Webster, Inc.,* 102 Cal. Rptr. 3d 1, 11 (Cal. Ct. App. 2nd 2009); *Arthur J. Gallagher & Co.* v. *Lang,* 2014 WL 2195062 (N.D. Cal. May 23, 2014) at *4 n.3.

[811] Starr, Prescott & Bishara, *supra* note 68 at 81.

[812] *Id.* at 68.

greatest in underserved areas and when there are worker shortages. Several commenters said that employment restrictions such as non-competes incentivize businesses to pay for credentials, training, and advanced education that low-wage and other workers would be unable to afford on their own, facilitating upward mobility. For highly educated workers, such as physicians, some employers said they need non-competes to protect payments for continuing education as well as mentorships and on the job training. Businesses and their advocates asserted that in some industries, many new employees are unprofitable for a significant period, requiring up-front investment and training from employers who want to recoup that investment.

In response, the Commission notes that, as described in Part IV.D.2.b.iii, firms have less restrictive alternatives for protecting human capital investments, including fixed-duration contracts and competing on the merits for the worker's labor services through better pay, benefits, or working conditions. Through these means, employers can retain workers without restricting who they can work for, or their ability to start a business, after their employment ends. The Commission also notes that these commenters often inaccurately describe the increased labor mobility afforded by the final rule as a one-way street. While it will be easier under the final rule for workers to switch jobs and work for a competitor, it will also be easier for firms to hire talented workers, since those workers are not subject to non-competes. In general, firms will benefit from access to a wider pool of labor, because the rule eliminates the friction non-competes impose on the free functioning of competition in labor markets. Whether this will be a net benefit to a particular firm, or not, will depend on the firm's ability to compete for workers on the merits to attract and retain talent.

A group of healthcare policy researchers stated that the investment justifications offered by corporate owners of physician practices are misleading since the true value of the investment in the practice is the book of business and referrals. These researchers suggested that non-competes are used to circumvent laws that prohibit payment for physician referrals. The Commission notes that this comment aligns with a statement by researcher Kurt Lavetti at the Commission's 2020 forum on non-competes. Lavetti stated that patient referrals are a valuable asset, but buying or selling those referrals is illegal, so non-competes are a secondary method of protecting that asset.[813]

Commenters also stated that non-competes protect investments other than in human capital, capital expenditures, and R&D, including recruiting and hiring, providing client and customer service, facilities, marketing, and technology, among others. The Commission is unaware of any empirical evidence showing that non-competes increase these types of investments, and commenters did not provide any. In general, however, firms can protect investments in trade secrets and confidential information, and investments in workers, through the less restrictive alternatives described in Part IV.D.2.b.

Two trade organizations stated that prohibiting non-competes could cause businesses to lose staff, and that losing staff could cause them to reduce investments that may be based on staffing assumptions. These commenters did not provide empirical evidence to support these arguments. The Commission also notes that firms would not necessarily lose workers because of the final rule. As described previously, some firms may lose workers because it will be easier for workers to leave for better opportunities, while some firms may gain workers by attracting workers from other firms. Additionally, firms can retain workers by competing on the merits for their labor services—*i.e.,* by offering better jobs than their competitors.

Commenters asserted that Starr, Prescott, and Bishara[814] found that notice of non-competes alongside a job offer is positively correlated with training compared to later notice. In response, the Commission notes that the evidence is a correlation between early notice and training, not a causal finding, so the Commission gives it minimal weight. In addition, regardless of whether there is an increase in training where notice of non-competes is provided along with the job offer instead of later on, this data is not salient on the question of whether employers have less restrictive alternatives to protecting training investments.

A few commenters stated non-competes protect against the ''disclosure'' of general trade knowledge and skills, while the less restrictive alternatives cited in the NPRM do not. Relatedly, some commenters argued prohibiting non-competes and broadly enabling workers to take general trade knowledge and skills to competitors will mean that their new employers will free ride off investments the former employers made in their human capital, which will discourage future investment in human capital. The Commission does not believe preventing workers from using their general trade knowledge and skills, including their gains in trade knowledge and skills through experience with a particular employer, is a legally cognizable or legitimate justification for non-competes. Under State common law, preventing a worker from using their general knowledge and skills with another employer is not a legitimate interest that can justify a non-compete.[815] Indeed, there is a general principle in the law of restrictive employment agreements—and trade secret law as well—that these tools cannot be used to prevent workers from using their general trade knowledge and skills.[816] The Commission does not view the inability to prevent disclosure or use of general skills and knowledge as a shortcoming of trade secret law and NDAs; instead, it considers the use of general skills and knowledge as beneficial competitive activity. Moreover, the Commission notes that sectoral job training strategies can be a tool for employers and workers to access worker training that is transferrable across employers.[817]

One commenter asserted trade secret law and NDAs are inadequate to protect employers' goodwill, while another commenter asserted these tools are inadequate to protect investments in relationships with clients. Regarding whether trade secret law and NDAs are adequate to protect employers' client relationships, the Commission interprets this to refer to employers' concern that a client will follow a worker to a competitor. The Commission believes that employers have alternatives for protecting these investments, including fixed-duration contracts (in the case of goodwill), NDAs (in the case of client lists), and competing on the merits to retain workers and/or clients. Firms can seek to protect client relationships by offering superior service and value—through the free and fair functioning of competition. These more narrowly

[813] Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements,* Remarks at the FTC Workshop on Non-Competes in the Workplace, at 145–46 (Jan. 9, 2020), at *https://www.ftc.gov//files//_events/1556256/non-compete-workshop-transcript-full.pdf.*

[814] Starr, Prescott & Bishara, *supra* note 68 at 53.

[815] *See* NPRM at 3495 n.162.

[816] *See* Montville, *supra* note 788 at 1161.

[817] *See, e.g.,* Mayu Takeuchi & Joseph Parilla, *Federal Investments in Sector-Based Training Can Boost Workers' Upward Mobility,* Brookings Inst. (Dec. 7, 2023), *https://www.brookings.edu/articles/federal-investments-in-sector-based-training-can-boost-workers-upward-mobility/.*

tailored alternatives reasonably protect the applicable interest while burdening competition to a lesser degree because they do not restrict the worker's ability to seek or accept work or start a business after their employment ends. Therefore, while trade secret law and NDAs may not protect goodwill or client relationships, the Commission finds that employers have adequate alternative tools to protect these interests. Furthermore, the Commission notes the final rule does not restrict employers from using trade secret law and NDAs in tandem—along with other alternatives—to protect their investments, and comments maintaining that employers lack adequate alternatives to non-competes because the commenter views just one of these mechanisms as inadequate are unpersuasive.

A commenter argued the final rule may implicate the ability of Federal contractors to provide letters of commitment, which are often required by government agencies and require contractors to identify key personnel who will work on an awarded contract, sometimes for years in the future. In response, the Commission notes that contractors have alternatives to non-competes to retain key personnel, including by using fixed-term employment contracts or providing the key personnel a better job than competitors.

A commenter stated that fixed-duration employment contracts are not necessarily effective at protecting human capital investments because employers may not know at the time of hiring when they will be providing training to a worker. This commenter also stated that improving the pay, benefits, and working conditions of workers is not necessarily an effective means for protecting human capital investments. In response, the Commission notes employers may enter into fixed-duration employment contracts with their workers at any time, not just at the outset of the employment relationship. It further notes competing to retain a trained worker will not work in every instance, but it is an important option available to employers and the provision of training can itself be a competitive differentiator for an employer.

A commenter also asserted California has the highest cost of living and, if this is attributable to the absence of non-competes, the proposed rule could risk increasing the cost of living nationwide. The commenter did not provide evidence to support the existence of an inverse relationship between non-compete enforceability and cost of living, and the Commission is aware of no such evidence. The Commission thus does not believe that there is a basis to conclude the final rule would increase the cost of living nationwide.

iii. Comments Regarding Alternatives to Non-Competes for Senior Executives

Commenters offered the same justifications for non-competes with senior executives: that they increase employers' incentive to make productive investments. However, many commenters argued senior executives are more likely than other workers to have knowledge of trade secrets and other competitively sensitive information or to have customer relationships and thus non-competes for senior executives are necessary, and other tools such as trade secret law and NDAs are not viable alternatives.

In response, the Commission finds that these tools—trade secret law, NDAs, patents, and invention assignment agreements—provide viable means of protecting valuable investments against disclosure by senior executives, just as they do for all other workers. Commenters do not identify any reasons why senior executives are uniquely situated with respect to these less restrictive alternatives—*i.e.,* why trade secret law or NDAs may not adequately protect firm investments from disclosure by senior executives specifically—and the Commission is not aware of any such reasons.

Some commenters argued non-competes with executives and high-wage workers promote competition because they encourage innovation in businesses by providing investors with more confidence that executives will not share trade secrets with competitors, decreasing competition. An industry organization asserted that non-competes allow executives to share ideas and business decisions with other workers within the business and collaborate to make strategic decisions. A commenter stated that an executive leaving to start a competing product could also delay the timeline for both the former employer's product and the competing product. As noted previously, the Commission does not believe there is reliable empirical data on the relationship between non-competes and disclosure of confidential information, but employers have alternatives to protect such information. Further, the empirical evidence shows non-competes overall inhibit innovation on the output side; therefore, to the extent any of these effects are occurring, they are more than outweighed by the negative effects of non-competes on innovation.[818]

According to some commenters, an executive moving to a competitor could unfairly advantage the competitor and irreparably harm the former employer. In response, the Commission notes that there is nothing inherently unfair about an executive moving to a competitor, particularly if this results from competition on the merits (such as the competitor paying more or otherwise making a more attractive offer). If companies seek to retain their executives, they have other means for doing so—such as increasing the executives' compensation or entering fixed-duration contracts—that do not impose significant negative externalities on other workers and on consumers, as non-competes do.[819]

Some commenters also said senior executives may have more client, business partner, and customer relationships than other employees and may contribute substantially to a firm's goodwill. The Commission believes that employers have alternatives for protecting goodwill and client/customer relationships. For example, if a firm wants to keep a worker from departing and taking goodwill or clients or customers with them, it can enter a fixed-duration contract with the worker, otherwise seek to retain the worker through competition on the merits, or seek to retain the client/customer through competition on the merits.

An accountant with experience analyzing executive non-competes for business valuations said such valuations are calculated based on the potential harm if the executive violated the non-compete. In addition, some commenters argued non-competes for senior executives and other important workers increase the value of firms in mergers and acquisitions because they ensure such valuable workers stay after the sale. An investment industry organization said investors seek to ensure the right workers who know the business stay and run the newly acquired business. In addition, that organization said some institutional investors may require contracts retaining key workers.

In response, the Commission notes that valuation of senior executive non-competes in such contexts is part of the reason the Commission is allowing such existing senior executive non-competes to remain in force.[820] In future

[818] *See* Part IV.B.3.b.ii.

[819] *See* Part IV.C.2 (describing the negative externalities of non-competes for senior executives).

[820] *See* Part IV.C.3.

transactions, businesses and investors have other methods of incentivizing senior executives and other workers to remain, including fixed duration contracts and competing to retain workers on the merits, and thereby enhancing the value of firms and transactions—methods that do not impose such significant externalities on other workers and consumers.

Some industry organizations said non-competes increase employer investment in management and leadership training for executives. An investment industry organization said non-competes allow senior executives to access training and experience for their own benefit and the benefit of investors in the firm. In response, the Commission notes that employers have alternative mechanisms to protect their investments in worker training, including fixed-duration contracts and improved compensation.

Some commenters argued that non-competes may improve executive performance, as some executives have non-competes tied to deferred compensation and other future benefits, which encourages long-term value creation by incentivizing executives to focus on long-term rather than short-term gains. A law firm said that forfeiture-for-competition clauses are an important component of deferred compensation agreements, and deferred compensation incentivizes long-term value-building and penalizes, via reduction or forfeiture, harm to the business, which the commenter said includes working for a competitor. The commenter claimed that if forfeiture-for-competition clauses are banned, firms would shift some of the deferred compensation to more short-term awards, which would in turn increase risk-taking and decrease overall wealth accumulation. The commenter cited a review by the Federal Reserve after the 2008 financial crisis which found that deferred compensation can mitigate executive risk-taking activities.[821] It also cited other Federal agencies and court decisions recognizing the value of deferred compensation to mitigate risk. Separately, the firm argued that without forfeiture-for-competition clauses, an executive who moves to a competitor will compete less against their former employer so as not to devalue their equity award, thus degrading competition. Commenters also contended that State courts have recognized forfeiture-for-competition clauses to be reasonable and that some State statutes governing non-competes carve them out.

In response, the Commission recognizes that many existing deferred compensation contracts may have been negotiated to include non-competes or forfeiture-for-competition clauses that may not be easily separated, and the final rule allows existing senior executive non-competes to remain in force.[822] However, the Commission is not persuaded that non-competes are necessary for future deferred compensation agreements. The Federal Reserve study on the value of deferred compensation does not mention non-competes or forfeiture-for-competition clauses. While the study states that clawback provisions may discourage specific types of behavior, it notes that they do not affect most risk-related decisions.[823] The commenter did not explain why non-competes are necessary for deferred compensation to reduce risk-taking or how post-employment competition could impact performance while at the firm. The commenter also did not explain why firms would forgo the benefits of deferred compensation even without a forfeiture-for-competition clause. The commenter separately argued that an executive who moves to a competitor will be conflicted and compete less against their former employer so as not to devalue their equity award. The comment framed this as an anticompetitive problem akin to interlocking directorates under the Clayton Act, as it could increase collusion (though the commenter provided no support for this argument). The commenter did not, however, explain why an executive would move to a competitor if doing so would devalue their own equity. The Commission also does not believe that the solution to this type of anticompetitive behavior, even if it were to occur, is to further restrict competition by blocking the executive from moving to the competitor in the first place.

Some commenters argued that forfeiture-for-competition clauses, which are sometimes attached to deferred compensation arrangements, were also justified. Some commenters contended that workers subject to forfeiture-for-competition clauses who choose to work for a competitor are likely to be compensated by the competitor for whom they will be working. Separately, a law firm and an investment industry organization stated that it would be unfair for companies to continue making deferred compensation or other payments to former workers who now work for a competitor if forfeiture-for-competition clauses were banned. A law firm also stated that forfeiture-for-competition clauses allow senior executives to retire without losing their deferred compensation, which in turn clears a path for younger workers to move up, while protecting senior executives' retirement benefits. In response, the Commission notes that pre-existing agreements for senior executives are not banned under the final rule.[824] The Commission also sees no reason why deferred compensation, including for retiring workers, cannot be used without forfeiture-for-competition clauses.

Some commenters stated that the study by Kini, Williams, and Yin, discussed in the NPRM with respect to senior executive earnings,[825] finds that CEOs with non-competes are more frequently forced to resign their position. Commenters note that Kini, Williams, and Yin also find that CEO contracts more closely align the incentives of executives (with respect to stock prices and risk taking) with shareholders when the executives have non-competes or when those non-competes are more enforceable. In response, the Commission notes that, as indicated by commenters, this study examines the use of non-competes in conjunction with their enforceability. The Commission therefore finds that the results may not reflect a causal relationship. For example, the use of non-competes and the propensity of the board to force an executive to resign may be jointly determined by the strength of the relationship or the trust between management and the board, rather than the use of non-competes causing forced turnover. The Commission also notes that—as shown in the study—there are other methods by which boards may encourage executives to perform, such as by structuring financial incentives to encourage or discourage risk taking, according to the preferences of the board. Boards can also fire poorly performing executives even without non-competes.

One commenter said that a ban on non-competes may encourage U.S. companies to relocate their executive teams outside the U.S. in order to continue using non-competes. The

[821] *See* Bd. of Govs. of the Fed. Reserve Sys., *Incentive Compensation Practices: A Report on the Horizontal Review of Practices at Large Banking Organizations* (Oct. 2011), *https://www.federalreserve.gov/publications/other-reports//incentive-compensation-practices-report-201110.pdf.*

[822] *See* Part IV.C.3.

[823] Federal Reserve Report on Incentive Compensation Practices, *supra* note 821 at 16–17.

[824] *See* § 910.2(a)(2).

[825] *See* Kini, Williams, & Yin, *supra* note 83.

commenter did not provide specific evidence to support this assertion. The Commission believes that firms' decisions on where to locate their executive teams are likely influenced by a multitude of factors other than whether the firm may or may not use non-competes.

3. The Asserted Benefits From These Justifications Do Not Justify the Harms From Non-Competes

a. The Commission's Final Findings

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission in this final rule finds that the claimed business justifications for non-competes do not justify the harms from non-competes—for either senior executives or for workers other than senior executives, whether considered together or separately—because the evidence indicates that increasing enforceability of non-competes has a net negative impact along a variety of measures. Whether the benefits from a practice outweigh the harms is not necessarily an element of section 5,[826] but, in any event, the benefits from the justifications cited in Part IV.D.1 clearly do not justify the harms from non-competes.

Not all the harms from non-competes are readily susceptible to monetization.[827] However, even the quantifiable harms from non-competes are substantial and clearly not justified by the purported benefits. Non-competes cause considerable harm to competition in labor markets and product and service markets. Non-competes obstruct competition in labor markets because they inhibit optimal matches from being made between employers and workers across the labor force through the process of competition on the merits for labor services. The available evidence indicates that increased enforceability of non-competes substantially suppresses workers' earnings, on average, across the labor force generally and for specific types of workers.[828]

In addition to the evidence showing that non-competes reduce earnings for workers across the labor force, there is also evidence that non-competes reduce earnings specifically for workers who are not subject to non-competes.[829] These workers are harmed by non-competes, because their wages are depressed, but they do not necessarily benefit from any purported incentives for increased human capital investment that non-competes may provide. Overall, these harms to labor markets are significant. The Commission estimates the final rule will increase workers' total earnings by an estimated $400 billion to $488 billion over ten years, at the ten-year present discounted value.[830]

The available evidence also indicates non-competes negatively affect competition in product and service markets. The weight of the evidence indicates non-competes have a negative impact on new business formation and innovation.[831] There is evidence that non-competes increase consumer prices and concentration in the health care sector.[832] There is also evidence non-competes foreclose the ability of competitors to access talent.[833] While available data do not allow for precise quantification of some of these effects, they are nonetheless substantial: the Commission estimates that the rule will reduce spending on physician services over ten years by $74–194 billion in present discounted value, will result in thousands to tens of thousands of additional patents per year, and will increase in the rate of new firm formation by 2.7%.[834]

In the Commission's view, the asserted benefits from non-competes do not justify their harms. Even if the businesses using non-competes benefit, pecuniary benefits to the party undertaking the unfair method of competition are not a sufficient justification under section 5.[835] As described in Part IV.D.1, the most commonly cited justifications for non-competes are that they increase employers' incentive to make productive investments in, for example, trade secrets, customer lists, and human and physical capital investment. There is some evidence that non-competes increase human and physical capital investment, as noted previously.[836] However, the empirical literature does not show the extent to which human capital investment and other investment benefits from non-competes accrue to any party besides the employer, and to the extent it addresses this issue it suggests otherwise. For example, in theory, if increased human capital investment from non-competes benefited workers, they would likely have higher earnings when non-competes are more readily available to firms (*i.e.,* when legal enforceability of non-competes increases). However, as explained in Parts IV.B.3.a.ii and IV.C.2.c.ii, the empirical evidence indicates that, on net, greater enforceability of non-competes reduces workers' earnings. Likewise, in theory, if increased human capital investment increased innovation that redounds to the benefit of the economy and society as a whole, one would expect to see legal enforceability of non-competes yield such benefits, but as elaborated in Part IV, the empirical evidence on innovation effects indicates the opposite.

Moreover, the Commission is also not aware of any evidence that these potential benefits of non-competes lead to reduced prices. Indeed, the only empirical study of the effects of non-competes on consumer prices—in the health care sector—finds increased prices as the enforceability of non-competes increases.[837] That study, which finds that non-compete enforceability increased physician pay, also finds that labor cost pass-through is not driving price decreases.[838]

Furthermore, there is no evidence that, in the three States in which non-competes are generally void, the inability to enforce non-competes has materially harmed employers, consumers, innovation (or economic conditions more generally), or workers. As a result, the Commission finds that the asserted benefits from non-competes do not justify the harms they cause.

The Commission finds that the harms from non-competes are clearly not justified by the purported benefits, regardless of whether one considers senior executives or workers other than senior executives together or separately. In this Part IV.D.3, the Commission explains why, for workers overall, the asserted benefits from non-competes do not justify the harms they cause. This is at least as true for senior executives as for other workers. As described in Part IV.C.2.c.i, non-competes with senior executives tend to negatively affect competitive conditions in product and service markets at least as much as non-competes with other workers—and likely to a greater extent—given the outsized role of senior executives in forming new businesses, serving on new

[826] *See* Part II.F (stating that the inquiry as to whether conduct tends to negatively affect competitive conditions focuses on the nature and tendency of the conduct and does not require a detailed economic analysis).

[827] *See, e.g.,* Parts IV.B.3.a.iii and IV.B.3.b.iv.

[828] *See* Part IV.B.3.a.ii; Part IV.C.2.c.ii.

[829] *See* Part IV.B.3.a.ii.

[830] *See* Part X.F.6.

[831] *See* Part IV.B.3.b.i-ii; Part IV.C.2.c.i.

[832] *See* Part IV.B.3.b.iii.

[833] *See* Part IV.C.2.c.i.

[834] *See* Part X.F.6.

[835] *See* Part II.F.

[836] *See* Part IV.D.1.

[837] *See* Part IV.B.3.b.iii.

[838] *See* Hausman & Lavetti, *supra* note 590 at 278.

businesses' executive teams, and setting the strategic direction of businesses with respect to innovation. At the same time, firms have the same less restrictive alternatives available for senior executives as they do for other workers, as described in Part IV.D.2.c.iii. For these reasons, whether one considers non-competes with senior executives or non-competes with other workers, the claimed business justifications for non-competes do not justify the harms from non-competes.

b. Responses to Comments

Commenters focused on the question of whether employers have adequate alternatives to non-competes and the analysis of costs and benefits of the proposed rule in the preliminary regulatory impact analysis, rather than the balancing analysis discussed in this Part IV.D.3 specifically. These comments are addressed in Part IV.D.2 and in Part X, respectively.

E. Section 910.2(b): Notice Requirement for Existing Non-Competes

The Commission proposed to require employers to rescind (*i.e.,* legally modify) existing non-competes and provide notice to inform workers that they are no longer bound by existing non-competes.[839] Based on comments, the Commission is not adopting a rescission requirement in the final rule. Rather than require employers to legally modify existing non-competes, the final rule prohibits employers from enforcing existing non-competes with workers other than senior executives after the compliance date.

The final rule adopts the notice requirement—for workers who are not senior executives—with minor revisions to facilitate compliance and to improve the likelihood of workers being meaningfully informed. The revisions include an option for employers to make the notice more accessible to workers who speak a language other than English. The final rule also simplifies compliance and ensures that workers have prompt notice that their non-competes are no longer in force by requiring employers to provide notice by the effective date, rather than 45 days thereafter.

1. The Proposed Rule

Proposed § 910.2(b)(1) would have required employers to rescind existing non-competes with all workers. Proposed § 910.2(b)(2) would have required employers that rescinded non-competes to provide notice to the affected workers that their non-compete is no longer in effect and may not be enforced.

As proposed, § 910.2(b)(2) had three subparagraphs that imposed various requirements related to the notice. Proposed § 910.2(b)(2)(i) stated that an employer that rescinds a non-compete pursuant to § 910.2(b)(1) must provide notice in an individualized communication to the worker that the worker's non-compete is no longer in effect and may not be enforced. The Commission stated in the NPRM that an employer could not satisfy the notice requirement by, for example, posting a notice at the employer's workplace.[840] Proposed § 910.2(b)(2)(i) also stated that the employer must provide the notice in writing on paper or in a digital format such as an email or text message within 45 days of rescinding the non-compete.

Proposed § 910.2(b)(2)(ii) stated that the employer must provide the notice to both current workers and former workers when the employer has the former worker's contact information readily available. To ease the burden of compliance, proposed § 910.2(b)(2)(iii) provided model language that would satisfy the notice requirement. Proposed § 910.2(b)(2)(iii) and § 910.2(b)(3) provided a safe harbor for employers using the model language, while also permitting an employer to use different language, provided that the language communicates to the worker that the worker's non-compete is no longer in effect and may not be enforced.[841]

In the NPRM, the Commission stated that the purpose of the proposed notice requirement was to ensure that workers are informed that their existing non-competes are no longer in effect. The Commission cited evidence indicating that many workers are not aware of the applicable law governing non-competes or their rights under those laws, and stated that it was therefore concerned that, absent a notice requirement, workers may not know that their non-competes are no longer enforceable as of the effective date.[842]

2. The Final Rule

a. The Final Rule Does Not Require Rescission (Legal Modification) of Existing Non-Competes

The Commission has eliminated the proposed rule's requirement that employers rescind (*i.e.,* legally modify) existing non-competes. The Commission believes the proposed rescission requirement would have imposed unnecessary burdens on employers, as other aspects of the final rule provide less burdensome means of ensuring that workers other than senior executives will not be bound or chilled from competitive activity by non-competes after the effective date. Under § 910.2(a)(1)(ii), it is an unfair method of competition for a person to enforce or attempt to enforce a non-compete (except where, under § 910.3 the person has a good-faith basis to believe that the final rule is inapplicable). Further, under § 910.2(b)(1), the person who entered into the non-compete must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete clause is no longer in effect and will not be, and cannot legally be, enforced against the worker. These provisions are sufficient to achieve the purposes of the proposed rescission requirement without requiring any affirmative conduct beyond the notice requirement.

The Commission has also eliminated the proposed rescission requirement in response to comments expressing confusion about the requirement and concern about its practical implications. Some comments interpreted the proposed rescission requirement to mean that the worker and employer must be returned to their original positions (*i.e.,* on the day they entered into the non-compete) and presumed to not have entered into it or that it mandated wholly new contracts to replace any existing agreements that contained non-competes. Some commenters objected to what they considered the high compliance costs of rescinding and revising every employment contract with a non-compete. Some businesses said their contracts with senior executives and potentially other workers would be unwound by a rescission requirement. Other commenters said that if the Commission promulgated the proposed rescission requirement, it would be disregarding the role non-competes played in the overall value of the exchange for an employment contract. An industry association said rescission would require assessment of each contract's severability under relevant State law, and the answers would vary widely.

The Commission does not intend for the final rule to have such effect and has omitted the rescission requirement proposed in the NPRM. The Commission also adopts § 910.3(b), which provides an exception for causes of action that accrued before the effective date, to be clear that the final rule does not render any existing non-competes unenforceable or invalid from the date of their origin. Instead, it is an unfair method of competition to enforce

[839] *See* NPRM, proposed § 910.2(b).

[840] *Id.* at 3513.

[841] *Id.* at 3514.

[842] *Id.* at 3513.

certain non-competes beginning on the effective date. Actions taken before the effective date—for example, enforcing an existing non-compete or making representations related to an existing non-compete—are not unfair methods of competition under the final rule. As noted elsewhere, the Commission also exempts from the rule future enforcement of existing non-competes with senior executives.

Commenters also argued that a rescission requirement would be impermissibly retroactive, present due process concerns, and/or constitute an impermissible taking under the Fifth Amendment. The Commission responds to these comments in Part V.B.

Numerous commenters opposed the proposed rescission requirement based on perceived challenges presented by proposed § 910.1(b)(2), which addressed *de facto* non-competes, and its purported ambiguity with respect to which contractual terms employers would be required to rescind. The Commission has removed the rescission requirement for the reasons described in this Part IV.E.2.a and has also revised the proposed rule's language concerning *de facto* non-competes to clarify the scope of the definition.

b. The Final Rule's Notice Requirement

While the final rule does not require rescission (*i.e.,* legal modification) of existing non-competes, the final rule does prohibit enforcement of existing non-competes after the effective date and requires the person who entered into the non-compete with the worker to provide clear and conspicuous notice to the worker, by the effective date, that the worker's non-compete will not be, and cannot legally be, enforced against the worker.[843] The notice must identify the person who entered into the non-compete with the worker and must be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.[844]

Several commenters emphasized the importance of notice, especially for former workers who may be actively refraining from competitive activity (in compliance with a non-compete), and who may continue to do so if they are not informed that their non-compete is no longer in effect. One commenter highlighted the importance of notice, because a non-compete may be coercive regardless of its enforceability. Many commenters emphasized the need for clear and concise language in the notices, including in languages other than English. One commenter asked the Commission to use concrete, lay-friendly terms to help reduce workers' fears of being sued. A commenter that recommended notice in languages other than English suggested that such a requirement apply to medium and large businesses with a threshold percentage of workers (such as 10%) who primarily speak a language other than English.

Commenters also suggested changes in notice procedures to improve the chances of workers receiving and understanding the notice. One commenter stated that text messages should not qualify as a primary means of individual notice because they are too casual, may be automatically deleted, and the sender may not be identifiable. However, in this commenter's view, text messages could be a secondary form of notice. Some commenters suggested that in addition to individual notice, the final rule should require an employer to post a copy of the notice in the workplace and/or online.

A number of commenters asserted that the requirement for employers to provide notice to former workers when ''the employer has the worker's contact information readily available'' was confusing or burdensome. A commenter stated that employers do not update former employees' contact information, so such information is likely incomplete and might be inaccurate. One commenter asserted that a requirement to provide notice within 45 days of the effective date is too difficult for small businesses. Another commenter suggested that the final rule should require contacting only former workers who left the firm two years or less before the effective date, unless the non-compete has elapsed.[845] Some commenters expressed concern that former workers might not be notified under the ''readily available'' standard. A commenter stated that, to avoid confusion and evasion, employers should be required to send notice to former workers at the worker's last known home address, email address, or cell phone number. Commenters also contended that the meaning of ''individualized communication'' was not clear or that compliance with it would be too difficult or burdensome.

The Commission finalizes the proposed rule's notice requirement largely as proposed, with minor revisions to facilitate compliance, reduce burdens on employers, and improve accessibility for non-English speakers.[846] The final rule also requires covered businesses to provide notice by the effective date, rather than 45 days thereafter, to simplify the final rule and to secure its benefits for competition in labor markets and product and service markets as soon as practicable.

The Commission finalizes a notice requirement because the available evidence indicates that many workers are not aware of the applicable law governing non-competes or their rights under those laws, or are unable to enforce their rights—and are chilled from engaging in competitive activity as a result. The evidence shows that even when employers impose non-competes that are unenforceable under State law, many workers believe they are bound by them (or are otherwise unable to enforce their rights to be free of non-competes).[847] As a result, the Commission finds that even after the final rule is in effect, absent a clear notice requirement, many workers may be unaware that, because of the final rule, their employer cannot enforce a non-compete and that the Commission has the authority to take action against employers who violate the final rule. Accordingly, absent notice, these workers may continue to be chilled from switching jobs or starting their own business. This would tend to negatively affect competitive conditions in the

[843] § 910.2(b)(1).

[844] This language mirrors language in other Federal regulations. *See, e.g.,* 17 CFR 9.11 (notice of disciplinary action must be made personally by mail at the person's last known address or last known email address); 29 CFR 38.79 (written notice must be sent to a ''complainant's last known address, email address (or another known method of contacting the complainant in writing)''); 16 CFR 318.5 (providing for written notification at an individual's last known address, or email if the individual chooses that option).

[845] Under the final rule, notice is only required for existing non-competes, *i.e.,* those that have not elapsed.

[846] The Commission notes that this required notice is a routine disclosure of valuable, factual information to workers that does not implicate the First Amendment. *See Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249–53 (2010) (citing *Zauderer* v. *Off. of Disciplinary Counsel,* 471 U.S. 626, 651 (1985)). As described in this Part IV.E, the Commission adopts this notice requirement to ensure workers do not wrongly believe they remain bound by unenforceable non-competes after the rule goes into effect. The Commission's conclusion that such notice is necessary to achieve the full benefits of the final rule is based on its expertise and on empirical evidence supporting the Commission's finding of an *in terrorem* effect related to non-competes.

[847] *See* Prescott & Starr, *supra* note 413; *see also* Part IV.B.2.b.ii (describing the Commission's finding that non-competes are exploitative and coercive where they trap workers in jobs or force them to bear significant harms or costs, even where workers believe the non-compete is unenforceable).

same manner as if non-competes were in full force and effect.

A notice requirement helps address this concern by informing individual workers, to the extent possible, that after the effective date the employer will not enforce any non-compete against the worker. The Commission believes that prompt and clear notice to workers other than senior executives that non-competes are no longer enforceable is essential to furthering the purposes of the final rule—to allow workers to seek or accept another job or to leave to start and run a business, and to allow other employers to compete freely for workers. Indeed, the Commission has refined the model language to make it shorter and clearer than the proposed model language.

While the proposed rule would have required employers to provide the notice no later than 45 days after the compliance date, the final rule requires notice no later than the effective date (*i.e.,* no later than 120 days after the final rule is published in the **Federal Register**). The Commission believes that it is practicable and reasonable for employers to provide the notice by the effective date. The Commission has designed the notice requirement to make compliance as easy as possible for employers. The final rule provides safe harbor model language that satisfies the notice requirement; [848] gives employers several options for providing the notice—on paper, by mail, by email, or by text; [849] and exempts employers from the notice requirement where the employer has no record of a street address, email address, or mobile telephone number for the worker.[850]

In addition, while the model language in the proposed rule used the phrase ''the non-compete clause in your contract is no longer in effect,'' [851] the model language in the final rule uses the phrase ''[EMPLOYER NAME] will not enforce any non-compete clause against you.'' [852] Because this language does not identify the recipient as having a non-compete, the employer does not need to determine which of its workers have non-competes; instead, it can simply send a mass communication such as a mass email to current and former workers.

Furthermore, requiring notice by the effective date simplifies the final rule and allows its benefits to begin sooner. In response to commenters that contended that they need more time to provide workers notice, the Commission believes that providing notice should not be time-consuming, even for small businesses, particularly given that the final rule provides model language, allows use of the worker's last known contact information for notice, allows digital notice, and (unlike in the proposed rule) categorically exempts an employer who has no such information from the notice requirement. Moreover, as described in Part IV.B.2.b.ii, non-competes trap workers in jobs or force them to bear other significant harms or costs—even where workers believe the non-compete is unenforceable. Given the limited burdens associated with providing notice only to workers whose last known contact information is on file and employers' option to simply copy and paste the safe harbor model notice, as well as the known and currently ongoing acute harms of non-competes (including their *in terrorem* effects) and the importance of workers knowing as soon as possible that their non-compete is unenforceable, the Commission declines to extend the time to provide notice.[853] The Commission finds that 120 days is more than adequate for employers to complete this task.

In response to comments expressing concern that the NPRM's ''individualized communication'' requirement was unclear or burdensome, the Commission has removed that language. Instead, the final rule ensures each worker will receive notice while specifying several permissible methods for providing the notice, which furthers compliance certainty while giving employers a range of options and an efficient means of complying. By allowing a number of formats for such communications, including digital formats, employers are more likely to be able to contact workers rapidly, individually, and have flexibility to do so at low cost. Accordingly, § 910.2(b)(2) of the final rule allows for notice by text message, by email, as well as paper notice by hand or by mail to the worker's last known street address. The final rule gives employers flexibility to choose among these methods. In responses to the concerns expressed by the commenter about text messages, the Commission believes that text messages should be a permissible method for providing the notice because they are widely used, delivered quickly, low-cost for employers, and an effective means of communication for workers who do not have email accounts.

In response to comments contending that notice to former workers is too burdensome or difficult, the Commission believes that providing notice to former workers is critical because former workers may be refraining from competitive activity because they believe they are subject to a non-compete. The Commission disagrees that providing notice to former workers will be burdensome. The Commission believes that most employers have contact information for former workers who may be subject to non-competes.[854] And under the final rule, in those rare cases in which an employer has no record of a street address, email address, mobile telephone number, or other method of contacting the worker or former worker, § 910.2(b)(3) exempts the employer from the final rule's notice requirement with respect to the worker. Furthermore, by specifying the circumstances under which notice may not be provided, this exemption also addresses concerns expressed by some commenters that ambiguity in the proposed rule's ''readily available'' standard for notifying former workers would lead to fewer former workers being notified.

In response to comments contending that notice to former workers is too burdensome or difficult, the Commission believes that providing notice to former workers is critical because former workers may be refraining from competitive activity because they believe they are subject to a non-compete. In light of the comments about the proposed ''readily available'' contact information standard, the Commission in this final rule does not adopt that language and instead requires that the notice must be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker. The Commission agrees with commenters that stated that most employers have such contact information for both present and former workers. For those rare cases in which

[848] § 910.2(b)(4)–(5).

[849] § 910.2(b)(2)(ii).

[850] § 910.2(b)(3).

[851] NPRM, proposed § 910.2(b)(2)(iii).

[852] § 910.2(b)(4).

[853] The Commission addresses the effective date in Part VIII.

[854] Employers have many record-keeping requirements under State and Federal laws under which they may retain the contact information described in § 910.2(b)(2)(ii). *See, e.g.,* IRS, Circular E, Employer's Tax Guide, Pub. 15, 8 (2024) (''Keep all records of employment taxes for at least 4 years,'' including addresses of employees and recipients and forms with addresses.); USCIS, Handbook for Employers M–274, Sec. 10.0, Retaining Form I–9 (requiring retention of I–9 form, which includes employees' addresses, email addresses, and telephone numbers).

an employer has no record of a street address, email address, mobile telephone number, or other method of contacting the worker or former worker, § 910.2(b)(3) exempts the employer from the final rule's notice requirement.

The Commission agrees with comments that notices in other languages spoken by workers would help achieve the goal of informing workers that their non-competes are no longer enforceable and help employers to comply with the final rule. However, to avoid imposing a burden of translation on employers, § 910.2(b)(6) makes it optional to provide notices in languages other than English. The Commission encourages employers to provide this notice to workers who speak languages other than English. To facilitate the provision of notices in other languages, the final rule provides a model notice in English and links to translations of other languages that are commonly spoken in U.S. homes, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean.[855]

V. Section 910.3: Exceptions

A. Section 910.3(a): Exception for Persons Selling a Business Entity

In the NPRM, the Commission proposed an exception for certain non-competes between the seller and the buyer of a business that applied only to a substantial owner, member, or partner, defined as an owner, member, or partner with at least 25% ownership interest in the business entity being sold. Based on comments, the Commission adopts an exception for the bona fide sale of a business without requiring that the seller have at least a 25% ownership interest.

1. The Proposed Rule

Proposed § 910.3 allowed non-competes where the restricted party is ''a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or . . . selling all or substantially all of a business entity's operating assets,'' and is also ''a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete.'' [856] The Commission proposed to define ''substantial owner, substantial member, and substantial partner'' as ''an owner, member, or partner holding at least a 25 percent ownership interest in a business entity.'' [857] The text of proposed § 910.3 stated that non-competes allowed under the proposed exception would remain subject to Federal antitrust law and all other applicable law.

The Commission stated in the NPRM that its proposal to exempt from the rule non-competes between the seller and the buyer of a business did not reflect a finding that such non-competes are beneficial to competition.[858] Rather, the Commission explained that such non-competes may implicate unique interests and have unique effects, and the evidentiary record did not permit the Commission to thoroughly assess the full implications of restricting their enforceability.[859] The Commission noted that because all States permit non-competes between the seller and the buyer of a business to some degree, and because the laws that apply to these types of non-competes have seen fewer changes recently than the laws applicable to non-competes that arise solely out of employment, there have not been natural experiments allowing researchers to assess this type of non-compete's effect on competition.[860]

2. Comments Received

A few commenters suggested eliminating the proposed exception. These commenters contended that non-competes between the seller and the buyer of a business may still be exploitative and coercive, particularly in the case of small business owners in transactions with larger, better-resourced corporations. However, most commenters who addressed the issue supported an exception that would allow certain non-competes between the seller and the buyer of a business. These commenters agreed with the NPRM that State common law generally applies less-intensive scrutiny to non-competes ancillary to the sale of a business and that every State statute banning non-competes has an exception which allows some or all non-competes between the seller and the buyer of a business. Most of the commenters who supported some form of exception for non-competes between the seller and the buyer of a business contended that they are necessary to protect the value of the sale by ensuring the effective transfer of the business's goodwill. According to these commenters, a buyer will be less willing to pay for a business if they cannot obtain assurance that they will be protected from future competition by the seller, and so a failure to exempt related non-competes may chill acquisitions. Commenters stated that sellers of a business have more bargaining power than workers do and generally receive a portion of the sales price, making exploitation and coercion less likely. They also noted that non-competes between the seller and the buyer of a business remain subject to State limitations on scope, duration, and reasonableness.

Some commenters supported the proposed 25% ownership threshold. However, most commenters who otherwise supported the exception stated that the proposed 25% ownership threshold is too high. They argued that the 25% threshold does not account for the reality of most transactions, in which owners with less than 25% interest in a business may have significant goodwill and receive significant proceeds from a sale. Some commenters focused on the tax costs of the threshold, pointing to IRS provisions that currently allow taxpayers to deduct from their taxable income the portion of the sales price made in exchange for non-competes. Others argued that the 25% threshold would disincentivize equity-based consideration. To avoid these harms, these commenters suggested a variety of other thresholds, including the 5% ownership threshold used in SEC regulations.[861] Some commenters contended that the Commission failed to provide evidence justifying the proposed 25% ownership threshold. Others questioned the effectiveness of ownership as a proxy for goodwill or the likelihood of exploitation and coercion. As examples, these commenters pointed to passive investors who may have significant ownership stakes in a business but none of its goodwill, and owners whose interests may be purchased for less than fair market value or who are excluded from sales negotiations.

A few commenters argued that the proposed 25% threshold would preempt the laws of California and other States which ban non-competes except in the sale of a business, none of which require that the seller have a substantial ownership stake. They pointed to cases in which California courts applied the exception and allowed enforcement of non-competes against shareholders holding as little as a 3% ownership interest. In light of these statutes, some of these commenters urged the Commission to adopt an exception for

[855] *See* Sandy Dietrich & Erik Hernandez, Census Bureau, *Nearly 68 Million People Spoke a Language Other Than English at Home in 2019* (Dec. 6, 2022) at Table 1, *https://www.census.gov/library/stories/2022/12/languages-we-speak-in-united-states.html.*

[856] NPRM, proposed § 910.3.

[857] *Id.,* proposed § 910.1(e).

[858] *Id.* at 3515.

[859] *Id.* at 3514–15.

[860] *Id.*

[861] *See, e.g.,* 17 CFR 240.13d–1 (requiring reporting by beneficial owners holding more than 5% interest in an equity security).

agreements that involve the sale of a business or equity in a company without a threshold ownership requirement.

Some commenters urged the Commission to adopt a case-by-case assessment of business sales based on State law, such as a ''totality of the circumstances'' or ''reasonableness'' test. Others proposed replacing the ownership-based exception with an exception for founders, key workers with IP access, and/or those with goodwill. At least one commenter asked the Commission to use a bright-line rule rather than a functional or definitional test that would require adjudication and interpretation by courts.

Some commenters presented empirical evidence to justify a lower ownership threshold. A few commenters pointed to data suggesting that more than 96% of CEOs of the 3,000 largest publicly traded companies own less than 25% of their company. One commenter pointed to data suggesting that the average duration of a startup's life from fundraising to acquisition is 6.1 years, arguing that it is unlikely for venture-capital backed businesses to operate and grow for that period of time without accepting funding that dilutes founders' and key employees' equity stake in the business. Other commenters supporting a lower threshold provided anecdotal evidence that businesses cede large shares to financial backers, resulting in many owner-operators holding significantly less than a 25% share in their business.

Finally, some commenters focused on eliminating potential loopholes to the proposed exception. Some commenters expressed concern that employers may set up sham transactions with wholly owned subsidiaries in order to impose non-competes that would otherwise be prohibited under the rule, urging the Commission to clarify that the exception applies only to bona fide transfers to an independent third party. Some commenters contended that firms may use ''springing'' non-competes (in which a worker must agree at the time of hiring to a non-compete in the event of some future sale) and repurchase rights, mandatory stock redemption programs, or similar stock-transfer schemes (pursuant to which a worker may be required to sell their shares if a certain event occurs) to impose non-competes on their workers which would otherwise be prohibited. They urged the Commission to address those instances specifically, including by defining the exception by the percentage of total equity value received in liquid proceeds at the time of the relevant transaction.

3. The Final Rule

The Commission adopts a sale of business exception for substantially the same reasons articulated in the NPRM. However, in response to comments concerning the ownership percentage threshold, the Commission modifies § 910.3(a) so that it no longer includes the proposed requirement that the restricted party be ''a substantial owner of, or substantial member or substantial partner in, the business entity'' to fall under the exception. The Commission otherwise adopts this provision largely as proposed. To address commenters' concerns that employers will use sham transactions, stock-transfer schemes or other mechanisms designed to evade the rule, § 910.3(a) requires that, to fall under the exemption, a non-compete must be entered into pursuant to a bona fide sale.

The Commission reiterates that § 910.3(a) does not reflect a finding that non-competes between the seller and the buyer of a business are beneficial to competition or that they are not restrictive and exclusionary or exploitative and coercive. Indeed, the Commission acknowledges that some non-competes between the seller and buyer of a business may be exploitative and coercive due to an imbalance in bargaining power and/or may tend to harm competitive conditions. However, commenters did not present empirical research on the prevalence of non-competes between the seller and the buyer of a business or on the aggregate economic effects of applying additional legal restrictions to non-competes between the seller and buyer of a business. The Commission's decision to adopt § 910.3(a) reflects the view of the Commission and most commenters that, compared to non-competes arising solely out of an employment relationship, non-competes between the sellers and buyers of businesses may implicate unique interests and have unique effects that this rulemaking record does not address.[862]

The proposed requirement that an excepted non-compete bind only a ''substantial'' owner, member or partner of the business entity being sold was designed to allow those non-competes between the seller and the buyer of a business which are critical to effectively transfer goodwill while prohibiting those which are more likely to be exploitative and coercive due to an imbalance of bargaining power between the seller and the buyer. However, commenters persuasively argued that the proposed 25% ownership threshold was too high because it failed to reflect the relatively low ownership interest held by many owners, members, and partners with significant goodwill in their business. The Commission declines to maintain the ''substantial'' interest requirement with a lower percentage threshold for the same reason.

The Commission also declines to adopt a threshold of $1 million, $250,000, or some other dollar limit on the proceeds received by the seller. On the current record, these thresholds were not sufficiently correlated to sellers' goodwill or bargaining power for a broadly generalizable approach. The Commission declines to adopt a ''totality of the circumstances'' or ''reasonableness'' test in the text of § 910.3(a) because they would provide little meaningful guidance to buyers and sellers and would be difficult to administer. For the same reasons, the Commission declines to replace the ownership-based exception with an exception for founders, key workers, workers with access to intellectual property, and/or workers with goodwill. Furthermore, non-competes allowed under the exception will continue to be governed by State law, which generally requires a showing that a non-compete is necessary to protect the value of the business being sold, as well as Federal antitrust law.[863]

Finally, the Commission agrees with commenters' concerns about the risks that firms may abuse the exception through sham transactions with wholly owned subsidiaries, ''springing'' non-competes, repurchase rights, mandatory stock redemption programs, or similar evasion schemes. The Commission adds the term ''bona fide'' and makes changes clarifying that any excepted non-compete must be made ''pursuant to a bona fide sale'' to ensure that such schemes are prohibited under the rule. A bona fide sale is one made in good faith as opposed to, for example, a transaction whose sole purpose is to evade the final rule.[864] In general, the Commission considers a bona fide sale to be one that is made between two

[862] *See* NPRM at 3514–15.

[863] *See, e.g., U.S.* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 281 (6th Cir. 1898) (''For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements [*inter alia*] by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold . . . . Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary . . . to the enjoyment by the buyer of the property, good will, or interest in the partnership bought. . . .'').

[864] Black's Law Dictionary defines bona fide as ''[m]ade in good faith; without fraud or deceit,'' and ''[s]incere; genuine.'' (11th ed. 2019).

independent parties at arm's length, and in which the seller has a reasonable opportunity to negotiate the terms of the sale. So-called ''springing'' non-competes and non-competes arising out of repurchase rights or mandatory stock redemption programs are not entered into pursuant to a bona fide sale because, in each case, the worker has no good will that they are exchanging for the non-compete or knowledge of or ability to negotiate the terms or conditions of the sale at the time of contracting. Similarly, sham transactions between wholly owned subsidiaries are not bona fide sales because they are not made between two independent parties.

The Commission declines to specifically delineate each kind of sales transaction which is not a bona fide sale under the exception to avoid the appearance that any arrangement not listed is allowed under the exception. Courts have effectively identified and prohibited such schemes pursuant to State statutes prohibiting non-competes.[865] In addition, non-competes allowed under the sale-of-business exception remain subject to Federal and State antitrust laws, including section 5 of the FTC Act.

B. Section 910.3(b): Exception for Existing Causes of Action

Proposed § 910.2(a) would have prohibited employers from maintaining an existing non-compete with a worker. The proposed rule also would have required employers to rescind existing non-competes.[866] Commenters argued that any invalidation or rescission required of existing non-competes would be impermissibly retroactive, present due process concerns, and/or constitute an impermissible taking under the Fifth Amendment.

As described in Part IV.C.5, the Commission adopts a modified § 910.2(a) under which existing non-competes for workers who are not senior executives are no longer enforceable. The Commission adds an exception in § 910.3(b) in response to comments raising concerns related to retroactivity. Section 910.3(b) specifies that the final rule does not apply if a cause of action related to a non-compete provision accrued prior to the effective date. This includes, for example, where an employer alleges that a worker accepted employment in breach of a non-compete if the alleged breach occurred prior to the effective date. This provision responds to concerns that the final rule would apply retroactively by extinguishing or impairing vested rights acquired under existing law prior to the effective date.[867] In this Part V.B, the Commission addresses commenters' arguments regarding retroactivity, due process, and impermissible taking under the Fifth Amendment.

1. Retroactivity

A number of commenters asserted that applying the final rule to prohibit the enforcement of existing non-competes would render the final rule impermissibly retroactive. The Commission disagrees. A rule ''does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the [rule's] enactment, or upsets expectations based in prior law.'' [868] Rather, courts have explained that an ''administrative . . . rule is retroactive [only] if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.'' [869] ''A rule that 'alter[s]' the past legal consequences of 'past action' is retroactive,'' while a rule that '''alter[s] only the 'future effect' of past actions, in contrast, is not.'' [870] Agency action ''that only upsets expectations based on prior law is not retroactive.'' [871]

The final rule is not impermissibly retroactive because it does not impose any legal consequences on conduct predating the effective date. The Commission is not creating any new obligations, imposing any new duties, or attaching any new disabilities for past conduct.[872] And to minimize concerns about retroactivity, the Commission adopts § 910.3(b), which states that the final rule does not apply where a cause of action related to a non-compete accrues before the effective date. The notice requirement in § 910.2(b) likewise does not render the final rule impermissibly retroactive because that requirement merely requires notice that non-competes that exist after the effective date will not be enforced in the future with respect to workers other than senior executives. No penalties attach to persons who entered non-competes before the effective date.

This final rule is analogous to the FCC rulemaking upheld in *National Cable & Telecommunications Ass'n* v. *FCC.* There, the agency promulgated a rule that ''forbade cable operators not only from entering into new exclusivity contracts, but also from enforcing old ones.'' [873] The court upheld the rule against a retroactivity challenge because the FCC had ''impaired the future value of past bargains but ha[d] not rendered past actions illegal or otherwise sanctionable.'' [874] This final rule does the same with existing non-competes. The final rule does not render it illegal or otherwise sanctionable for parties to have entered into non-competes before the effective date; it merely provides that persons cannot enforce or attempt to enforce such agreements with workers other than senior executives or represent to such workers that they are bound by an enforceable non-compete after the effective date. It is thus not impermissibly retroactive.

In *National Cable,* the court also considered whether the agency had ''balance[d] the harmful 'secondary retroactivity' of upsetting prior expectations or existing investments against the benefits of applying [its] rules to those preexisting interests.'' [875] While commenters did not frame their objection as one of ''secondary retroactivity,'' some did object that the final rule would upset the benefits of pre-existing bargains. As in *National Cable,* however, the Commission has ''expressly consider[ed] the relative benefits and burdens of applying its rule

[865] *See, e.g., Bosley Med. Grp.* v. *Abramson,* 161 Cal. App. 3d 284, 291 (Cal. Ct. App. 1984) (refusing to enforce non-compete imposed on physician under agreement requiring physician to purchase 9% of stock at hiring and resell to corporation upon termination because agreement ''was devised to permit plaintiffs to accomplish that which the law otherwise prohibited: an agreement to prevent defendant from leaving plaintiff medical group and opening a competitive practice'').

[866] *See* proposed § 910.2(b)(1).

[867] As discussed in Part V.B.1, courts have explained that an ''administrative . . . rule is retroactive [only] if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.'' *Regents of the Univ. of Cal.* v. *Burwell,* 155 F. Supp. 3d 31, 44 (D.D.C. 2016) (alteration in original) (quoting *Nat'l Min. Ass'n* v. *DOL,* 292 F.3d 849, 859 (D.C. Cir. 2002)). But a regulation is *not* retroactive simply because it ''impair[s] the future value of past bargains'' if it does not also ''render[ ] past actions illegal or otherwise sanctionable.'' *Nat'l Cable & Telecomms. Ass'n* v. *FCC,* 567 F.3d 659, 670 (D.C. Cir. 2009).

[868] *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 269 (1994).

[869] *Burwell,* 155 F. Supp. 3d at 44 (alteration in original) (quoting *Nat'l Min. Ass'n,* 292 F.3d at 859).

[870] *Id.* (alterations in original) (quoting *Ne. Hosp. Corp.* v. *Sebelius,* 657 F.3d 1, 14 (D.C. Cir. 2011)).

[871] *Nat'l Cable,* 567 F.3d at 670 (internal quotation omitted) (quoting *Mobile Relay Assocs.* v. *FCC,* 457 F.3d 1, 11 (D.C. Cir. 2006)).

[872] For instance, the D.C. Circuit found that agency action impermissibly attached a ''new disability'' when a Department of Interior rule made mine operators ineligible for a surface mining permit based on ''pre-rule violations.'' *Nat'l Min. Ass'n* v. *U.S. DOI,* 177 F.3d 1, 8 (D.C. Cir. 1999). Here, the final rule imposes no penalties or other disabilities on persons who entered into non-competes before the effective date.

[873] *Nat'l Cable,* 567 F.3d at 661.

[874] *Id.* at 670.

[875] *Id.* at 670.

to existing contracts.'' [876] This consideration led the Commission to adopt the various exceptions described in the final rule, including the decision not to apply the final rule to non-competes entered into with senior executives before the effective date. As explained in Part IV.B, however, the Commission has determined that, for workers other than senior executives, there are substantial benefits to applying the rule to prohibit the future enforcement of non-competes entered into before the effective date. These benefits include the anticipated increase in worker earnings, new business formation, and innovation.[877] Additionally, the Commission finds such agreements are generally coercive and exploitative, so prohibiting their future enforcement is also a benefit.[878]

In the Commission's view, these significant benefits justify any burdens of applying the final rule to the future enforcement of pre-existing agreements with workers other than senior executives. Having balanced the burdens and benefits of so applying the final rule, the Commission has satisfied its obligation to consider the secondary retroactivity effects of the final rule. Moreover, the Commission notes that non-competes were already subject to case-by-case adjudication under section 5.[879] Employers were thus already responsible, even before the final rule, for ensuring their non-competes are not unfair methods of competition.

2. Takings

The Commission also disagrees with commenters who contended that applying the final rule to non-competes entered into before the effective date would violate the Fifth Amendment by effecting a taking without due compensation. Some comments interpreted the proposed rescission requirement to mean that the worker and employer must be returned to their original positions (*i.e.,* on the day they entered into the non-compete) and presumed to not have entered the agreement, or that the rule would mandate wholly new contracts to replace any existing agreements that contained non-competes. The Commission does not intend the final rule to have such effect and has omitted the rescission requirement proposed in the NPRM. The Commission also adopts § 910.3(b), which provides an exception for causes of action that accrued before the effective date, to clarify that the final rule is purely prospective. The final rule does not render any existing non-competes unenforceable or invalid from the date of their origin. Instead, under the final rule, it is an unfair method of competition to enforce certain non-competes beginning on the effective date. Action taken before the effective date to enforce an existing non-compete or representations made before the effective date related to an existing non-compete are not an unfair method of competition under the final rule. The final rule does not effectuate a taking.

The Takings Clause provides that ''private property'' shall not ''be taken for public use, without just compensation.'' [880] When, as here, ''the government, rather than appropriating private property for itself or a third party, imposes regulations that restrict an owner's ability to use his own property,'' courts consider whether the regulation ''goes too far'' and constitutes a ''regulatory taking.'' [881] Consistent with the Supreme Court's decision in *Penn Central Transportation Co.* v. *City of New York* (''*Penn Central*''), this is necessarily an ''ad hoc, factual inquir[y]'' and focuses on three factors: ''the economic impact of the regulation on the claimant''; ''the extent to which the regulation has interfered with distinct investment-backed expectations''; and ''the character of the governmental action.'' [882] ''[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.'' [883] As a general matter, ''the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.'' [884]

Under the *Penn Central* test, the final rule does not effect a taking as a matter of law. First, the economic impact of the regulation on employers with existing non-competes with workers who are not senior executives is insufficient to constitute a taking.[885] The Commission has found that such agreements are rarely the product of bargaining, and that little to nothing is offered in exchange for them. And research has confirmed that for many such agreements, employers do not value the ability to enforce the agreements.[886] The final rule also includes provisions that allow employers and workers to ''moderate and mitigate the economic impact'' of the final rule.[887] The Commission has made clear that employers may continue to use reasonable NDAs and trade secrets law to protect their interests, including customer goodwill.[888] In fact, one study finds that 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and 74.7% of workers with non-competes are subject to all three provisions.[889] And in cases where non-competes with workers other than senior executives were tied to benefits like cash or equity, the Commission has provided time for those agreements to be renegotiated if necessary.[890] For senior executives, the Commission allows existing agreements to continue to be enforced.

The character of the governmental action here also counsels against viewing the final rule as a taking. ''A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'' [891] There is no physical invasion here, and the final rule is promulgated under the Commission's authority to identify and prohibit unfair methods of competition.[892] Among other economic benefits described in Part IV.B, the Commission finds economy-wide benefits, including increases in new business formation and innovation. The Commission also finds that the final rule will increase earnings for workers by preventing enforcement of agreements that suppress their earnings. Moreover, non-competes have long been subject to government regulation, including not only section 5 of the FTC Act, but also State common

[876] *Id.* at 671.

[877] *See* Part IV.B.

[878] *See* Part IV.B.2.b.

[879] Part I.B.1.

[880] U.S. Const. amend. V.

[881] *Cedar Point Nursery* v. *Hassid,* 594 U.S. 139, 148 (2021).

[882] *Penn Cent. Transp. Co.* v. *City of N.Y.,* 438 U.S. 104 (1978).

[883] *Lingle* v. *Chevron U.S.A. Inc.,* 544 U.S. 528, 540 (2005).

[884] *Connolly* v. *Pension Ben. Guar. Corp.,* 475 U.S. 211, 224 (1986); *see also Nat'l Min. Ass'n* v. *Babbitt,* 172 F.3d 906, 917 (D.C. Cir. 1999) (applying *Connolly* to a Takings challenge to an administrative rule).

[885] *Murr* v. *Wis.,* 582 U.S. 383, 405 (2017); *see also Connolly,* 475 U.S. at 225.

[886] *See* Hiraiwa, Lipsitz, & Starr (2023) (showing that firms do not value the ability to enforce non-competes for workers earning up to $100,000 per year and potentially more).

[887] *Connolly,* 475 U.S. at 225–26.

[888] *See* Part IV.D.2.

[889] Balasubramanian, Starr, & Yamaguchi, supra note 74 at 35.

[890] *See* § 910.6.

[891] *Penn Cent. Transp. Co.* v. *City of N.Y.,* 438 U.S. 104, 124 (1978) (internal citation omitted).

[892] *See* 15 U.S.C. 45(a); *see also* Parts IV.B and C (the Commission's findings outlining the public benefits of the final rule and the public harm from the use of non-competes).

law, State enactments, and other Federal antitrust laws.

Finally, the final rule does not upset investment-backed expectations to the extent necessary to constitute a taking. Even in States that prohibit some or all non-competes, employers make many investments in workers that they would continue to make regardless of their ability to use non-competes, such as training, or that would be protected by other mechanisms, such as reasonable NDAs, trade secret law, and/or fixed term contracts. In other words, non-competes are not a prerequisite to employers' productivity and output, in large part because (as described in Part IV.D) employers have reasonable alternatives to protecting the investments they make. The Commission has also lessened the economic burden of the final rule by creating an exception for situations where a cause of action accrued before the effective date.[893] Furthermore, States and the Federal government have regulated and considered further regulating non-competes for years, and the Commission issued the NPRM more than 18 months before the effective date—and began exploring whether to regulate non-compete agreements more than five years ago.[894] There has thus been ample notice that non-competes may become unenforceable by rule,[895] and prior to this rule non-competes were already subject to case-by-case adjudication under section 5. For all these reasons, the Commission does not believe the final rule constitutes a taking.

3. Due Process

Similarly, the Commission disagrees with commenters who argued that applying the final rule to existing non-competes would present due process concerns. Assuming that these due process concerns are independent of other constitutional concerns like the alleged retroactive application of the final rule,[896] which are addressed in Parts V.B.1 and V.B.2, the Commission disagrees that there is any due process infirmity. Due process requires the government, at a minimum, to provide notice and an opportunity to be heard before depriving any person of property.[897] By issuing the NPRM and engaging in notice-and-comment rulemaking, the Commission has provided sufficient due process. And on top of the notice-and-comment process, there will be further process in an administrative adjudication or in court before any person is found to have violated the rule.

C. Section 910.3(c): Good Faith Exception

The Commission adds an exception in § 910.3(c) in an abundance of caution to ensure the final rule does not infringe on activity that is protected by the First Amendment [898] and to improve clarity in § 910.2(a). The exception states: ''It is not an unfair method of competition to enforce or attempt to enforce a non-compete clause or to make representations about a non-compete clause where a person has a good-faith basis to believe that this part 910 is inapplicable.'' A similar ''good-faith basis'' clause was in proposed § 910.2(a).

As described in Parts IV.B.4 and IV.C.5, the final rule includes a prohibition on enforcing or attempting to enforce non-competes in both § 910.2(a)(1) and (2). Under the *Noerr-Pennington* doctrine, filing a lawsuit—even if the suit may tend to restrict competition and is ultimately unsuccessful—is typically protected under the First Amendment right to petition and immune from antitrust scrutiny.[899] However, courts have recognized that where a lawsuit is a ''sham,'' *i.e.,* objectively baseless and subjectively designed solely to prevent competition, it is not protected.[900] For a non-compete covered by the final rule, enforcing or attempting to enforce the non-compete would likely be considered a ''sham'' lawsuit. Accordingly, such a lawsuit would not enjoy protection under the First Amendment. Section 910.3(b) ensures, however, that if a circumstance arises under which an employer's enforcement of or attempt to enforce a non-compete is protected by the First Amendment, the final rule does not run afoul of it.

As explained in Parts IV.B.4 and IV.C.5, the Commission adopts a prohibition on ''representing'' that a worker is subject to a non-compete in §§ 910.2(a)(1)(iii) and 910.2(a)(2)(iii). In § 910.3(c), the Commission incorporates a ''good-faith'' exception that applies to the prohibition on ''representing'' the worker is subject to a non-compete. Taken together, these provisions of the final rule prohibit an employer from representing to a worker that the worker is subject to a non-compete unless the employer has a good-faith basis to believe the worker is subject to an enforceable non-compete.

The Supreme Court has held ''there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.'' [901] Accordingly, ''[t]he government may ban forms of communication more likely to deceive the public than to inform it, . . . or commercial speech related to illegal activity.'' [902] The final rule does not cover protected speech because it prohibits only misrepresentations about whether a non-compete covered by the rule is enforceable. The good-faith exception in § 910.3(b) ensures, however, that the final rule does not run afoul of the First Amendment if a circumstance arises under which an employer's representation that a worker is subject to a non-compete is protected by that Amendment.

In the NPRM, the Commission stated that an employer would have no good faith basis to believe that a worker is subject to an enforceable non-compete ''where the validity of the rule . . . has been adjudicated and upheld.'' Some commenters stated that legal challenges to the final rule will create uncertainty and unpredictability related to compliance. The Commission believes the foregoing statement in the NPRM would contribute to this confusion and does not adopt it in this final rule. The Commission clarifies that the absence of a judicial ruling on the validity of the final rule does not create a good-faith basis for non-compliance. If the rule is in effect, employers must comply.

D. Requests To Expand Final Rule Coverage or To Provide an Exception From Coverage Under the Final Rule

In the NPRM, the Commission preliminarily concluded that applying the rule uniformly to all employers and workers would advance the proposed

[893] *See* § 910.3(b).

[894] *See* Part I.B.

[895] *Connolly* v. *Pension Ben. Guar. Corp.,* 475 U.S. 211, 226 (1986).

[896] Commenters invoking a due process concern outside the retroactivity context provided little contextual detail on the precise substance of the concern, nor did they explain what further process would be due before the Commission could promulgate the rule.

[897] *See, e.g., N. Am. Butterfly Ass'n* v. *Wolf,* 977 F.3d 1244, 1265 (D.C. Cir. 2020) (citing *Mathews* v. *Eldridge,* 424 U.S. 319, 333–34 (1976)).

[898] The Commission adopts § 910.3(b)(3) out of an abundance of caution and does not believe that any of the requirements in the final rule run afoul of the First Amendment because the Commission finds that the use of certain existing non-competes is an unlawful unfair method of competition.

[899] *See E.R.R. Presidents' Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington,* 381 U.S. 657 (1965).

[900] *Pro. Real Est. Invs., Inc.* v. *Columbia Pictures Indus., Inc.,* 508 U.S. 49, 60 (1993).

[901] *Cent. Hudson Gas & Elec.* v. *Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 563 (1980).

[902] *Id.* at 563–64.

rule's objectives to a greater degree than differentiating among workers on the basis of industry or occupation, earnings, another factor, or some combination of factors, and that it would better ensure workers are aware of their rights under the rule.[903] The Commission sought comment on this topic, including what specific parameters or thresholds, if any, should apply in a rule differentiating among workers.[904]

The vast majority of commenters supported the Commission's proposal to ban non-competes categorically for all workers.[905] Commenters from a broad spectrum of job types and industries stated that non-competes harm competition in a way that hurts workers and employers.

Commenters also supported the rule with perspectives specific to particular industries. In response to the Commission's request for comment on the issue, some commenters argued that the Commission should further expand the rule to cover non-competes between franchisors and franchisees.

Other commenters argued the Commission should differentiate among workers and employers along different parameters. They stated that workers with higher earnings, higher skills, specific job titles, or access to specific types of information should be excluded. Some stated that particular industries should be excluded wholesale, including all workers in an industry regardless of their job duties, while some stated that only certain workers in particular industries should be excluded.

In adopting the final rule, the Commission considered each request for exclusion from or expansion of coverage under the final rule and concludes that the use of covered non-competes is an unfair method of competition. The Commission also concludes that applying the final rule as adopted in part 910 to the full extent of the Commission's jurisdiction with respect to covered workers advances the final rule's objectives to a greater degree than differentiating among workers. In response to, *inter alia,* comments regarding the potential costs and difficulties that may result from invalidating existing non-competes for certain senior executives, however, the final rule differentiates between senior executives and other workers by allowing existing non-competes for senior executives to remain in force. The final rule adopts a uniform rule categorically banning new non-competes for all workers. The Commission substantiates its finding that the use of non-competes with workers is an unfair method of competition in Parts IV.B and IV.C.

In this Part V.D, the Commission addresses comments related to differentiation or exclusion of certain workers, employers, or industries. Comments related to expanding or limiting the definition of worker or employer are addressed in Parts III.C and III.G. Comments related to the Commission's jurisdiction and exclusions from the Commission's jurisdiction in the FTC Act are addressed in Part II.E. Comments related to the prevalence of non-competes within and across industries are addressed in Part I.B.2.

Overall, the Commission is committed to stopping unlawful conduct related to the use of certain non-competes to the full extent of its authority and jurisdiction. The Commission finds every use of a non-compete covered by the final rule to be an unfair method of competition under section 5 of the FTC Act for the reasons in Parts IV.B and IV.C. The use of an unfair method of competition cannot be justified on the basis that it provides a firm with pecuniary benefits.[906] To the extent commenters argue for an exception based on this justification, the Commission declines to create any exception on that basis. Moreover, a uniform rule carries significant benefits, which many commenters who otherwise opposed the NPRM acknowledged.[907] Among those benefits is the certainty for both workers and employers from a uniform rule, which also lessens the likelihood of litigation over uncertain applications. Exceptions for certain industries or types of workers would likely increase uncertainty and litigation costs, as parties would dispute whether a specific business falls within an industry-wide exception. Most importantly, exceptions would fail to remedy the tendency of non-competes to negatively affect competitive conditions in the excepted industries or for excepted types of workers and would likely have *in terrorem* effects.

1. Differentiation by Worker Compensation or Skills

Many commenters sought an exception for highly paid or highly skilled workers, often alongside requests for an exception for senior executives, while many others asked the Commission to keep these workers within the scope of the final rule. Commenters seeking an exception argued that highly paid and highly skilled workers in particular did not experience exploitation and coercion and were more likely to have access to confidential information or client or customer relationships, along with the other justifications for non-competes discussed in Part IV.D. Commenters' specific arguments on the evidence concerning highly paid or highly skilled workers are considered in the relevant subsections of Part IV.B. Many commenters proposed using a compensation threshold to differentiate highly paid workers and senior executives, discussed in IV.C.4.b. Other commenters suggested an exception based on the FLSA exemptions or the worker's level of access to confidential information, discussed in Parts IV.C.4. and V.D.2.

The Commission finds that non-competes have a tendency to negatively affect competitive conditions in labor markets and product and service markets, including non-competes binding highly paid and highly skilled workers. The evidence shows that, among the other effects described in Part IV.B, non-competes for highly paid and highly skilled workers suppress wages for these workers,[908] restrict competitors' access to highly skilled workers,[909] and restrict entrepreneurship.[910] Notably, as described in Parts IV.B.2 and IV.C.1, the Commission concludes that non-competes for highly paid or highly skilled workers who are not senior executives are generally exploitative and coercive. The Commission finds that highly paid and highly skilled workers who are not senior executives only rarely negotiate meaningful consideration in exchange for a non-compete. As the Commission finds, the overwhelming response from commenters, particularly workers, was that non-competes are exploitative and

[903] NPRM at 3518. The NPRM's proposed definition of "worker" excluded franchisees in the context of franchisee-franchisor relationships. *Id.* at 3520. The NPRM also proposed an exception for certain non-competes between the seller and the buyer of a business.

[904] NPRM at 3519.

[905] The Commission received over 26,000 public comments from a wide range of stakeholders. Among these comments, over 25,000 expressed support for the Commission's proposal to categorically ban non-competes.

[906] *See, e.g., Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) ("Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves."); *see also* Part II.F.

[907] *See* Part IX.C.

[908] *See* Part IV.B.3.a.ii.

[909] *See* Part IV.C.2.c.i.

[910] *See* Part IV.B.3.b.i.

coercive for many workers in highly paid professions other than senior executives.[911] While there may be highly paid or highly skilled workers who do not meet the definition of "senior executive" and who are not exploited or coerced, including workers above the definition's total compensation threshold, the Commission explains in Part IV.C.4 why a compensation threshold is necessary—but not sufficient—for purposes of defining senior executives whose existing non-competes may remain in force under the final rule. Further, the Commission finds that employers have sufficient alternatives to non-competes for highly paid and highly skilled workers.[912] The Commission also explains why it is not exempting all non-competes that were exchanged for consideration in Part IV.C.3. Accordingly, the final rule does not include any workers other than highly paid senior executives in the exception from the ban on enforcing existing non-competes. To ensure that only workers for whom there is insufficient evidence of exploitation and coercion are included in the exception, the final rule narrowly defines senior executive in § 910.1.[913]

2. Differentiation by Worker Access to Information

Some commenters suggested excluding workers with access to trade secrets, confidential business information, or other intellectual capital. Commenters contended these workers are uniquely situated because of their access to valuable employer information. Many commenters responded to these arguments and disagreed with them. Some commenters stated that employers overstate the proportion of workers who have access to such information. Commenters also stated that employers exaggerate the amount or quality of information that should be appropriately considered a trade secret, confidential business information, or other intellectual capital, and therefore exaggerate the purported cost to the firm of not being able to use non-competes. Commenters also stated that employers have alternatives to non-competes that generate less harm to competition, to workers, to the economy, and to rival firms, including NDAs and fixed-term employment contracts.

The Commission declines to adopt an exclusion based on workers' access to trade secrets, confidential business information, or other intellectual capital because it finds such an exclusion would be unnecessary, unjustified, unworkable, and prone to evasion. The Commission finds the use of non-competes to be an unfair method of competition and addresses claimed justifications related to trade secrets, confidential business information, or other intellectual capital in Part IV.D. The Commission finds that protecting trade secrets, confidential information, and other intellectual capital is an insufficient justification for non-competes because employers have less restrictive alternatives for protecting such information. Moreover, if the Commission were to exempt workers with access to confidential information, employers could argue that most or all workers fall under the exception, requiring workers to engage in complex and fact-specific litigation over the protected status of the underlying information. As explained in Part IX.C, such case-by-case adjudication of the enforceability of non-competes has an *in terrorem* effect that would significantly undermine the Commission's objective to address non-competes' tendency to negatively affect competitive conditions in a final rule.

3. Differentiation by Industry Other Than Healthcare

Some businesses and organizations argued that specific industries should be exempt from the final rule. The Commission carefully considered these comments and declines to adopt any industry-based exceptions. The Commission notes that while some commenters characterized purported justifications for an exclusion from the final rule as unique to a particular industry, the purported justifications were in fact the same as the those addressed in Part IV.D, namely, the need to protect investments in labor, trade secrets, confidential business information, or other intellectual capital. The Commission addresses those arguments in full in Part IV.D, but in this Part V.C.3 further discusses examples of comments seeking industry-based exceptions.

a. Client- and Sales-Based Industries

Some commenters in client- or sales-based industries, including real estate and insurance, argued they are unique and should be excluded from any rule. A real estate commenter argued that job switching by real estate employees is similar to the sale of a business where the goodwill and book of business generated by the departing employee must remain with the business. A timeshare industry commenter claimed the industry had unique features justifying the use of non-competes with highly paid workers, such as the cost of marketing and cultivation of relationships to bring in and maintain customers as well as the need to protect proprietary targets and strategies for resort development, due in part to the limited number of available resort contracts. A commenter representing insurance marketing organizations (IMOs), which serve as facilitators between insurance carriers, agents, and consumers similarly argued for an exclusion, citing client goodwill, purported trade secrets in sales methods, sales leads, unique compensation structures, and company analyses, and consumer harm from potential agent misconduct if the agent moves to a new IMO and changes the consumer's policy. Some businesses stated that non-competes rarely impact a worker's ability to find other work in their industry, sometimes because the new employer "buys out" the non-compete.

The majority of commenters from the real estate and insurance industry workers and small, independent insurance agencies, supported a comprehensive ban. These comments painted a picture consistent with the Commission's findings in Part IV.B regarding indicia of unfairness, including facial unfairness, and the tendency of non-competes to negatively affect competitive conditions in the labor and product and service markets. A worker from the real estate industry stated that non-competes are standard in the industry for all workers, regardless of their position in a company. Commenters stated that they were asked to sign after starting their job, with one worker stating that they faced the option of either signing the non-compete or leaving and losing future commissions for work they had done. Workers noted that they were terminated without cause and still required to comply with a non-compete, and that they had no bargaining power for promotion or wage increases. The following examples are illustrative of the comments the Commission received:

- As an aspiring entrepreneur in the real estate space, I am in a relatively small market where one company dominates. I recently ended my employment with them. They use non-competes to restrict competition and trap employees. The abolition of non-competes is paramount as small towns/cities grow. . . .[914]
- I signed a non-compete after working at a Real Estate Brokerage for several months. I

[911] *See* Part IV.B.2.b.

[912] *See* Part IV.D.2.

[913] For a more detailed discussion of proposed § 910.1(i), *see* Part IV.C.4.a.

[914] Individual commenter, FTC–2023–0007–10710.

was told I had to sign it or I would not be paid on the transactions I had pending. The non-compete was so overreaching—there was no geographical scope, the penalty was more than prohibitive. I was told that no one really enforces them or attempts to. I signed it, collected my outstanding pay and left the company within 90 days. Fast forward 4 years, I have been defending myself in litigation over this non-compete for over 3 years. Unable to afford qualified representation.[915]

- I am a business owner and have had 40 independent contractors under my business at my peak. They were all under non-compete, and if I could go back, I would eliminate the non-compete. It doesn't help the employee or contractor, and it doesn't help the business either. It spurs an unhealthy work environment. Clogs up the judicial system with frivolous cases where they try and scare people from earning a living. . . . I 100% support this ban, and it should go into effect immediately.[916]

Commenters stated that non-competes are standard in the insurance industry and that the industry is facing significant consolidation, fueled in part by private equity firms. These commenters argued that workers in the insurance industry are prohibited from seeking jobs with higher pay and better benefits in their specialty. Commenters stated that they were not able to negotiate better conditions at their current job and that employers can change the employment terms at will, so workers face reduced commissions and pay while still being held to a non-compete. Commenters stated that insurance agents are highly trained and specialized, and non-competes force them to leave their specialty and start over in a new specialty for less pay. Commenters also argued that non-competes thwart consumer choice because insurance agents create relationships with their customers, and customers lose the ability to choose the same agent if the agent is bound by a non-compete. Commenters also noted that standard employment agreements in the insurance industry require workers to pay their own costs to defend against noncompete litigation even if the worker is successful in the challenge such that even if a worker does not violate the terms of a noncompete, or the noncompete is not enforceable, workers who change jobs or start a new agency are often faced with significant legal bills. Commenters noted that although independent licensing agents are meant to be able to contract with multiple insurance companies, they are heavily restricted by non-competes, creating regional monopolies. The following examples are illustrative of the comments the Commission received:

- As a captive ''Independent Contractor'' for a large insurance company, this rule would be a lifeline should I decide to pursue an independent agent opportunity. The insurance company I represent, has gradually cut commissions over the past few years . . . that makes it extremely uncompetitive compared to peers. There is absolutely no reason why I should be held prisoner and not be able to pursue far more favorable, and beneficial opportunities, for both myself and my family.[917]
- Ideally I would like to start my own insurance agency but am currently prevented from doing so due to a non-compete clause. We are already somewhat limited in employment opportunities here in rural West Texas . . . . I'm finding it difficult to find a path to provide for my family during the two year period [of the non-compete], and therefore am considering scrapping the new business idea and remaining at my current job. . . . In a sense, I feel trapped at my current job, and ultimately I feel hobbled from achieving my full potential as a future small business owner.[918]

The Commission declines to adopt an exclusion for client- or sales-based industries such as real estate and insurance. The use of non-competes is an unfair method of competition and the purported justifications raised by commenters do not change the Commission's finding. The Commission also notes that, to the extent commenters seeking an exception are referencing different restrictive covenants, including some garden variety non-solicitation agreements, which do not prohibit or function to prevent a worker from switching jobs or starting a new business as described in Part III.D, the final rule does not apply to them. Thus, the Commission focuses on commenters' purported need for an exclusion based on non-competes alone.

In response to commenters arguing that information and techniques related to sales, including strategy on developing business, is confidential or proprietary and that workers' ability to move to another job or start a business would thus harm them, the Commission notes that any specific information or truly proprietary techniques can be protected by much less restrictive alternatives, such as trade secret law and NDAs. For example, proprietary targets and strategies for timeshares or unique compensation structures or company analyses cited by IMOs can be otherwise protected. Moreover, companies can compete on the merits to retain their customers by offering better products and services. Requiring workers to leave the industry or the workforce is an overbroad restriction that tends to negatively affect—and actually harms—competition with attendant harm to workers and rivals, as outlined in Part IV.B.

With respect to commenter arguments that non-competes are needed to protect specialization related to particular products and skills related to sales, as the Commission finds in Part IV.D, preventing workers from using their general trade knowledge and skills, including their gains in the same through experience with a particular employer, is not a legally cognizable justification for non-competes. That a real estate, insurance, or any other sales agent inherently learns skills and gains knowledge in the performance of their job, becoming a more effective salesperson over time, is not itself a cognizable justification for preventing the worker from re-entering the labor market as a worker or business owner. Employers' efforts to use non-competes to prevent workers from using general trade knowledge and skills is an unfair method of competition under section 5 because it is an attempt to avoid competition on the merits.[919] To the extent employers seek to protect legitimate investments in training, the Commission finds employers have less restrictive alternatives, including fixed duration contracts and better pay or other terms and conditions of employment to retain the worker. Finally, the Commission notes that because all covered employers can no longer maintain or enforce non-competes with workers who are not senior executives, employers may also have a larger pool of trained and experienced workers to hire from.

The Commission disagrees with commenters arguing that a worker leaving a sales position is akin to the sale of a business. Unlike the seller of a business, a worker is in an unequal bargaining position and does not receive compensation when leaving the firm. The fact that a worker generates goodwill for an employer is not a cognizable justification for non-competes. First, it not clear that the employer would lose goodwill associated with their business if a particular worker leaves. Moreover, commenters do not specify the extent to which their legitimate investment in the worker—separate from employing the

[915] Individual commenter, FTC–2023–0007–5502.

[916] Individual commenter, FTC–2023–0007–6782.

[917] Individual commenter, FTC–2023–0007–10919.

[918] Individual commenter, FTC–2023–0007–19441.

[919] *See Nat'l Soc'y of Prof. Engrs.* v. *United States,* 435 U.S. 679 (1978) (confirming that limiting competition, even if based on the specific advantages of doing so because of the particular nature of an industry, is not a cognizable justification).

worker to use their general skills and knowledge to successfully perform the job—generates such goodwill. To the extent employers do seek to protect investments in goodwill, the employer has less restrictive alternatives to attract and retain workers and customers or clients.

b. Industries With Apprenticeships or Other Required Training

Some commenters representing industries with apprenticeships or that require training as a part of employment, such as real estate appraisers, plumbers, and veterinarians, argued their industry should be excluded from the final rule. These commenters contended that a significant investment is needed to make workers productive in their industries and that they need to use non-competes to protect that investment. Each commenter cited an apprenticeship or training period during which they are not able to bill or must bill a lower amount for a worker's labor.

Worker commenters from these industries stated that non-competes leave them unable to launch or progress in their career because non-competes tie them to their first employer. Some appraiser commenters noted that, while their share of the appraisal fee rises to some extent after completing their apprenticeship, they cannot negotiate higher shares of the fee or other better working conditions because of non-competes. A union commenter representing plumbers noted that plumbers with non-competes are not able to accept better offers of employment, with better pay and benefits, including union positions. Other worker commenters mentioned geographic overbreadth and excessively long non-competes of two years. Many veterinarian commenters supported the proposed rule, stating that non-competes artificially held down their compensation and did not allow them to start new practices in areas where the need for more veterinary services is great, with some commenters stating that this contributed to consolidation.

The Commission declines to exclude industries, such as real estate appraisal, plumbing, and veterinary medicine, in which an industry must purportedly invest in significant training or apprenticeship of workers before the employer considers them to be productive. The Commission finds that these employers have less restrictive alternatives—namely fixed duration contracts—to protect their investment in worker training. A return on investment in the training does not require that the worker be unable to work for a period after leaving employment. Moreover, employers stand to benefit from the final rule through having access to a broader labor supply—including incoming experienced workers—with fewer frictions in matching with the best worker for the job.

c. Financial Services

Some commenters representing financial services companies opposed the rule, arguing non-competes are necessary for the industry and their industry is unique because non-competes have been used for decades, while numerous firms have entered the market, workers are mobile, and there is no evidence of blocked or curbed entry, lack of access to talent, lower innovation, or other negative impacts in that market. These commenters mention that mobility and access to talent is possible because new employers often "buy out" a worker's non-compete to hire a worker who may be otherwise bound by a non-compete. Several commenters also contend that non-competes are especially vital to firms that focus on securities or commodities trading because disclosure of commercially sensitive information to competitors can be extremely damaging to their former employers' profitability.

Commenters identified three studies which they contend suggest that non-competes improve worker productivity. First, commenters identified two studies on the Broker Protocol, an agreement among financial advisory firms which ostensibly limited the use of NDAs, non-solicitation agreements, and non-competes simultaneously. One study by Gurun, Stoffman, and Yonker finds that firms that joined the Protocol experienced higher rates of employee misconduct and earned increased fees.[920] The other study, by Clifford and Gerken, finds that firms which joined the Protocol invested more heavily in licensure and experienced fewer customer complaints.[921] Commenters noted that these two studies have conflicting findings on advisor misconduct. The authors themselves discuss these findings, with each criticizing the approach of the other. One commenter stated that, from a technical standpoint, the Clifford and Gerken study has a superior approach due to its substantially larger sample size and its analysis of the assumptions underlying the methodologies used in both studies. A third study—a study of the mutual fund industry by Cici, Hendriock, and Kempf—finds that mutual fund managers increase their firms' revenue when non-competes are more enforceable by investing in higher performing funds, attracting new clients, and increasing revenue from fees.[922] This study uses three changes in non-compete enforceability, measured in a binary fashion.

A commenter representing a large group of public equity investors supported the rule, stating that a comprehensive ban would create an inclusive labor market, which is integral to long-term corporate value and a dynamic, innovative, and equitable economy. Financial services worker commenters also supported the rule, citing to their failure to be paid for their skills over time, the threat of litigation in seeking new employment, and the overbroad nature of non-competes in the industry. The following example is illustrative of the comments the Commission received:

- I am a female finance professional with strong qualifications and experience. I am subject to an extremely long and comprehensive non compete contract which I was induced to sign at a young age. I have been offered many positions at other firms who would be more willing to provide me with leadership opportunities and a path to further advancement, but I am unable to consider them and I am essentially trapped at my firm. . . .[923]

The Commission declines to exclude financial services companies over which it has jurisdiction from the final rule. The Commission finds in Part IV.C that non-competes are restrictive, exclusionary, and also exploitative and coercive for higher wage and highly skilled workers, including workers in finance. The Commission also finds in Part IV.B and IV.C that non-competes tend to negatively affect competitive conditions in labor market through reduced labor mobility and in the product and services market through reduced innovation and new business formation. Evidence that new employers sometimes buy out non-competes also suggests that such clauses harm competition by raising the cost to compete and creating deadweight economic loss for the new employer.[924]

The empirical evidence provided by commenters arguing for differentiation

[920] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker, *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry,* 141 J. of Fin. Econ. 1218–43 (2021).

[921] Christopher P. Clifford & William C. Gerken, *Property Rights to Client Relationships and Financial Advisor Incentives,* 76 J. of Fin. 2409–45 (2021).

[922] Gjergji Cici, Mario Hendriock, & Alexander Kempf, *The Impact of Labor Mobility Restrictions on Managerial Actions: Evidence from the Mutual Fund Industry,* 122 J. of Banking & Fin. 105994 (2021).

[923] Individual commenter, FTC–2023–0007–0953.

[924] *See* Part IV.C.2.c.i.

for the finance industry does not support their claims. The Commission finds that it is difficult to weigh the evidence in the two studies of the Broker Protocol because they reach conflicting results, though the Commission agrees that the technical approach in the Clifford and Gerken study is superior due to its larger sample size. More importantly, both studies primarily concerned non-solicitation agreements, and do not isolate any effects of non-competes. So even if the studies did not reach conflicting results, the Commission believes they still would yield little reliable information about the effects of non-competes specifically. With respect to the study of the mutual fund industry, the Commission notes that under section 5, firms may not justify unfair methods of competition based on pecuniary benefit to themselves.[925] The study does not establish that there were societal benefits from the attraction of new clients or the increased fee revenue—just that the firms benefited. Therefore, this study does not establish a business justification that the Commission considers cognizable under section 5.

d. On-Air Talent

Some commenters opposing the rule stated that investment in on-air talent would be considerably reduced without non-competes. Commenters argued that on-air talent becomes well-known because of employers' investment and reputation and that employers must be able to use non-competes to protect this investment. The Commission also received a number of comments from and on behalf of on-air talent. Those commenters stated that non-competes are ubiquitous for on-air talent, that they are often localized geographically, that they suppress compensation, and that they force workers seeking a better match to move out of their localities. The following example is illustrative of the comments the Commission received:

- I am a professional broadcast journalist subject to a non-compete agreement with every employment contract I have ever signed, which is the industry standard. I understand the need for contractual agreements with on-air talent and some off-air talent, but non-compete agreements have historically offered nothing to employees besides restricting where they work, and how much money they are able to earn . . . [while] knowing that employees would have to completely relocate if they wanted to seek or accept another opportunity.[926]

The Commission declines to exclude on-air talent from the final rule. The Commission finds the use of non-compete agreements is an unfair method of competition as outlined in Part IV.B, and commenters do not provide evidence that a purported reduction in investment in on-air talent would be so great as to overcome that finding. Specifically, the success of on-air talent is a combination of the employer's investment and the talent of the worker, both of which benefit the employer. As noted in Part IV.D, other less restrictive alternatives, including fixed duration contracts and competing on the merits to retain the talent, allow employers to make a return on their own investments. Moreover, as stated in Part II.F, firms may not justify unfair methods of competition based on pecuniary benefit to themselves. Employers in this context do not establish that there are societal benefits from their investment in on-air talent, but only that the firms benefited.

e. Construction

A commenter representing companies who provide skilled workers in construction stated that the Commission should exclude the industry from the rule because non-competes are necessary to the industry's success. The commenter states that non-competes are necessary for investment in innovation and productivity in the industry. The comment cites to three studies. Two of the studies find a general reduction in productivity in construction and conclude, *inter alia,* further study is warranted to better understand the trend—Goolsbee and Syverson[927] and Huang, Chapman, and Burty (''NIST study''[928]). The third study is a McKinsey & Company report published in 2020 predicting innovation in the construction industry in the coming years.[929]

The evidence cited by this commenter is exclusively about broad trends in productivity in the industry, and what may impact those trends. None of the studies explicitly examines non-competes, and they do not support inferences on the effects of non-competes in this particular industry. Indeed, the Commission finds that the final rule addresses issues raised by the commenter. For example, the commenter notes that productivity in the industry has been broadly declining for years. Notably, this downward trend exists with non-competes in use in the industry. The Commission notes that, under its analysis of the effect of the final rule, productivity will benefit because the final rule frees up labor and allows for greater innovation. The NIST study raises ''skilled labor availability'' as the very first factor that affects productivity. The Commission finds in Part IV that non-competes suppress labor mobility and the Commission believes the final rule will result in firms having access to workers who are a better, more productive fit. The McKinsey & Company report notes that changes in the industry will require adaptation by firms. The Commission believes the final rule will facilitate this adaptation by sharing non-confidential know-how across firms through increased mobility of workers. The rule may also help mitigate, and certainly will not exacerbate, concerns over increased concentration in the industry raised in the McKinsey & Company report, as the Commission finds that non-competes inhibit new business formation in Part IV.B.3.b.i. Moreover, the Commission believes non-competes may increase concentration, as discussed in Part IV.B.3.b.iii.

Additionally, the Commission finds that less restrictive alternatives, including appropriately tailored NDAs and non-solicitation agreements, are sufficient to address disclosure of confidential information and concerns related to client business. With respect to concerns that the construction industry as a whole is suffering from under-investment in capital and that the final rule may further disincentivize capital investment, as the Commission finds in Part IV.B.3.b.i, non-competes inhibit new business formation. The increase in new business formation from the final rule will bring new capital to bear in the industry. The Commission addresses the empirical literature and comments related to capital investment in detail Part IV.D.1. The Commission notes here that it is not clear any purported capital investment associated with non-competes is entirely beneficial because it may be the result of firms over-investing in capital because they do not face competition on the merits. Even if there is some net decrease in capital investment due to the final rule, commenters provide no reason to believe it would be a material amount.

[925] *Id.*

[926] Individual commenter, FTC–2023–0007–12779.

[927] Austan Goolsbee & Chad Syverson, *The Strange and Awful Path of Productivity in the U.S. Construction Sector* (NBER Working Paper 30845, Jan. 2023).

[928] Allison L. Huang, Robert E. Chapman, & David Burty, *Metrics and Tools for Measuring Construction Productivity: Technical and Empirical Considerations,* Nat'l Inst. of Standards and Tech., Bldg. and Fire Rsch. Lab., NIST Special Publication 110 (September 2009).

[929] McKinsey & Co., *The Next Normal in Construction: How Disruption is Reshaping the World's Largest Ecosystem* (June 2020).

4. Exclusion for Covered Market Participants That Have Competitors Outside the FTC's Jurisdiction

The Commission explained in the NPRM that some entities that would otherwise be employers may not be subject to the final rule to the extent they are exempted from coverage under the FTC Act.[930] As described in Part II.E.1, the Act exempts, *inter alia,* ''banks,'' ''persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act of 1921'' [931] as well as an entity that is not ''organized to carry on business for its own profit or that of its members.'' [932] A few business and trade organization commenters argued the Commission should rescind the proposal or should not promulgate the rule because limits on the Commission's jurisdiction mean that the rule will distort competitive conditions where coverage by the final rule may not be universal. These commenters identified industries where employers excluded from the Commission's jurisdiction compete with covered persons, including livestock and meatpacking industries, and areas where government or private employers subject to the State action doctrine compete with covered employers. They contended that excluded employers will be able to use non-competes while their covered competitors are legally prohibited from doing so, advantaging excluded employers.

The Commission declines to rescind the proposal or otherwise refrain from promulgating a rule simply because the rule would not cover firms outside the Commission's jurisdiction. As an initial matter, jurisdictional limits are not unique to the Commission. All agencies have limits on their jurisdiction—many of which do not neatly map to all competitors in a particular market. Moreover, as explained in Parts IV and X, the final rule will have substantial benefits notwithstanding the FTC Act's jurisdictional limits, including increases in worker earnings, new firm formation, competition, innovation, and a decrease in health care prices (and potentially other prices). Furthermore, the Commission finds the risk of material disparate impact in markets where some but not all employers are covered by the final rule is minimal and, in any event, the final rule's overall benefits justify any such potential impact. As commenters acknowledged, excluded employers already compete with covered employers in the same markets. That is, coverage under the FTC Act—whether an employer is subject to the FTC Act and enforcement by the FTC—differs across a range of topics and long predates this final rule, which does not materially alter the status quo in that respect. Moreover, even in the absence of the rule, firms within the jurisdiction of the FTC Act are already subject to potential FTC enforcement against unfair methods of competition, including against non-competes, while firms outside the FTC's jurisdiction are not. The final rule does not alter that basic landscape.

At least one financial services industry commenter stated that national banks are outside of the Commission's jurisdiction and argued the final rule should exclude bank holding companies, subsidiaries, and other affiliates of Federally regulated banks to avoid disparate treatment of workers employed by different affiliates within the same organization, and because those entities are already heavily regulated. The Commission declines to exclude bank holding companies, subsidiaries, and other affiliates of Federally regulated banks that fall within the Commission's jurisdiction. While these institutions may be highly regulated, and depending on the corporate structure non-competes may be allowed for some workers but not others, the Commission finds that neither factor justifies excluding them from the final rule. If Federally regulated banks are concerned about disparate treatment of workers employed by their own different affiliates, they have the option to stop using non-competes across all their affiliates.

A corporation wholly owned by an Indian tribe asserted that the Commission should exclude Indian tribes and their wholly owned business entities from the definition of ''employer.'' The commenter asserted that the FTC Act does not explicitly grant jurisdiction over Indian tribes and their corporate arms. The commenter further argued that critical tribal revenue will be lost if tribal businesses' ability to retain skilled workers is impacted. The Commission declines to categorically exclude tribes or tribal businesses from coverage under the final rule. The FTC Act is a law of general applicability that applies to Indians, Indian Tribes, and tribal businesses.[933] The Commission recognizes, however, that in some instances these entities may be organized in such a way that they are outside the Commission's jurisdiction.[934] Whether a given Tribe or tribal business is a corporation within the FTC Act will be a fact-dependent inquiry. The Commission is aware of no evidence suggesting the final rule would disproportionately impact tribes or tribal businesses.[935]

5. Coverage of Healthcare Industry

Many commenters representing healthcare organizations and industry trade associations stated the Commission should exclude some or all of the healthcare industry from the rule because they believe it is uniquely situated in various ways. The Commission declines to adopt an exception specifically for the healthcare industry. The Commission is not persuaded that the healthcare industry is uniquely situated in a way that justifies an exemption from the final rule. The Commission finds use of non-competes to be an unfair method of competition that tends to negatively affect labor and product and services markets, including in this vital industry; the Commission also specifically finds that non-competes increase healthcare costs. Moreover, the Commission is unconvinced that prohibiting the use of non-competes in the healthcare industry will have the claimed negative effects.

a. Comments Received

Many business and trade industry commenters from the healthcare industry seeking an exception,

[930] NPRM at 3510.

[931] *Id.* (citing 15 U.S.C. 45(a)(2)).

[932] *Id.* (citing 15 U.S.C. 44).

[933] *See Fed. Power Comm'n* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116–17 (1960) (examining case law supporting the conclusion that ''a general statute in terms applying to all persons includes Indians and their property interests''); *FTC* v. *AMG Servs., Inc.,* No. 2:12–CV–00536–GMN, 2013 WL 7870795, at *16–*21 (D. Nev. July 16, 2013), *report and recommendation adopted,* No. 2:12–CV–00536–GMN, 2014 WL 910302 (D. Nev. Mar. 7, 2014) (discussing the FTC Act's applicability to Indian Tribes and tribal businesses).

[934] *See, e.g., AMG Servs.,* 2013 WL 7870795, at *22 (finding genuine dispute of material fact barring summary judgment on question of whether tribal chartered corporations were corporations under the FTC Act).

[935] The commenter also asked the Commission to engage Indian tribes about the proposed rule, citing Executive Order 13175. However, the Commission notes that Executive Order 13175, which requires consultation with Indian Tribes before promulgating certain rules, does not apply to independent regulatory agencies such as the Commission. E.O. No. 13175, 65 FR 67249 (Nov. 6, 2000) (stating that the term ''agency,'' which governs the applicability of the executive order, excludes agencies ''considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5)''); 44 U.S.C. 3502(5) (listing the Commission as an ''independent regulatory agency''). The Commission did, however, provide extensive opportunities for public input from any and all stakeholders, including a 120-day comment period (extended from 90 days) and a public forum held on February 16, 2023, that provided an opportunity to directly share experiences with non-competes.

including, for example, hospitals, physician practices, and surgery centers, focused on whether the Commission has jurisdiction to regulate nonprofit entities registered under section 501(c) of the Internal Revenue Code. The Commission addresses its jurisdiction in Part II.E and considers comments related to requests for an industry-based exclusion for all or part of the healthcare industry in this section. As stated in Part II.E, entities claiming tax exempt status are not categorically beyond the Commission's jurisdiction, but the Commission recognizes that not all entities in the healthcare industry fall under its jurisdiction.

Based on the assumption that entities claiming tax-exempt status as nonprofits and publicly owned healthcare organizations would be exempt, many industry commenters contended that for-profit healthcare organizations must be also exempted from the rule as a matter of equal treatment. Commenters cited data from the American Hospital Association (AHA) indicating that as many as 58% of all U.S. hospital systems claim tax-exempt status as nonprofits, 24% are for-profit hospitals, and 19% are State and local government hospitals. One commenter cited AHA data indicating that 78.8% of for-profit hospitals are located in the same Hospital Referral Region (HRR) as at least one entity that claims tax-exempt status as a nonprofit. Many commenters argued that for-profit entities and entities that claim nonprofit status compete for patients, physician and non-physician staff, and market share. These commenters contended that a rule covering only for-profit healthcare entities will distort the market in favor of entities claiming tax-exempt status as nonprofits, which would continue using non-competes. One commenter identifying as an entity claiming nonprofit tax-exempt status argued that such entities need to rely on non-competes to compete with for-profit competitors because, unlike for-profit health systems, they invest significantly in specialized training and mentorship, and offer a guaranteed minimum salary to recent graduates.

Some commenters contended that favoring entities claiming tax-exempt status as nonprofits would have negative effects. Some commenters argued that disparate coverage under the rule may exacerbate consolidation in the healthcare industry by advantaging entities that claim tax-exempt status as nonprofits. They stated that increased consolidation would reduce the available supply of skilled labor for for-profit hospitals, increasing labor costs and contributing to higher prices paid by patients. Commenters noted a trend in physicians increasingly leaving private practice to work at large hospital groups claiming tax-exempt status as nonprofits, which, they contended, may continue to lock those physicians up using non-competes. Industry commenters also argued that insurance premiums will rise more than they would absent the rule because of the greater market power and resulting leverage of entities that claim tax-exempt status as nonprofits in provider network negotiations. One manufacturing industry association commenter argued that the burden of rising premiums will be passed on to manufacturers who provide health insurance to their employees.

Commenters also argued that a rule covering for-profit healthcare providers would cause independent, physician-owned practices, and small community practices to suffer a competitive disadvantage compared to larger entities that claim tax-exempt status as nonprofits and public hospital groups, reducing the number of these practices and interrupting continuity of care for their patients. Commenters stated that such practices will suffer these consequences acutely in States or localities that are particularly saturated with entities that claim tax-exempt status as nonprofits or exempt State or local hospitals, and cited New York and Mississippi as examples. A commenter claimed that public hospitals regulated by the Commission will incur losses because of their reduced ability to hire and retain physicians that perform profitable procedures. One commenter cited a 1996 Commission study to contend that, all else equal, hospitals that claim tax-exempt status as nonprofits set higher prices when they have more market power. A business commenter contended that, given what they considered a large-scale exemption of certain physician employers from the Commission's jurisdiction, the States are more appropriate regulators of non-competes between physicians and employers. Other commenters claimed that the Commission must further study the consequences of differential treatment.

Conversely, many commenters vociferously opposed exempting entities that claim tax-exempt status as nonprofits from coverage under the final rule. Several commenters contended that, in practice, many entities that claim tax-exempt status as nonprofits are in fact ''organized to carry on business for [their] own profit or that of [their] members'' such that they are ''corporations'' under the FTC Act. These commenters cited reports by investigative journalists to contend that some hospitals claiming tax-exempt status as nonprofits have excess revenue and operate like for-profit entities. A few commenters stated that consolidation in the healthcare industry is largely driven by entities that claim tax-exempt status as nonprofits as opposed to their for-profit competitors, which are sometimes forced to consolidate to compete with the larger hospital groups that claim tax-exempt status as nonprofits. Commenters also contended that many hospitals claiming tax-exempt status as nonprofits use self-serving interpretations of the IRS's ''community benefit'' standard to fulfill requirements for tax exemption, suggesting that the best way to address unfairness and consolidation in the healthcare industry is to strictly enforce the IRS's standards and to remove the tax-exempt status of organizations that do not comply. An academic commenter argued that the distinction between for-profit hospitals and nonprofit hospitals has become less clear over time, and that the Commission should presumptively treat hospitals claiming nonprofit tax-exempt status as operating for profit unless they can establish that they fall outside of the Commission's jurisdiction.

The Commission also received many comments about coverage of the health care sector generally under the rule. Some commenters urged the Commission to ensure that health care workers, including doctors and physicians, were covered by the final rule. Several commenters stated that eliminating non-competes would allow doctors wishing to change jobs to stay in the same geographic area, fostering patient choice and improving continuity of care. Other commenters urged the Commission to create an exception for health care workers. Some argued that the evidence does not support the Commission's conclusion that non-competes depress earnings in health care. Other reasons commenters cited in support of an exception included concerns about continuity and quality of care for patients, the increased costs for employers of health care workers, physicians' negotiating power with their employers, and the effect on incentives for employers to train their health care workers.[936]

Thousands of healthcare workers submitted comments supporting a ban on non-competes. Worker commenters

[936] Some commenters also contended that the health care industry should be exempt from the rule because many health care providers fall outside of the Commission's jurisdiction. The Commission summarizes and responds to those commenters in Part II.E.2.

did not always identify whether they were working at for-profit organizations, entities that claim tax-exempt status as nonprofits, or State or local healthcare organizations, but each category was represented in the comments. These commenters detailed the negative effects of non-competes on their families, their mental health, their financial health, and their career advancement, as elaborated in Part IV.B.2.b.ii. Specifically, healthcare workers commented that because non-competes prohibited them from switching jobs or starting their own businesses, they had to stay at jobs with unsafe and hostile working conditions, to take jobs with long commutes, to relocate their families, to give up training opportunities, and to abandon patients who wanted to continue seeing them. Illustrative comments are highlighted in Parts I and IV.

Additionally, commenters stated the hardship patients have suffered because of non-competes when, for example, their physician was required to move out of their area to work for a different employer. The Commission highlights some of these comments in Part IV.B.2.b.ii and includes two further illustrative comments here:

• As a patient, non compete clauses are affecting mine and my [family's] ability to receive medical care. Our pediatrician left a practice and we aren't able to be informed where they are going. When we find out, it is an hour away [because] of the non compete. And when we look for other [doctors] closer they aren't accepting new patients. So for an entire year we are driving 2 [hours] round trip to see our pediatrician until they can move back to a local medical group. The non compete clause is not just affecting the life of the [doctor], but is also impacting many of us who rely on their services.[937]

• As a family physician this has caused much grief and obstructs my desire to work and provide care for underserved populations. I am a NHSC scholarship recipient and due to non compete clauses was unable to continue working in the town I served due to its rurality. This created a maternity desert in the region I served. Now in a more metropolitan area, there has been an exodus of physicians in the area due to non compete clauses that has caused worsening access to primary care, specialty services, including behavioral health and substance use disorder treatment.[938]

A number of physician group commenters stated that nonprofit healthcare organizations regularly impose non-competes on physicians, and that the impact of the rule would be limited if nonprofits are not required to comply. Some physician group commenters urged the Commission to work with other agencies to fill in gaps in applying the rule based on the Commission's jurisdiction, citing the importance of banning non-competes as widely as possible because of the harms they impose on physicians and patients irrespective of employer status. Specifically, commenters suggested that the Commission use its antitrust and referral authority to aggressively monitor nonprofit organizations for antitrust violations, to collaborate with other Federal agencies, including the IRS, and to provide incentives and guidance to States, which can enact measures to ensure that a prohibition on non-competes is implemented comprehensively. One commenter also noted that a ban would bring scrutiny to non-competes and would likely intensify pressure to eliminate them. A few commenters also contended that entities claiming tax-exempt status as nonprofits are subject to the Commission's jurisdiction as ''persons'' under the FTC Act.

b. The Final Rule

After carefully considering commenters' arguments, the Commission declines to exempt for-profit healthcare employers or to exempt the healthcare industry altogether.

First, as described in Part IV, the Commission finds that certain uses of non-competes are an unfair method of competition. The use of unfair methods of competition cannot be justified on the basis that it provides a firm with pecuniary benefits to help them compete with other firms that use similar tactics.[939] In this case, for-profit and other covered entities have urged the Commission to allow them to continue to employ an unfair method of competition (*i.e.,* use non-competes) because some competitors are not prohibited from doing so as they are beyond the Commission's jurisdiction. The Commission is committed to stopping unlawful conduct to the full extent of its jurisdiction. For example, the Commission would not refrain from seeking to enjoin unlawful price fixing by a for-profit within its jurisdiction because entities outside its jurisdiction under the FTC Act would not be subject to the same FTC action.

Second, the Commission disagrees with commenters' contention that all hospitals and healthcare entities claiming tax-exempt status as nonprofits necessarily fall outside the Commission's jurisdiction and, thus, the final rule's purview. As explained in Part II.E.2, a corporation's ''tax-exempt status is certainly one factor to be considered,'' but that status is not coterminous with the FTC's jurisdiction and therefore ''does not obviate the relevance of further inquiry into a [corporation's] operations and goals.''[940] Accordingly, as noted by commenters, entities that claim tax-exempt nonprofit status may in fact fall under the Commission's jurisdiction. Similarly, whether the final rule would apply to quasi-public entities or certain private entities that partner with States or localities, such as hospitals affiliated with or run in collaboration with States or localities, depends on whether the particular entity or action is an act of the State itself under the State action doctrine, which is a well-established, fact-specific inquiry.[941] Thus, some portion of the 58% of hospitals that claim tax-exempt status as nonprofits and the 19% of hospitals that are identified as State or local government hospitals in the data cited by AHA likely fall under the Commission's jurisdiction and the final rule's purview. Further, many States have banned non-competes for a variety of healthcare professionals in both for-profit and nonprofits entities by statute.[942] Even if

[937] Individual commenter, FTC–2023–0007–10085.

[938] Individual commenter, FTC–2023–0007–0924.

[939] *See Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (''Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves.'').

[940] *In the Matter of the Am. Med. Assoc.,* 94 F.T.C. 701, 1979 WL 199033 (FTC Oct. 12, 1979).

[941] *In the Matter of Ky. Household Goods Carriers Ass'n, Inc.,* 139 F.T.C. 404, 405 (2005) (''The Supreme Court has made clear that the state action doctrine only applies when (1) the challenged restraint is clearly articulated and affirmatively expressed as state policy, and (2) the policy is actively supervised by the State itself.'') (citation and alterations omitted); *see also id.* at 410–13 (applying test); *Elec. Inspectors, Inc.* v. *Vill. of East Hills,* 320 F.3d 110, 117–19 (2d Cir. 2003).

[942] Colo. Rev. Stat. sec. 8–2–113(5)(a) (Colorado statute banning non-competes for physicians); D.C. Code sec. 32–581.01 (D.C. statute banning non-competes for medical specialists earning less than $250,000, compared to $150,000 for other workers); Fla. Stat. sec. 542.336 (Florida statute banning non-competes for physician specialists in certain circumstances); Ind. Code Ann. secs. 25–22.5–5.5–2 and 2.5(b) (Indiana statute banning non-competes for primary care physicians and restricting non-competes for other physicians); Iowa Code sec. 135Q.2(3)(a) (banning non-competes for health care employment agency workers who provide nursing services); Ky. Rev. Stat. sec. 216.724(1)(a) (Kentucky statute banning non-competes for temporary direct care staff of health care services agencies); N.M. Stat. Ann. secs. 24–1I–1 and 2 (New Mexico statute banning non-competes for several types of health care practitioners); S.D. Codified Laws secs. 53–9–11.1–11.2 (South Dakota statute banning non-

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the final rule's coverage extends only to hospitals that do not identify as tax-exempt non-profits based on AHA data, as explained in Part IV.A.1, the Commission finds every use of covered non-competes to be an unfair method of competition and concludes that the evidence supports the Commission's decision to promulgate this final rule, which covers the healthcare industry to the full extent of the Commission's authority.

Relatedly, in response to commenters' concern that large numbers of healthcare workers will not benefit from the final rule because they work for entities that the final rule does not cover, the Commission notes many workers at hospitals, including those that claims tax-exempt status as a nonprofit or government-owned hospital, contract with or otherwise work for a for-profit entity, such as a staffing agency or physician group. Although some of these individuals may work at an excluded hospital, the final rule applies to their employer—the staffing agency or for-profit physician group—because it is covered by the final rule.

The Commission disagrees with commenters stating the ability to use non-competes will provide a material competitive advantage to entities claiming tax-exempt status as nonprofit or publicly owned entities that are beyond the Commission's jurisdiction. To the contrary, those entities outside FTC jurisdiction that continue to deploy non-competes may be at a self-inflicted disadvantage in their ability to recruit workers, even if they derive some short-term benefit from trapping current workers in their employment. Furthermore, commenters' concern that for-profit healthcare entities will be at a competitive disadvantage is based on the false premise that entities outside the jurisdiction of the FTC will not be otherwise regulated or scrutinized with respect to the use of non-competes. States currently regulate non-competes by statute, regulation, and common law. According to the AHA data cited by commenters, over 12% (398/3,113) of nonprofit hospitals and 13% of government hospitals (187/1,409) are in States that ban non-competes for all employers. In any event, even if true, arguments that for-profit and other covered entities could suffer competitive harm by not being able to employ an unfair method of competition would not change the Commission's finding that use of certain non-competes is an unfair method of competition, as further discussed in Part IV.

While the Commission shares commenters' concerns about consolidation in healthcare, it disagrees with commenters' contention that the purported competitive disadvantage to for-profit entities stemming from the final rule would exacerbate this problem. As some commenters stated, the Commission notes that hospitals claiming tax-exempt status as nonprofits are under increasing public scrutiny. Public and private studies and reports reveal that some such hospitals are operating to maximize profits, paying multi-million-dollar salaries to executives, deploying aggressive collection tactics with low-income patients, and spending less on community benefits than they receive in tax exemptions.[943] Economic studies by FTC staff demonstrate that these hospitals can and do exercise market power and raise prices similar to for-profit hospitals.[944] Thus, as courts have recognized, the tax-exempt status as nonprofits of merging hospitals does not mitigate the potential for harm to competitive conditions.[945]

Commenters provide no empirical evidence, and the Commission is unaware of any such evidence, to support the theory that prohibiting non-competes would increase consolidation or raise prices. To the contrary, as elaborated in Parts IV.B.3.a and IV.B.3.b, the empirical literature suggests, and the Commission finds, that the final rule will increase competition and efficiency in healthcare markets, as workers at for-profit healthcare entities will be able to spin off new practices or work for different employers where their productivity is greater. This is true even if the Commission does not reach some portion of healthcare entities. While the Commission's prior research may indicate, as one commenter suggested, that nonprofit hospitals set higher prices when they have more market power, the Commission finds that the final rule is not likely to increase healthcare prices

competes for several types of healthcare practitioners); Tex. Bus. & Com. Code secs. 15.50–.52 (Texas statute restricting the use of non-competes for physicians).

[943] *See, e.g.,* Press Release, Office of U.S. Sen. Chuck Grassley, *Bipartisan Senators Probe Potential Abuse Of Tax-Exempt Status By Nonprofit Hospitals* (Aug. 9, 2023), *https://www.grassley.senate.gov/news/news-releases/bipartisan-senators-probe-potential-abuse-of-tax-exempt-status-by-nonprofit-hospitals;* Request for Information Regarding Medical Payment Products, 88 FR 44281 (July 12, 2023); U.S. Gov't Accountability Off., Testimony Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, *Tax Administration: IRS Oversight of Hospital's Tax-Exempt Status,* GAO–23–106777 (Apr. 26, 2023), *https://www.gao.gov/assets/gao-23-106777.pdf; Pottstown Sch. Dist.* v. *Montgomery Cnty. Bd. of Assessment Appeals,* 289 A.3d 1142 (Pa. Commw. Ct. 2023) (holding that for-profit hospitals purchased by nonprofit claiming tax exempt status under Federal law do not qualify under State law for nonprofit tax exemption); *Phoenixville Hosp., LLC* v. *Cnty. of Chester Bd. of Assessment Appeals,* 293 A.3d 1248 (Pa. Commw. Ct. 2023); *Brandywine Hosp., LLC* v. *Cnty. of Chester Bd. of Assessment Appeals,* 291 A.3d 467 (Pa. Commw. Ct. 2023); *Jennersville Hosp., LLC* v. *Cnty of Chester Bd. of Assessment Appeals,* 293 A.3d 1248 (Pa. Commw. Ct. 2023); The Daily, *How Nonprofit Hospitals Put Profits Over Patients* (Jan. 5, 2023), *https://www.nytimes.com/2023/01/25/podcasts/the-daily/nonprofit-hospitals-investigation.html;* Gov't Accountability Off., *Tax Administration: Opportunities Exist to Improve Oversight of Hospitals' Tax-Exempt Status,* GAO–20–679 (Sept. 17, 2020), *https://www.gao.gov/products/gao-20-679;* Danielle Ofri, *Why Are Nonprofit Hospitals So Highly Profitable?,* N.Y. Times, Feb. 20, 2020, *https://www.nytimes.com/2020/02/20/opinion/nonprofit-hospitals.html;* Maya Miller & Beena Raghavendran, *Thousands of Poor Patients Face Lawsuits From Nonprofit Hospitals That Trap Them in Debt,* ProPublica (Sept. 13, 2019), *https://www.propublica.org/article/thousands-of-poor-patients-face-lawsuits-from-nonprofit-hospitals-that-trap-them-in-debt.*

[944] *See, e.g.,* Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-For-Profit Hospital Mergers: A Case Study,* 49 J. Indus. Econ. 63 (2001), *http://onlinelibrary.wiley.com/doi/10.1111/1467-6451.00138/epdf* (finding substantial price increases resulting from a merger of nonprofit, community-based hospitals, and determining that mergers involving nonprofit hospitals are a legitimate focus of antitrust concern); Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction,* 18 Int'l J. Econ. Bus. 65, 79 (2011), *http://www.tandfonline.com/doi/full/10.1080/13571516.2011.542956* (finding evidence of post-merger price increases ranging from 28%–44%, and concluding that ''[o]ur results demonstrate that nonprofit hospitals may still raise price quite substantially after they merge. This suggests that mergers involving nonprofit hospitals should perhaps attract as much antitrust scrutiny as other hospital mergers.'').

[945] *See, e.g., FTC* v. *OSF Healthcare Sys.,* 852 F. Supp. 2d 1069, 1081 (N.D. Ill. 2012) (''[T]he evidence in this case reflects that nonprofit hospitals do seek to maximize the reimbursement rates they receive.''); *FTC* v. *ProMedica,* No. 3:11 CV 47, 2011 WL 1219281 at *22 (N.D. Ohio Mar. 29, 2011) (finding that a nonprofit hospital entity ''exercises its bargaining leverage to obtain the most favorable reimbursement rates possible from commercial health plans.''); *United States* v. *Rockford Mem'l Corp.,* 898 F.2d 1278, 1284–87 (7th Cir. 1990) (rejecting the contention that nonprofit hospitals would not seek to maximize profits by exercising their market power); *FTC* v. *Univ. Health, Inc.,* 938 F.2d 1206, 1213–14 (11th Cir. 1991) (''[T]he district court's assumption that University Health, as a nonprofit entity, would not act anticompetitively was improper.''); *Hospital Corp. of America* v. *FTC,* 807 F.2d 1381, 1390–91 (7th Cir. 1986) (rejecting the contention that nonprofit hospitals would not engage in anticompetitive behavior). *See also* FTC & Dep't of Jusitce, *Improving Health Care: A Dose of Competition* 29–33 (2004), *https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf* (discussing the significance of nonprofit status in hospital merger cases, and concluding that the best available empirical evidence indicates that nonprofit hospitals exploit market power when given the opportunity and that ''the profit/nonprofit status of the merging hospitals should not be considered a factor in predicting whether a hospital merger is likely to be anticompetitive'').

through this same mechanism because it is unlikely to lead to significant increases in healthcare nonprofits' market share, if at all.

Moreover, the Commission has other tools to address consolidation in healthcare markets and is committed to using them. The Clayton Act grants the Commission authority to enforce compliance with, *inter alia,* section 7 of the Clayton Act. The Clayton Act does not include any carveout for entities that are nonprofit or otherwise do not operate for profit—and the FTC's jurisdictional limit based on the definition of ''corporation'' in the FTC Act does not apply in this context.[946] Accordingly, the Commission has authority under the Clayton Act to review and challenge mergers and acquisitions involving healthcare entities or hospitals regardless of nonprofit status.[947] Thus, even if the jurisdictional limitations of the final rule were to somehow incentivize some hospitals and other healthcare entities claiming non-profit status to consolidate, the Commission will continue to scrutinize those mergers and work with State partners to vigorously defend competition.[948] For the same reason, the Commission disagrees with commenters who contended that the effects of consolidation and staffing shortages will be worse in areas highly saturated with nonprofits claiming tax-exempt status.

Finally, the Commission disagrees with commenters that stated the Commission must further study the final rule's effect on healthcare workers and entities. The Commission has specific, long-time expertise in the healthcare market as anticompetitive mergers and conduct in healthcare markets have long been a focus of FTC law enforcement, research, and advocacy.[949] This work includes economic analyses of the effects of mergers involving nonprofit hospitals and studies of the impacts of hospital mergers.[950] Accordingly, given this expertise and the extensive record in the rulemaking, the Commission finds it has sufficient understanding of healthcare markets and that the evidence supports the final rule's application to the healthcare industry.

6. Coverage of Franchisors Vis-à-Vis Franchisees

a. The Proposed Rule

The Commission proposed to exclude franchisees from the definition of ''worker'' and requested comment on whether and to what extent the rule should cover non-competes between franchisors and franchisees (''franchisor/franchisee non-competes'').[951] The Commission explained that it proposed to exclude franchisees from the definition of ''worker'' because, in some cases, the relationship between a franchisor and franchisee may be more analogous to the relationship between two businesses than the relationship between an employer and a worker.[952] The Commission also noted that the evidentiary record relates primarily to non-competes that arise out of employment. However, the Commission stated that, in some cases, franchisor/franchisee non-competes may present concerns under section 5 similar to the concerns presented by non-competes between employers and workers and sought comment on coverage of franchisor/franchisee non-competes.[953]

b. Comments Received

Many commenters requested that the final rule cover franchisor/franchisee non-competes. Numerous commenters contended the franchisee-franchisor relationship is closer to a relationship between a worker and an employer than a relationship between businesses. These commenters argued that franchisees are often individual business owners who, like workers, lack bargaining power to negotiate over non-competes. One commenter stated that the Commission acknowledged in the Franchise Rule that franchisees generally lack bargaining power.[954] Several commenters, including industry commenters representing franchisees, argued that franchisees tend to suffer even greater power imbalances than workers because many risk significant personal assets to start their franchises. According to these commenters, this risk places acute strain on franchisees' bargaining leverage when negotiating to renew franchise agreements because, if they choose to reject a new agreement, they not only lose the opportunity to continue working in the same field due to their non-compete, but also the value of their investment.

Commenters seeking coverage of franchisor/franchisee non-competes also stated that these non-competes do not protect legitimate interests because franchisors generally do not entrust franchisees with trade secrets or details about their broader commercial strategy. These commenters stated that, even if franchisees do receive such information, franchisors have less restrictive alternatives for protecting it, including NDAs and trade secret law. Some commenters also stated that non-competes have anticompetitive effects because franchisors may degrade the quality of inputs or raise input prices without fearing that their existing franchisees will leave for a competitor.

Many franchisee commenters also stated their desire to compete after exiting their franchise relationships. Franchisees also stated that their non-competes harm their negotiating position in bargaining over franchise renewal terms. These franchisees stated that franchisors can impose higher royalty rates or other less favorable terms over time as the franchisees feel powerless to refuse or make effective counteroffers, due to their non-competes. Many franchisees asserted that their non-competes are overbroad because they restrain individual owners' spouses and other close relatives from competing in the same industry. Some franchisees stated that their non-competes include penalties for choosing

[946] 15 U.S.C. 18; 15 U.S.C. 45; *Univ. Health, Inc.,* 938 F.2d at 1214–16.

[947] *Id.*

[948] *See, e.g., In the Matter of RWJ Barnabas Health and Saint Peters Healthcare Sys.,* Docket No. 9409 (Jun. 2, 2022) (complaint); *FTC* v. *Advoc. Health Care,* No. 15 C 11473, 2017 WL 1022015, at *1 (N.D. Ill. Mar. 16, 2017); *FTC* v. *Penn State Hershey Med. Ctr.,* 838 F.3d 327, 332 (3d Cir. 2016).

[949] *See, e.g.,* FTC, *Competition in the Health Care Marketplace, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care; FTC, Overview of FTC Actions in Health Care Services and Products* (2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/2022.04.08%20Overview%20Healthcare%20%28final%29.pdf;* Joseph Farrell et al., *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals,* 35 Rev. Indus. Org. 369 (2009), *http://link.springer.com/content/pdf/10.1007%2Fs11151-009-9231-2.pdf;* FTC, *Examining Health Care Competition* (Mar. 20–21, 2014), *https://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition;* FTC & Dep't of Justice, *Examining Health Care Competition* (Feb. 24–25, 2015), *https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition; Improving Health Care: A Dose of Competition, supra* note 945.

[950] *See, e.g.,* FTC, *FTC Policy Perspectives on Certificates of Public Advantage* (Aug. 15, 2022), *www.ftc.gov/copa;* FTC, *Physician Group and Healthcare Facility Merger Study* (ongoing, initiated Jan. 2020), *https://www.ftc.gov/enforcement/competition-matters/2021/04/physician-group-healthcare-facility-merger-study;* Christopher Garmon, *The Accuracy of Hospital Merger Screening Methods,* 48 RAND J. of Econ. 1068 (2017), *https://www.ftc.gov/system/files/documents/reports/accuracy-hospital-merger-screening-methods/rwp_326.pdf;* Joseph Farrell, et al., *Economics at the FTC: Hospital Mergers, Authorized Generic Drugs, and Consumer Credit Markets,* 39 Rev. Indus. Org. 271 (2011), *http://link.springer.com/content/pdf/10.1007%2Fs11151-011-9320-x.pdf;* Devesh Raval, Ted Rosenbaum, & Steve Tenn, *A Semiparametric Discrete Choice Model: An Application to Hospital Mergers,* 55 Econ. Inquiry 1919 (2017).

[951] NPRM at 3511, 3520.

[952] *Id.* at 3511.

[953] *Id.* at 3520.

[954] Trade Regulation Rule on Franchising and Business Opportunity Ventures, 43 FR 59614, 59625 (Dec. 21, 1978).

not to renew their contracts even if they do not compete.

Other commenters, primarily franchisors and trade organizations, stated that franchisor/franchisee non-competes should be excluded from the final rule. Many of these commenters argued that franchisor/franchisee non-competes are more similar to restrictive covenants between businesses than non-competes between employers and workers. Some of these commenters argued that franchisor/franchisee non-competes are more justified than non-competes in the employment context because, unlike employment relationships, entering into a franchise agreement is completely voluntary. Some commenters argued that, unlike non-competes in the employment context, franchisor/franchisee non-competes are only entered into by individuals with access to substantial capital and who therefore always have the option of starting their own businesses.

Many of these commenters argued that prohibiting non-competes for franchisees would threaten to severely disrupt or destroy the franchise business model, and that this would harm franchisors and franchisees alike, as franchising offers a unique opportunity for working people to become entrepreneurs with established brands. Commenters asserted non-competes are critical to the franchise business model because they offer both franchisors and franchisees confidence that existing franchisees will likely stay with a brand and refrain from using a franchise's trade secrets to unfairly compete against the franchisor. Commenters also asserted that franchisees are often exposed to proprietary information through training manuals and operational support and that non-competes help protect this information. In addition, commenters contended franchisor/franchisee non-competes protect investments made by other franchisees and maintain a franchise's goodwill.

Commenters supporting the exclusion of franchisor/franchisee non-competes from the final rule also asserted that the Commission lacked an evidentiary basis for covering such non-competes. These commenters also claimed no State has prohibited non-competes for franchisees, and the Commission would therefore lack data from natural experiments to justify extending a final rule to the franchise context.

c. The Final Rule

The Commission continues to believe that, as many commenters attested, franchisor/franchisee non-competes may in some cases present concerns under section 5 similar to the concerns presented by non-competes between employers and workers. The comments from franchisors, franchisees, and others provide the Commission with further information about non-competes in the context of the franchisor/franchisee relationship, but the evidentiary record before the Commission continues to relate primarily to non-competes that arise out of employment. Accordingly, the final rule does not cover franchisor/franchisee non-competes. Non-competes used in the context of franchisor/franchisee relationships remain subject to State common law and Federal and State antitrust laws, including section 5 of the FTC Act.

VI. Section 910.4: Relation to State Laws and Preservation of State Authority and Private Rights of Action

In proposed § 910.4, the Commission addressed State laws and preemption. Based on comments, the Commission adopts a modified provision clarifying and explaining that States may continue to enforce laws that restrict non-competes and do not conflict with the final rule, even if the scope of the State restrictions is narrower than the final rule.[955]

A. The Proposed Rule

The NPRM contained an express preemption provision, proposed § 910.4, that explained the proposed rule preempted State laws inconsistent with the rule and did not preempt State laws that offer greater protection than the rule. The NPRM explained that when a State law offers greater protection than the rule, employers would be able to comply with both the NPRM and the State law. Thus, the proposed rule would have established a regulatory floor, but not a ceiling. The NPRM provided two hypothetical examples, one of a State law that would be inconsistent with, and therefore preempted by, proposed § 910.2(a) and one that would not because it satisfied the savings clause by offering greater protection and was not inconsistent with proposed part 910.[956]

B. Authority for Preemption

Numerous commenters supported the preemption of inconsistent State laws. Some commenters asserted the Commission lacks the legal authority to preempt State laws, including State common law, on non-competes because Congress allegedly did not confer the necessary authority to the Commission or because of federalism principles. They argued there must be clear Congressional intent to preempt State laws relating to non-competes.[957] Numerous commenters asserted the Commission lacks clear authority from Congress to preempt State laws on non-competes, arguing the FTC's statutory authority neither expressly nor impliedly authorizes preemption of non-competes. Commenters made similar points based on cases about the preemptive force of the Commission's UDAP regulations. For example, one commenter asserted the FTC may not have the authority to preempt less restrictive State laws, citing *American Optometric Association* v. *FTC,* in which the court noted the need for congressional authorization for the Commission to preempt an entire field of State laws that arise from the State's police powers.[958]

The Commission finds it has the authority to promulgate regulations that preempt inconsistent State laws under section 6(g), together with section 5, of the FTC Act. Even without an express preemption provision, Federal statutes and regulations preempt conflicting State laws. Under the Supreme Court's conflict preemption doctrine, a Federal statute or regulation impliedly preempts State laws when it is impossible for the regulated parties to comply with both the Federal and the State law, or when a State law is an obstacle to achieving the full purposes and objectives of the Federal law.[959] ''Federal regulations have no less pre-emptive effect than Federal statutes.'' [960] Indeed, even commenters who questioned the FTC's authority to preempt State laws agreed that if a Federal agency promulgates a rule pursuant to its Congressionally conferred authority, the rule preempts conflicting State laws.

As discussed in Parts II.A, II.B, and II.C, the Commission has the authority to promulgate this final rule. Accordingly, the final rule preempts conflicting State laws. To provide a clear explanation of the Commission's intent and the scope of preemption effected by the final rule, the final rule includes an express preemption

[955] State statutes, regulations, orders, or interpretations, including State common law, are referred to as ''State laws'' for ease of reference.

[956] NPRM at 3515.

[957] Comments on the Commission's authority to promulgate this final rule, separate from the issue of preemption of State law, are summarized in Part II.

[958] *Am. Optometric Ass'n* v. *FTC,* 626 F.2d 896, 910 (1980).

[959] *See, e.g., Federal Preemption: A Legal Primer,* Cong. Rsch. Serv., 23 (May 18, 2023) (Report R45825), *https://crsreports.congress.gov/product/pdf/R/R45825/3.*

[960] *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 153 (1982).

provision at § 910.4.[961] As discussed in Part VI.D, the Commission has modified proposed § 910.4 to make clear that even when the scope of non-compete prohibitions under a State law is less than that of the final rule, State authorities and persons may enforce the State law by, for example, bringing actions against non-competes that are illegal under the State law.

C. The Benefits of Preemption

Numerous commenters stated that variations in State laws chill worker mobility and expressed support for a uniform Federal standard. Some commenters explained that a preemption clause could bring clarity to the law's effect.

The U.S. Department of Justice commented that, due to the patchwork of State laws, a worker may be free to switch jobs in one jurisdiction but subject to a non-compete in another, creating uncertainty as to the non-compete's enforceability for both firms and workers.[962] In another commenter's view, the variation in State non-compete laws creates competitive disadvantages for companies in States that ban such clauses, necessitating a Federal ban.

Another commenter pointed out that most States have not passed statutes that ban or restrict non-competes, and that existing statutes cover different categories of workers and different wage levels, making it difficult for workers to know whether employers can enforce a particular non-compete. The commenter stated that variations in the legal authority of State attorneys general to take action on the public's behalf also limit the effectiveness of State restrictions on non-competes. A number of commenters explained that the difficulties arising from variations in State non-compete laws are exacerbated by the increase in remote and hybrid work, and workers who travel to work across State lines. Accordingly, many commenters favored a uniform Federal standard that would promote certainty for employers and workers. Even some commenters who generally opposed banning non-competes favored preemption to eliminate the patchwork of State laws that makes it difficult for workers to know the applicable law and encourages forum shopping by employers who want to bring suits in sympathetic jurisdictions.

Other commenters opposed preemption, asserting that State legislatures and courts are best situated to address non-competes and that the States have historically regulated this area. They contended States should be allowed to continue adjusting the scope of restrictions on non-competes including applicability to different types of workers, time span, and geographic scope.

The Commission finds that preemption of State laws, including State common law, that conflict with the final rule best mitigates the negative effects of the patchwork of State laws, including chilling worker mobility and undercutting competitive conditions in labor and product and services markets.[963] Preempting this patchwork with a Federal floor is particularly important given the increase in work across State lines, and remote and hybrid work, since the COVID–19 pandemic.

Moreover, as discussed in Part IX.C, preemption furthers a primary goal of the final rule: to provide a uniform, high level of protection for competition that is easy for both employers and workers to understand and makes it less likely that employers will subject workers to illegal non-competes or forum shop. Indeed, some commenters who otherwise opposed the proposed ban on non-competes regarded the patchwork itself burdensome to employers as well as workers and noted the rule would reduce burden by eliminating uncertainty and confusion caused by State law variations.[964] As described in Part IX.C, the Commission has determined that declining to issue this final rule and continuing to rely solely on State laws and case-by-case adjudication would be less effective than issuing a clear national standard. The Commission concludes, however, that supplementing the final rule with additional State authority and resources, so long as the State laws are not inconsistent with the final rule, will assist in protecting both workers and competition.

D. The Extent of Preemption

Some commenters strongly supported the NPRM but expressed concern that the preemption provision as proposed could undermine States' efforts to curb non-competes and would thereby undercut the final rule's effectiveness. These commenters stated that under one interpretation, proposed § 910.4 could preempt State laws that prohibit non-competes for workers earning less than a specified income because the law as a whole may not be deemed to provide greater protection than the final rule. In their view, such an interpretation would not further the final rule's goals, because States with income-based restrictions on non-competes rather than complete bans may offer covered workers protections against non-competes that the FTC's proposed rule would not provide, such as State enforcement, private rights of action, and certain financial penalties.[965]

These commenters also asserted that in many cases, State agencies and residents could be better positioned to respond to unlawful non-compete use specific to a particular State, but they would be unable to do so and dependent on the Commission if their laws were fully preempted. To enable concurrent enforcement of State laws that restrict the use of non-competes, thereby increasing the enforcement resources devoted to the issue, they recommended a ''savings clause'' that would exempt from preemption State laws that provide workers with protections substantially similar to or greater than those afforded by the

[961] Many FTC regulations, including regulations promulgated under section 6(g) of the FTC Act, include provisions addressing State laws and preemption. *See, e.g.,* Funeral Rule, 16 CFR 453.9 (exempting from preemption State laws that ''afford an *overall* level of protection that is *as great as, or greater than,* the protection afforded by'' the FTC's Rule) (emphasis added); Concerning Cooling Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.2(b) (exempting laws and ordinances that provide ''a right to cancel a door-to-door sale that is *substantially the same or greater* than that provided in this part'') (emphasis added); Business Opportunity Rule, 16 CFR 437.9(b) (''The FTC does not intend to preempt the business opportunity sales practices laws of any [S]tate or local government, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers *equal or greater protection*[.]'') (emphasis added); Mail, internet, or Telephone Order Merchandise Rule, 16 CFR 435.3(b) (''This part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are *equal to or greater* than those rights granted a buyer by this part.'') (emphasis added); Franchise Rule, 16 CFR 436.10(b) (''The FTC does not intend to preempt the franchise practices laws of any [S]tate or local government, except to the extent of any inconsistency with part 436. A law is not inconsistent with part 436 if it affords prospective franchisees *equal or greater protection*[.]'') (emphasis added); Labeling and Advertising of Home Insulation, 16 CFR 460.24(b) (preemption of ''State and local laws and regulations that are inconsistent with, or frustrate the purposes of this regulation''). *See also* Part II.B.

[962] Comment of Dep't of Justice Antitrust Div., FTC–2023–0007–20872 at 7.

[963] *See* Part IX.C.

[964] *See, e.g.,* Comment of Mech. Contractors Ass'n of Am., FTC–2023–0007–18218 (although opposed to the proposed rule, MCCA's position supports a single Federal rule and some level of preemption).

[965] *See* Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043, at 14–15 (''jurisdictions like Colorado, Illinois, Washington, and the District of Columbia have passed laws that ban non-competes for workers making under a specified income threshold and also include remedies provisions that authorize [S]tate agencies and residents to enforce the law''); *id.* at 9–11 (discussing State enforcement, private action, and damages in several State non-compete laws).

rule.[966] They also recommended that the rule not preempt State antitrust and consumer protection laws that may protect workers against non-competes and other restrictive employment arrangements as those laws can provide another enforcement avenue for State agencies and residents.

Another commenter recommended including a narrow reverse preemption provision so that relevant State laws in States that enact the Uniform Restrictive Employment Agreement Act[967] would not be preempted.[968] The comment asserted that by doing so, a final rule would preserve a role for the States and encourage their cooperation with the Commission, and also provide greater protections for employees than the proposed rule provided in several ways, such as allowing for greater enforcement and including classes of employers that the final rule would not cover.[969] The uniform law would ban non-competes for workers earning at or below the State's annual mean wage and would allow non-competes for those earning more, but apply limits and require disclosures for any non-compete.

Based on comments, the Commission has modified the final rule's preemption provision to clarify and explain that State laws that restrict non-competes and do not conflict with the final rule are not preempted. Section 910.4 also expressly references State common law, antitrust law, and consumer protection law, so that the intended scope of preemption is clear. State common law is expressly referenced because many States do not have a general non-compete statute, and the common law varies considerably.

Section 910.4(b) reflects the Commission's intent that States may continue to enforce in parallel laws that restrict non-competes and do not conflict with the final rule, even if the scope of the State restrictions is narrower than that of the final rule. That is, State laws cannot authorize non-competes that are prohibited under this final rule, but States may, for example, continue to pursue enforcement actions under their laws prohibiting non-competes even if the State laws prohibit a narrower subset of non-competes than this rule prohibits.

Accordingly, § 910.4(a) states that the final rule will not be construed to annul, or exempt any person from complying with, any State statute, regulation, order, or interpretation applicable to a non-compete, including, but not limited to, State antitrust and consumer protection laws and State common law. Rather, the final rule supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b).[970] These revisions provide that when States have restricted non-competes and their laws do not conflict with the final rule, employers must adhere to both provisions, and workers are protected by both provisions (including State restrictions and penalties that exceed those in Federal law).

For example, § 910.4 makes clear that the final rule does not preempt State law enforcement where a State bans non-competes only for workers earning below a certain amount and thus has a ban that is narrower than the final rule. Thus, if a State's law bars non-competes only for workers who earn less than $150,000 per year, the final rule and the law are different in scope of protection but not directly inconsistent. The State may continue to enforce its ban for workers earning less than $150,000, but all non-competes covered by the final rule, regardless of a worker's earnings, remain an unfair method of competition under the final rule and are therefore unlawful.

In response to concerns raised by commenters and to further bolster the consistent use of State laws, the Commission expressly recognizes State authority and the existence of private rights of action arising under State laws that restrict non-competes or bar unfair methods of competition. This is set forth in § 910.4, now titled "Relation to State laws and preservation of State authority and private rights of action," and is detailed in § 910.4(b). That section provides that unless a State law conflicts with the final rule and is superseded as described in § 910.4(a), part 910 does not limit or affect the authority of State attorneys general and other State agencies or the rights of a person to bring a claim or regulatory action arising under State laws, including State antitrust and consumer protection laws and State common law. Section 910.4(b) also explains that persons retain the right to bring a claim or regulatory action under State laws unless the laws conflict with the final rule and have been superseded as described in § 910.4(a).

These modifications are consistent with many commenters' recommendations and recognize State-based enforcement as a potent force that supplements Federal enforcement. In addition, the modifications, particularly those that explain § 910.4 does not exempt any person from complying with State laws, are intended to curb the use of preemption as a defense against State restrictions of non-competes.[971] Under the final rule, States may continue to play a critical role in restricting the use of non-competes. In contrast to the FTC Act, which cannot be enforced by private persons or State authorities,[972] the non-compete laws of numerous States provide for such enforcement.[973] Non-competes that are outside the FTC's jurisdiction or otherwise outside the scope of the final rule may be covered by State non-compete laws.[974] State penalties can be substantial and may be particularly important as a deterrent.

The modifications also reflect the Commission's long history of working in concert with States and encouraging concurrent enforcement of State laws to pursue common goals. While the Commission recognizes this will leave some variation in the enforcement exposure covered persons face among States, that variation will be greatly reduced by the final rule, which sets a

[966] Another comment recommended a similar formulation, which would exempt from preemption State laws that offer workers protection that is equal to or greater than the protection provided by the final rule. This commenter asserted that this formulation would allow existing State law to stand.

[967] *See* Uniform Restrictive Employment Agreement Act, *supra* note 332 at sec. 5, sec. 8.

[968] *See* Comment of ULC, FTC–2023–0007–20940.

[969] *See also* Part II.E (discussing comments on the Commission's jurisdiction under the FTC Act).

[970] The effect of part 910 is limited to non-competes. It would not broadly preempt other uses of State antitrust and consumer protection law.

[971] *See, e.g., Sprietsma* v. *Mercury Marine,* 537 U.S. 51, 62–70 (2002) (finding Federal Boat Safety Act did not relieve defendant from liability for State common law tort claim because it did not expressly nor impliedly preempt State common law).

[972] *See, e.g.,* FTC, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority App. A (May 2021), *https://www.ftc.gov/about-ftc/mission/enforcement-authority; Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986, 997 (D.C. Cir. 1973).

[973] Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043 at 7 ("jurisdictions like Colorado, Illinois, Washington, and the District of Columbia have passed laws that ban non-competes for workers making under a specified income threshold and also include remedies provisions that authorize state agencies and residents to enforce the law"). *See also* 2023 Cal. Legis. Serv. Ch. 157 (S.B. 699) West (adding Cal. Bus. & Prof. Code sec. 16600.5, Sept. 1, 2023) (providing for a private right of action in regard to California's non-compete statute).

[974] *See* Part II.E (discussing the Commission's jurisdiction under the FTC Act). *See, e.g.,* Cal. Bus. & Prof. Code secs. 16600–16602 (broad coverage); Minn. Stat. Ann. sec. 181.988, subdiv. 1 (b) ("'Employer' means any individual, partnership, association, corporation, business, trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.").

floor that applies nationally.[975] As it has done in the past, the Commission will ''share the field'' with States and partner with them in the battle against abusive non-competes.[976] As set out in Part IX.C, the Commission considered and rejected the alternative of relying on existing State laws alone. Consistent with that determination, the Commission declines to adopt the suggestion from a comment that relevant State laws in States that enact the Uniform Restrictive Employment Agreement Act not be preempted.

VII. Section 910.5: Severability

The Commission stated in the NPRM that it may adopt a severability clause[977] and it received a comment stating the Commission should adopt such a clause to protect the rights and securities of workers if one part of the rule or one category of workers were invalidated. The Commission adds § 910.5, together with this section, to clarify the Commission's intent.[978]

Section 910.5 states that if any provision of the final rule is held to be invalid or unenforceable either facially, or as applied to any person or circumstance, or stayed pending further agency action, such invalidity shall not affect the application of the provision to other persons or circumstances or the validity or application of other provisions. Section 910.5 also states that if any provision or application of the final rule is held to be invalid or unenforceable, the provision or application shall be severable from the final rule and shall not affect the remainder thereof. This provision confirms the Commission's intent that the remainder of the final rule remain in effect in the event that a reviewing court stays or invalidates any provision, any part of any provision, or any application of the rule—including, for example, an aspect of the terms and conditions defined as non-competes, one or more of the particular restrictions on non-competes, or the standards for or application to one or more categories of workers.

The Commission finds that each of the provisions, parts of the provisions, and applications of the final rule operate independently and that the evidence and findings supporting each provision, part of each provision, and application of each provision stand independent of one another. In this final rule, the Commission determines that certain conduct is an unfair method of competition in Part IV.B and Part IV.C and differentiates between senior executives and workers who are not senior executives with respect to existing non-competes. The final rule distinguishes between the two in both the final rule's operation and in the bases for adopting the final rule. The difference in restrictions among different workers, and the distinct bases for adopting the restrictions, is described in detail in Parts IV.B and IV.C. The Commission also estimates the effect of excluding senior executives entirely from the rule in Part X.F.11 and finds that the benefits of covering only those workers who are not senior executives justify the costs.

The Commission promulgates each provision, part of each provision, and application of each provision as a valid exercise of its legal authority. Were any provision, part of any provision, or any application of any provision of the final rule stayed or held inapplicable to a particular category of workers, to particular conduct, or to particular circumstances, the Commission intends the remaining elements or applications of the final rule to prohibit a non-compete between covered persons and covered workers as an unfair method of competition.

In Parts IV.B and IV.C, the Commission finds that the use of non-competes is an unlawful unfair method of competition under section 5 of the FTC Act because it is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in several independent ways. In support of its finding that the use of non-competes is an unlawful unfair method of competition for workers who are not senior executives, the Commission additionally finds that the use of non-competes is exploitative and coercive in Part IV.B.2.b.

The Commission relies principally on empirical evidence regarding the effects of changes in non-compete enforceability, both when finding in Part IV.B.3.a and Part IV.C.2.c.ii that the use of non-competes tends to negatively affect competitive conditions in labor markets, and when finding in Part IV.B.3.b and Part IV.C.2.c.i that the use of non-competes tends to negatively affect competitive conditions in product and service markets. The Commission further analyzes and quantifies these effects in Part X.F.6, including sensitivity analyses that compare the estimated effects of smaller changes in enforceability and larger changes in enforceability.

Based on this empirical evidence and analysis, the Commission believes that more limited application of the rule—which might result were a court to render the final rule inapplicable in some way—may be equivalent to smaller changes in the enforceability of non-competes in the empirical literature. As described in Part IV.B.3.a and IV.B.3.b, smaller changes in enforceability change the magnitude, but not the directional nature, of the labor market and product and service market effects.[979] Accordingly, consistent with the findings related to the use of certain non-competes being an unfair method of competition in Part IV, the empirical evidence on the use of non-competes, the regulatory impact analysis in Part X, and its expertise, the Commission finds that any smaller reduction in enforceability resulting from circumstances in which a court stays or invalidates some application of the final rule would not impair the function of the remaining parts of the final rule nor would it undermine the justification or necessity for the final rule as applied to other persons, conduct, or circumstances. The Commission intends for any remaining application of the final rule to be in force because it is committed to stopping any and all unlawful conduct related to the use of certain non-competes and the Commission finds every use of a non-compete covered by the final rule to be an unlawful unfair method of competition under section 5 of the FTC Act.[980]

In Part X, the Commission conducts a regulatory impact analysis for the final rule as applied to all workers, as applied to all workers other than senior executives, and as applied to senior executives. The Commission finds that the asserted benefits of the use of non-competes do not justify the harms from the use of non-competes for any category of workers. The Commission's findings and differential analysis demonstrate that the asserted benefits from the use of non-competes do not justify the harms from the use of non-competes for higher- or lower-wage earners, including, for example, lower-wage workers defined as workers whose total annual compensation is less than $151,164.

[975] The Commission has taken this position in previous regulations. *See, e.g.,* Part 429—Cooling-Off Period for Door-to-Door Sales, 37 FR 22934 (Oct. 26, 1972).

[976] For a previous example, *see* Trade Regulation Rule; Funeral Industry Practices, 47 FR 42260, 42287 (Sept 24, 1982) (noting the purpose of the rule's provision addressing relation of the rule to State law is ''to encourage [F]ederal-[S]tate cooperation by permitting appropriate [S]tate agencies to enforce their own [S]tate laws that are equal to or more stringent than the trade regulation rule'').

[977] NPRM at 3518–19 & n.429.

[978] In the NPRM, proposed § 910.5 addressed the compliance date.

[979] *See also* Part X.F.6.

[980] *See* NPRM at 3518–19.

For instance, if, for any reason, a reviewing court were to stay or invalidate the final rule as applied to senior executives, the Commission would intend for the remainder of the final rule to apply to all workers other than senior executives. Likewise, if a reviewing court were to stay or invalidate the final rule to apply to workers other than senior executives, the Commission would intend for the remainder of the final rule to apply to senior executives. Additionally, if a reviewing court were to stay or invalidate the final rule as applied to some other subset of workers, the Commission would intend for the remainder of the final rule to apply to all but those workers. So, for example, if a reviewing court were to stay or invalidate the final rule as applied to workers other than lower-wage workers—defined as workers whose total annual compensation is less than $151,164—the Commission would intend for the remainder of the final rule to apply to those workers, and further notes the evidentiary record demonstrates that application of the rule to those remaining workers would be beneficial and achieve lawful objectives. In the same way, if a reviewing court were to stay or invalidate the provision of the final rule regarding enforcing an existing non-compete or the notice requirement, the Commission would intend for the remainder of the final rule to apply. As described in Part IX.C, although the Commission concludes that a national standard is most effective, a number of States currently apply different standards to different workers and States also apply a myriad of legal standards to non-competes generally. Accordingly, were a reviewing court to stay or invalidate a particular application of the final rule, a covered person could simply comply with the provisions, parts of provisions, or applications of the final rule that remain in effect.

The Commission's adoption of the final rule does not hinge on the same restrictions applying to all non-competes, on the final rule applying to all workers, or on joint adoption or operation of each provision. Accordingly, the Commission considers each of the provisions adopted in the final rule to be severable, both within each provision and from other provisions in part 910. In the event of a stay or invalidation of any provision, any part of any provision, or of any provision as it applies to certain conduct or workers, the Commission's intent is to otherwise preserve and enforce the final rule to the fullest possible extent.

VIII. Section 910.6: Effective Date

The Commission adopts a uniform effective date of 120 days after publication of the final rule in the **Federal Register**. The final rule will go into effect, and compliance with the final rule will be required, on that date. Based on comments urging the Commission to reduce the compliance period from the 180-day period proposed in the NPRM so that the benefits of the final rule may be obtained as soon as possible, the Commission's findings that the use of non-competes is exploitative and coercive for the vast majority of workers, and modifications in the final rule that reduce covered entities' compliance burden, the Commission modifies the date that compliance with the final rule is required from 180 days to 120 days after publication in the **Federal Register**.

A. The Proposed Rule

In the NPRM the Commission proposed a compliance date of 180 days after publication of the final rule in the **Federal Register**. The Commission stated that, during the compliance period, employers would need to: (1) assess whether to implement replacements for existing non-competes (such as NDAs), draft those covenants, and then negotiate and enter into those covenants with the relevant workers; (2) remove any non-competes from employment contracts that they provide to new workers; and (3) rescind, no later than the date that compliance is required, any non-competes that it entered into prior to the compliance date.[981] The Commission preliminarily found that 180 days would be enough time for employers to accomplish all of these tasks.[982] The NPRM would have also required employers to provide the notice specified in proposed § 910.2(b)(2) within 45 days of rescinding the non-compete.[983]

The Commission also stated that it proposed to establish an effective date of 60 days after the final rule is published in the **Federal Register** even though compliance would not be required for 180 days.

[981] *Id.* at 3483, 3515–16. In the NPRM and herein, the Commission refers to the period between the publication of the final rule and the date on which compliance with the final rule is required as the ''compliance period.'' *See id.* at 3515.

[982] *Id.* at 3516.

[983] *Id.* (addressing compliance with proposed § 910.2(b)(2)).

B. Comments Received

Many worker commenters urged the Commission to act as quickly as possible to bring the final rule into force, citing the current acute, ongoing harms to their earnings, mobility, quality of life, and other significant impacts and noting the final rule's potential for immediate relief if their non-compete was no longer in force. Representatives of many local governments from different States contended that the negative effects of non-competes and the anticipated benefits of the proposed rule justified allowing the Commission's rule to go into effect as soon as possible. Other commenters supported the compliance date as proposed or favored other measures to obtain the anticipated benefits of the final rule as soon as practicable. Another commenter contended that the 180-day compliance period was sufficient to allow businesses to ensure compliance and suggested that the Commission move the effective date back to the day or the day after the final rule is published.[984]

Several commenters suggested the Commission adopt a longer compliance period of one year, 18 months, or two years. These commenters generally stated that businesses need more time to adjust their compensation packages, contracting practices, and employee policies to comply with the rule and to protect their intellectual property. At least one commenter also argued the Commission should adopt a two-year compliance period to allow courts sufficient time to hear and resolve challenges to the final rule. One commenter asserted that the compliance period would be especially burdensome for smaller business. Another industry commenter argued application of the rule should be phased in over time.

C. The Final Rule

The Commission adopts a 120-day compliance period. As outlined in Parts IV.B and IV.C, based on both voluminous comments from the public as well as a significant body of empirical evidence, the Commission finds that the use of non-competes is coercive and exploitative for the vast majority of workers across different earnings levels and occupations and that for all workers it tends to negatively affect competitive conditions in labor markets and also tends to negatively affect competitive conditions in product and service markets—and that such actual harms are in fact currently ongoing. The Commission adopts a 120-

[984] The comment did not consider the limitations on the effective date imposed by the CRA.

day compliance period to stop these unfair methods of competition as soon as practicable. The Commission finds that a 120-day period appropriately balances the interests at hand.

The Commission has taken several steps in the final rule to make compliance as simple as possible for employers. These steps make it practicable and reasonable to require compliance within 120 days. The final rule allows regulated entities to enforce existing non-competes with senior executives, who commenters contended are most likely to have complex compensation arrangements that include non-competes. Accordingly, there is no need for a lengthy compliance period, as the most complex existing arrangements are left in place. The Commission also eliminated the rescission requirement for all workers. Under the final rule, employers will not need to rescind (*i.e.,* legally modify) existing non-competes for any workers; rather, employers will simply be prohibited from enforcing them after the effective date of the final rule and will be required to provide the notice in § 910.2(b)(1).[985] While employers are required to provide notice to workers with existing non-competes who are not senior executives, under § 910.2(b), the final rule provides model safe harbor language that satisfies the notice requirement.[986] The final rule gives employers several options for providing the notice—on paper, by mail, by email, or by text.[987] And employers are exempt from the notice requirement where the employer has no record of a street address, email address, or mobile telephone number for the worker.[988] Furthermore, as explained in Part IV.E, the Commission has simplified the notice requirement to facilitate employers' ability to comply by simply sending a mass communication such as a mass email to current and former workers.

Starting on the effective date of the final rule, employers will be prohibited from entering into new non-competes barred by this final rule and from enforcing non-competes that the employer entered into prior to that date with workers other than senior executives. Prior to the effective date employers will need to identify each of their workers with existing non-compete agreements and can assess which, if any, are senior executives and determine if they wish to maintain those non-competes. Employers will also need to assess and revise, if necessary, any employment policies or handbooks that purport to bind workers even after the effective date.

To the extent they have confidential business information, trade secrets, or other investments to protect with respect to a particular worker, employers will be able to assess their options to lawfully protect that information. However, new protections will be unnecessary in many cases, because, for example, 95.6% of workers subject to non-competes are already subject to an NDA.[989] In the rare case where compensation might be tied to a non-compete that is not with a senior executive, the employer and worker can determine whether to amend their original employment agreement. The Commission concludes that the 120-day compliance period gives employers more than sufficient time to complete these tasks. For example, firms routinely complete entire onboarding processes for new employees in much shorter timeframes than 120 days.

The Commission also finds that the 120-day compliance period gives small businesses enough time to comply with the final rule. Although small businesses may have limited staff and funds compared to larger firms, they also have fewer workers, and the exclusion for existing non-competes for senior executives will relieve the compliance burden altogether for those small firms that use non-competes only with those workers. Moreover, the steps the Commission has taken to reduce the compliance burden of § 910.2(b) will further simplify and streamline compliance for small businesses.

The Commission has also determined it is not necessary to extend the compliance period to give courts time to adjudicate pending non-compete litigation because, as described in Part V.C.3, the Commission has adopted § 910.3(b), which provides that the final rule does not apply where a cause of action related to a non-compete arose prior to the effective date. The Commission also finds that a longer compliance period is not needed to hear and resolve challenges to the final rule, especially given the ability of a challenger to seek a preliminary injunction.

In sum, the Commission finds that due to modifications reducing covered entities' burden to comply with the final rule, a compliance period of 120 days is sufficient time to comply with the final rule. Given these changes the longer compliance period proposed in the NPRM is no longer warranted and would allow the use of certain non-competes that are an unfair method of competition—and their related harms and costs—to continue for longer than necessary. The substantial benefits to competition and to workers of the final rule taking effect as soon as possible outweigh any concerns about potential difficulties in meeting an earlier compliance date.

The Commission also adopts a 120-day effective date. The Commission concludes that it would ease the burden of implementation and reduce possible confusion by having a uniform date for when the final rule goes into effect and when compliance under the final rule is required. A 120-day effective date complies with the requirements of the Congressional Review Act that a "major rule" may not take effect fewer than 60 days after the rule is published in the **Federal Register**.

IX. Alternative Policy Options Considered

The Commission proposed to ban non-competes categorically, with a limited exception for non-competes entered into by a person who is selling a business entity. In the NPRM, the Commission discussed and sought comment on potential alternatives to the proposed categorical ban, including discrete alternatives that would implement a rebuttable presumption of unlawfulness or apply different standards to different categories of workers.[990] The Commission also sought comment on whether a rule should apply a different standard to senior executives, and whether, in lieu of the proposed rule, the Commission should adopt a disclosure rule or reporting rule.[991] The Commission sought comment on all aspects of potential alternatives, including whether the Commission should adopt one of the identified alternatives or some other alternative instead of the proposed rule.[992] The Commission also sought comment on the extent to which a uniform Federal standard for non-competes would promote certainty for employers and workers.[993]

The Commission received many comments on these questions, as well as on the question of whether the Commission should issue a Federal standard for non-competes or continue relying on existing law and case-by-case litigation to address harms from non-

[985] *See* Part IV.E (describing why the Commission is not finalizing a rescission requirement).

[986] § 910.2(b)(4) and (5).

[987] § 910.2(b)(2)(ii).

[988] § 910.2(b)(3).

[989] Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 44.

[990] NPRM at 3516.

[991] *Id.* at 3519–21.

[992] *Id.* at 3521.

[993] *Id.* at 3497.

competes. In this section, the Commission discusses the comments received regarding these alternatives and the reasons it has decided not to adopt them. This Part IX addresses these comments but does not address alternatives related to the design of specific regulatory provisions, which are discussed in the Part addressing the relevant provision.

A. Categorical Ban vs. Rebuttable Presumption

1. The Rebuttable Presumption Alternative Generally

While preliminarily finding that a categorical ban would best achieve the proposed rule's objectives, the Commission nevertheless sought comment on the alternative of a rebuttable presumption, under which it would be presumptively unlawful for an employer to use a non-compete, but a non-compete would be permitted if the employer could meet a certain evidentiary burden or standard.[994] The Commission also sought feedback on the form any rebuttable presumption should take.[995]

Most commenters that addressed this issue, including those both supporting and opposing the proposed rule, discouraged the Commission from including a rebuttable presumption in the final rule. These commenters contended that a rebuttable presumption would add complexity and uncertainty to the rule.

Supporters of the proposed rule asserted that a rebuttable presumption would undermine the rule's effectiveness, failing to deter employers from imposing non-competes while making litigation too uncertain and costly for most workers to pursue. Some of these commenters contended that a rebuttable presumption would also do little to reduce the chilling effects of non-competes. They argued that employers would continue to impose non-competes that are unlikely to survive a rebuttable presumption.

Many commenters critical of the proposed rule opposed a rebuttable presumption for essentially the same reasons they opposed the rule in general. They contended that, in States where non-competes are generally enforceable, a rebuttable presumption would inappropriately shift the burden of proof from workers to employers. Many of these commenters specifically opposed a rebuttable presumption that would use a test similar to antitrust law's ''quick look'' analysis, contending that the Commission's analysis of empirical research on non-competes cannot substitute for the lengthy experience courts usually have with a particular restraint before giving it quick-look treatment. A few commenters contended that a rebuttable presumption would increase litigation and raise employers' compliance costs by complicating the determination of whether a given non-compete is likely valid, requiring more lawyer involvement in drafting clauses and more reliance on courts to determine a non-compete's validity.

A few commenters supported a rebuttable presumption, arguing the Commission's proposed ban on non-competes was too blunt an instrument. Some also contended that a rebuttable presumption would offer a more flexible approach akin to the majority of State law approaches. At least one commenter stated a rebuttable presumption would make the final rule more likely to survive judicial review. A few commenters stated a rebuttable presumption would provide more protections than most State laws by allowing only non-competes that the commenter contended are not unfair to the worker, such as where highly paid workers agree to narrow non-competes in exchange for bargained-for consideration. One commenter argued a rebuttable presumption would enable the Commission to accrue more experience adjudicating non-competes and assessing their impact on competition.

Commenters advocating for a rebuttable presumption generally preferred a test focusing on one or more factors, including: the non-compete's geographic scope and duration; the presence and amount of any liquidated damages or penalty provision; whether the clause is narrowly tailored to prevent competition with actual competitors; the restrained worker's duties and income; and the availability of less restrictive alternatives. A few commenters supported a ''preponderance'' (as opposed to a ''clear and convincing'') standard to permit as many non-competes as possible but acknowledged that such a rule may be so similar to the existing common law as to be redundant.

After carefully reviewing and considering the comments, the Commission concludes that a rule implementing a rebuttable presumption is not preferrable to the final rule as adopted. Based on the Commission's expertise, including careful review and consideration of the entire rulemaking record, the Commission finds that a rebuttable presumption would be less effective than the final rule for achieving the Commission's stated goals. A rebuttable presumption also presents administrability concerns that the final rule does not.

Overall, the comments reinforced the Commission's concerns that a rebuttable presumption would foster substantial uncertainty about the validity of a given non-compete and would do little to reduce the *in terrorem* effects of non-competes. Research demonstrates that employers maintain non-competes even where they likely cannot enforce them,[996] that many workers are not aware of the applicable law governing non-competes or their rights under those laws,[997] and that the degree to which non-competes inhibit worker mobility is affected not only by whether a non-compete is actually enforceable but also on whether a worker believes their employer may enforce it.[998] Accordingly, the Commission concludes that a rule implementing a rebuttable presumption would be inadequate to reduce the prevalence of non-competes, their chilling effect on worker mobility, or their tendency to negatively affect competitive conditions. Relatedly, the Commission believes a rebuttable presumption would increase litigation costs for workers and employers relative to the final rule as adopted.

The Commission also believes that, in important respects, a rebuttable presumption for non-competes is inconsistent with the Commission's findings in this final rule. As discussed in greater detail in Part IX.C, a rule that provides for case-by-case, individualized assessment of non-competes is unlikely to address the negative effects of non-competes on competition in the aggregate. In addition, by focusing on considerations specific to the worker and the employer, a rebuttable presumption is unlikely to address the external effects of non-competes (*i.e.,* the effects on persons other than the parties to the non-compete), including their negative effects on the earnings of workers who are not covered by non-competes.

The Commission recognizes there may be some benefits to a rebuttable presumption relative to the status quo. Because it puts the burden of proof on employers, a rebuttable resumption would be stricter than the current law in States where non-competes are allowed, and research suggests even a small decrease in enforceability would increase worker mobility, raise wages,

[994] *Id.* at 3517.

[995] *Id.* at 3517–19.

[996] *See* Part IV.B.2.b.

[997] *See* Prescott & Starr, *supra* note 413.

[998] Starr, Prescott, & Bishara, *supra* note 68 at 633, 652, 664.

and promote innovation.[999] But the categorical ban adopted in the final rule would have greater benefits in these respects without the drawbacks explained in this Part IX.A.1.

2. Discrete Alternatives Related to Rebuttable Presumptions

In the NPRM, the Commission also sought comment on four discrete alternatives to the proposed rule: Alternative #1 (categorical ban below some threshold, rebuttable presumption above); Alternative #2 (categorical ban below some threshold, no requirements above); Alternative #3 (rebuttable presumption for all workers); and Alternative #4 (rebuttable presumption below some threshold, no requirements above).[1000]

As explained in Part IX.A.1, the Commission finds a rebuttable presumption would be ineffective in addressing the harms to competitive conditions caused by non-competes. For the same reasons, the Commission declines to adopt Alternatives #1, #3, and #4, all of which contemplated a rebuttable presumption for some or all workers.

While the vast majority of commenters supported the Commission's proposal to ban non-competes categorically for all workers, a number of commenters suggested that the Commission permit non-competes with senior executives (or other highly skilled or highly paid workers) and other workers. The Commission addresses these comments in Part IV.C and V.D.1, where it finds that such non-competes tend to negatively affect competitive conditions in labor markets and in product and service markets, and that non-competes are also exploitative and coercive for workers other than senior executives. For these reasons, the Commission declines to adopt Alternative #2, which contemplated imposing no requirements on workers above a certain wage or other threshold.

B. Other Discrete Alternatives

1. Disclosure Rule

In the NPRM, the Commission sought comment on the potential alternative of adopting disclosure requirements related to non-competes.[1001] The Commission explained that the rule could, for example, require an employer to disclose to a worker prior to making an employment offer that the worker will be subject to a non-compete and/or to explain the terms of the non-compete and how the worker would be affected by signing it.[1002] The Commission noted that a 2021 study by Starr, Prescott, and Bishara finds that disclosure of non-competes to workers prior to the acceptance of a job offer was associated with increased earnings, rates of training, and job satisfaction.[1003] The authors of the study, however, cautioned that their analysis ''should not be interpreted causally,'' a point the Commission noted in explaining why it gave minimal weight to the study.[1004] The Commission preliminarily concluded in the NPRM that a disclosure requirement would not achieve the objectives of the proposed rule.[1005]

In general, commenters stated they agreed with the Commission's preliminary view that, while there may be some benefits to a disclosure rule, it would not achieve the objectives of the rule. Workers and worker advocacy groups stated that non-competes are often presented to workers on their first day on the job, or after they accept an employment offer. Although these commenters generally supported a comprehensive ban, they noted that if the Commission did not pursue a ban, a disclosure requirement may help improve workers' awareness of non-competes before accepting an offer. On the other hand, these commenters contended that a disclosure rule would do little to reduce the prevalence of non-competes, because workers have little choice but to accept non-competes, which are typically presented as ''take-it-or-leave-it'' terms and are ubiquitous in many fields.

Many trade organizations, advocacy groups, and academics who were generally supportive of the rule stated that a disclosure rule would fail to mitigate the competitive harms caused by non-competes in the aggregate. While acknowledging a disclosure rule may ameliorate some problems related to worker awareness of non-competes, these commenters contended that non-competes are unfair and coercive because employees generally lack adequate bargaining power to refuse to sign or bargain over non-competes even when they are presented at the time of an employment offer, and that a disclosure rule would therefore not have the effect of making non-competes less unfair or coercive. A few commenters opposed a disclosure rule generally but urged the Commission to adopt a disclosure requirement for any non-competes permitted by the final rule, including for any non-competes entered into by a person who is selling a business.

On the other hand, some trade organizations, advocacy groups, and businesses that generally opposed the rule advocated for the Commission to adopt a disclosure rule in lieu of the proposed categorical ban. These commenters contended that a disclosure rule would substantially mitigate the unfairness of non-competes that are entered into without adequate notice to the worker without drastically altering the legal status quo, thereby maintaining the protections for trade secrets, training expenditures, and intellectual property they contend that non-competes provide. They stated that eight States and the District of Columbia have statutory notice requirements for non-competes.

Most of the commenters who supported a disclosure rule also argued that rather than demonstrating that non-competes tend to negatively affect competitive conditions, the available evidence merely demonstrates opportunistic behavior by employers (such as presenting non-competes only after prospective workers have taken hard-to-reverse steps towards accepting employment) and workers (such as seeking to be excused from a non-compete after recognizing its impact on future job prospects). These commenters asserted that a disclosure rule would be better suited to address these types of opportunistic behaviors than a categorical ban.

Some commenters based their support for a disclosure rule on their contention that workers have sufficient bargaining power to negotiate over non-competes when they are provided with notice of them. One such commenter pointed to the cited research by Starr, Prescott, and Bishara finding that disclosure of non-competes to workers prior to acceptance of a job offer may increase earnings, increase rates of training, and increase job satisfaction.[1006] The commenter also referenced the study's finding that of those workers who did not attempt to negotiate a non-compete, 52% reported that they thought the terms were reasonable and 41% reported that they assumed the terms to be non-

[999] Johnson, Lavetti, & Lipsitz, *supra* note 388 (decreasing enforceability increases worker mobility and earnings); Johnson, Lipsitz, & Pei, *supra* note 526 at 2–5 (enforceability negatively impacts patent quantity and quality).

[1000] NPRM at 3519.

[1001] *Id.* at 3521 n.446 (noting certain provisions in the Commission's Franchise Rule (16 CFR part 436), such as § 436.5(i) and (q), require non-competes to be disclosed to a franchisee).

[1002] *Id.* at 3521.

[1003] *Id.,* citing Starr, Prescott, & Bishara, *supra* note 68 at 75.

[1004] *Id.* at 3487, citing Starr, Prescott, & Bishara, *supra* note 68 at 73.

[1005] *Id.* at 3521.

[1006] Starr, Prescott, & Bishara, *supra* note 68 at 75.

negotiable.[1007] The commenter contended that a disclosure rule would decrease the number of workers who assumed non-competes were non-negotiable.

A few commenters contended a disclosure rule may be more likely to withstand judicial review because the Commission could promulgate a disclosure rule in this context under its UDAP authority pursuant to the Magnuson-Moss Act. In addition, a few commenters requested the Commission adopt timing rules for when the disclosure must be provided, such as by requiring that employers disclose a non-compete in the job advertisement, at the time of the job offer, or at least five business days prior to the worker's deadline to sign an employment agreement.

The Commission declines to adopt a disclosure rule.[1008] The Commission finds that merely ensuring workers are informed about non-competes would not address the negative externalities non-competes impose on workers, rivals, and consumers. As described in Part IV.B.3.a.ii, non-competes suppress wages for workers across the labor force, including workers who are not subject to non-competes. Ensuring that a worker who enters into a non-compete is informed about the non-compete does not address the harm to these other workers. In addition, it does not address the ways in which non-competes harm consumers and the economy through reduced new business formation and innovation, described in Part IV.B.3.b. In other words, non-competes have negative spillover effects on workers, consumers, businesses, and the economy that disclosure cannot remediate.

The Commission also finds that a disclosure requirement would not be as effective as a categorical ban in addressing the exploitation and coercion of workers through non-competes. As described in Part IV.B.2.b.i, there is a significant imbalance in bargaining power between employers and most workers, which is particularly acute in the context of negotiating employment terms such as non-competes. And, as many comments from workers and worker advocacy groups attest, non-competes are often included in standard-form contracts and offered on a take-it-or-leave-it basis.[1009] As a result, workers have limited practical ability to negotiate non-competes even if they are notified of such clauses prior to accepting their employment offer. Indeed, as described in Part IV.B.2.b.i, the comment record reflects that very few workers (other than senior executives) bargain over their non-competes—whether the worker knew about the non-compete before the job offer and understood its terms, or not.

The Commission gives the findings of the Starr, Prescott, and Bishara study on the impacts of disclosure little weight because the study reflects only correlation, not causation, with respect to the effects of a disclosure rule (similar to the "use" studies the Commission gives little weight to, as described in Part IV.A.2). The study merely compares a set of workers whose firms disclosed the non-compete and workers whose firms did not, and any correlation may thus be attributable to confounding factors. This comparison—similar to comparisons of workers with and without non-competes—may be polluted by differences between firms that opt to disclose non-competes and those that do not, or differences between workers who are the beneficiaries of disclosure versus those who are not.[1010] For example, it is possible that firms that disclose non-competes are also more responsible employers in general that tend to pay their workers more, train their workers more, and have more satisfied workers. The Commission therefore does not find that this evidence represents a causal relationship between the disclosure of non-competes and earnings and other outcomes. Moreover, the weight of the evidence discussed in Parts IV.B and IV.C finding increased earnings, new business formation, and innovation from the final rule significantly surpass the potential effects of disclosing non-competes.

One commenter stated that the Starr, Prescott, and Bishara study suggests that a disclosure rule would decrease the number of workers who assume a non-compete with which they are presented is non-negotiable. The study suggests that the potential effects of a disclosure rule in this respect would be, at best, limited.[1011] For the reasons described in this Part IX.B.1, the Commission is skeptical that a disclosure requirement would meaningfully increase the share of workers who actually bargain over non-competes.

A disclosure rule may address some deceptive or misleading practices in connection with non-competes. However, considering that a disclosure rule is not likely to significantly reduce the negative competitive impacts of non-competes on labor markets and on product and service markets, this benefit is significantly outweighed by the limitations of a disclosure rule.[1012]

The Commission further concludes that a disclosure rule is not necessary for non-competes in the context of sales of a business entity. As described in Part V.A, persons selling a business entity tend to have bargaining power in the context of the transaction, and the Commission is unaware of evidence that deceptive and misleading practices in connection with non-competes (such as waiting to disclose a non-compete until after the job offer) are common with respect to business sales.

2. Reporting Rule

In the NPRM, the Commission sought comment on a reporting rule as a potential alternative to the proposed rule.[1013] The Commission stated that it could require employers to report certain information to the Commission relating to their use of non-competes; for example, employers that use non-competes could be required to submit a copy of the non-compete to the Commission.[1014] As the Commission explained, a reporting rule might enable the Commission to monitor the use of non-competes and could potentially discourage employers from using non-competes that are not clearly justified under existing law.[1015]

The Commission stated in the NPRM that it did not believe a reporting rule would achieve the objectives of the proposed rule. The Commission stated that merely requiring employers to report their non-competes to the Commission would not meaningfully reduce the prevalence of non-competes and would therefore fail to reduce the negative effects non-competes have on competitive conditions in labor markets and product and service markets.[1016] At the same time, the Commission stated that a reporting rule would impose

[1007] *Id.* at 72.

[1008] The Commission notes that the Franchise Rule requires franchisors to disclose any non-compete that franchisees must impose on managers. 16 CFR 436.5(o)(3). These non-competes are prohibited by the final rule. *See* Parts III.D and V.D.6.

[1009] *See* Part IV.B.2.b.i.

[1010] Indeed, the authors of this study note that "unobservables may more plausibly account for these estimates." *See* Starr, Prescott, & Bishara, *supra* note 68 at 77 n.35.

[1011] *Id.* at 72. The study finds that 38% of workers asked to sign a non-compete before accepting a job offer assumed they could not negotiate, versus 48% of workers asked after accepting a job offer.

[1012] The Commission considered whether a disclosure rule would be appropriate for senior executives, but concludes that it is not because it would fail to address many of the ways in which non-competes are restrictive and exclusionary and tend to negatively affect competitive conditions.

[1013] *Id.* at 3521.

[1014] *Id.*

[1015] *Id.*

[1016] *Id.*

significant and recurring compliance costs on employers.[1017]

Most commenters addressing this topic agreed with the Commission's preliminary view that a reporting rule would not achieve the goals of the proposed rule. At least one business opposed any reporting requirement due to the cost of compliance and to avoid exposing any confidential information contained in employment agreements. At the same time, some commenters stated that a reporting rule may assist enforcement and provide quantitative data sets to measure compliance, while recognizing that such benefits would lose significance if the Commission were to adopt the proposed rule. One commenter suggested that, to improve the effectiveness of any reporting rule, any such rule should include a provision stating that any non-competes which were not properly disclosed to State and Federal authorities are null and void.

The Commission declines to adopt a reporting rule. A reporting rule would impose recurring compliance costs on employers, compared with the proposed rule, which largely imposes one-time costs. At the same time, a reporting rule would be inadequate to address the negative effects of non-competes on competitive conditions in labor markets and product and service markets, or the Commission's concerns about exploitation and coercion through the use of non-competes, since it would allow for the continued use of non-competes.

3. Limitations on Scope and Duration

In addition to those alternatives listed in the NPRM, a few commenters suggested adopting an alternative rule that allows non-competes but sets a limitation on their geographic scope and/or duration. Some commenters suggested a geographic limit of five, ten, or thirty miles and/or a temporal limit of six months or one, two, or three years, while others suggested a fact-specific requirement that the geographic scope or duration of a non-compete be "reasonable." Many of these commenters cited State laws that take a similar approach.

A few commenters opposed this alternative. One worker advocacy group argued that any bright-line limit may end up serving as a default, encouraging employers to impose non-competes of the maximum allowable scope or duration even if that limit is longer or broader than they otherwise would have imposed. At least one academic commenter argued that setting geographic scope or duration limitations on non-competes is unlikely to have a substantial impact, pointing to the continued prevalence of overly broad non-competes despite State laws designed to set upper limits on geographic scope and duration.

The Commission declines to adopt a standard providing that the geographic scope or duration of non-competes must be "reasonable." The Commission is concerned a reasonableness standard would foster significant uncertainty among workers and businesses about the enforceability of non-competes, for the same reasons a rebuttable presumption would. In addition, as described in Part II.C.1 of the NPRM, all States where non-competes are enforceable currently apply a reasonableness standard, so a Federal reasonableness standard would not mitigate the negative effects of non-competes that are presently occurring.

The Commission also declines to adopt the alternative of imposing limits on the scope and duration of non-competes. Such a rule would be insufficient to address the negative effects of non-competes on competitive conditions in labor markets or products and services markets. Although a non-compete that lasts for a shorter duration or within a smaller geographic area curtails job mobility for the individual worker it binds to a lesser degree, it nonetheless curtails the worker's job mobility and the ability of competing employers to recruit and access talent. Non-competes limited in duration and scope still tend to inhibit efficient matching between workers and employers, with spillover effects on new business formation and innovation through the mechanisms described in Parts IV.B and IV.C. Furthermore, limitations on the scope and duration of non-competes would not address the spillover effects from non-competes on other workers and consumers. In short, even if a non-compete applies only to a relatively delimited location or time period, it still—by design—cuts off free and fair competition in labor and product and service markets.

In addition, most of the commenters who stated that they were exploited and coerced by non-competes did not do so on the basis that the non-compete was overbroad in scope or duration. Instead, most of the commenters who described the terms of their non-competes described limits on scope and duration that were within the bounds of what is typically permissible under State law.[1018] Some of these commenters even stated expressly that they were subject to the non-compete that was standard or typical in their field. Even these commenters, however, explained how they were exploited and coerced in connection with non-competes because the non-compete was unilaterally imposed and because the non-compete trapped them in worse jobs or forced them to bear significant harms or costs. For these reasons, the Commission declines to adopt bright-line limits on the scope and duration of non-competes.

4. Compensation Requirement

Some commenters requested that the Commission adopt an alternative that would permit non-competes so long as the worker is compensated. Some commenters pointed to Massachusetts and Oregon law governing non-competes under which, for certain workers, non-competes may be enforced if, *inter alia,* they include a minimum level of compensation or consideration to the worker separate from compensation for employment.[1019]

The Commission declines to adopt a rule requiring compensation for non-competes. First, such a rule would not address the harms to competitive conditions that non-competes cause, which result in harm to other workers, to rivals of employers, and to consumers. The Commission finds in Parts IV.B.3.a.ii and IV.C.2.c.ii. that non-competes harm workers other than the workers who sign them, by reducing the number of job opportunities and thereby inhibiting efficient matching for all workers. The Commission further finds in Parts IV.B.3.b and IV.C.2.c.i that non-competes inhibit new business formation and innovation, which affects consumers. Therefore, even if a worker were fully compensated for a non-compete, the fact of that compensation would not redress these negative externalities. Second, this alternative would be ineffective or significantly less effective because of the *in terrorem* effect of non-competes, which the Commission finds to be grounded in empirical evidence and supported by the comment record described in Part IV.B.2.b. Third, such a rule would be difficult to administer and potentially easy to evade, as employers could suppress other wages or job quality while labeling some compensation as attributable to the non-compete.

5. Combination of Different Alternatives

Some commenters suggested the possibility of combining two or more of the alternatives discussed in this Part IX

[1017] *Id.*

[1018] *See* Part IV.B.2.b.

[1019] Mass. Gen. Laws Ann. ch. 149, sec. 24L; Or. Rev. Stat. Ann. sec. 653.295.

in place of a categorical ban. While a combination of these regulations or limitations might modulate some of the ways in which non-competes are exploitative and coercive, they would not be as effective as a comprehensive ban. In particular, a combination approach would lack the clarity of a comprehensive ban and thus would not be as effective as a categorical ban in addressing the exploitation and coercion of workers through non-competes. Moreover, as noted previously, the alternatives discussed would do little to address the tendency of non-competes to negatively affect competitive conditions and to cause spillover effects on other workers and on consumers. Accordingly, a combination of these alternative regulations or limitations would fail to remedy the aggregate and spillover effects of non-competes and thus would not achieve the Commission's stated goals.

C. The No-Action Alternative: Reliance on Existing Legal Frameworks Instead of a Clear National Standard

The Commission sought comment on whether a Federal standard for non-competes would promote certainty for employers and workers.[1020] The Commission finds that a clear national standard for non-competes will more effectively address non-competes' tendency to negatively affect competitive conditions than case-by-case adjudication or relying on existing law alone. The Commission also finds that declining to adopt the final rule, and instead relying on case-by-case adjudication or existing law alone, would not address the exploitation and coercion of workers through non-competes.

1. Comments Received

Many commenters expressed support for the NPRM because they viewed current laws as insufficient to protect all workers, rivals, or consumers, regardless of where they are located, from the negative effects of non-competes on competitive conditions in labor markets and markets for products and services. Numerous workers, businesses, and other commenters said the patchwork of State laws and confusion about those laws, particularly reasonableness tests, makes it difficult for workers and businesses to understand the law and in turn contributes to the use of unenforceable or overbroad non-competes and chills worker mobility. Several commenters also said that case-by-case adjudication and reasonableness tests make it difficult for parties to predict outcomes, which in turn raises litigation costs. Even some organizations opposed to the proposed rule or who supported a different policy believed that a Federal rule could be beneficial, such as to businesses operating in multiple jurisdictions.

In addition, according to commenters, case-by-case adjudication under State law cannot address the harms caused by non-competes through their use in the aggregate. Some commenters also asserted that the patchwork of State laws is complicated by remote and hybrid workers. Others argued that State laws are skewed in favor of employers or leave workers vulnerable to unreasonable agreements. Some argued that many workers, businesses, non-competes, and labor markets cross State lines, demonstrating the need for one standard. Several State Attorneys General also said that numerous complications arise when localities span more than one State and those States have different laws on non-competes; workers become confused and enforcement of non-competes can have spillover effects in another State.[1021]

In contrast, many commenters stated that case-by-case adjudication is preferable to a Federal rule because it allows individual facts to be considered. In addition, many commenters argued that existing State legislative and judicial decisions are sufficient to impose limitations on non-competes while recognizing legitimate business interests. Commenters also argued that States should be allowed to continue their natural experiments with non-competes; that non-competes historically have been and should remain an issue of State law; and that States are best suited to make policy judgments for their citizens.

Some commenters argued that unenforceable or overly broad non-competes are not a problem because courts can strike down or reform them. Some employers asserted that they specifically, or employers more generally, did not enter into unenforceable non-competes. Other commenters argued that employers did not use choice of law clauses to evade State laws, stating the clauses are the products of arms-length bargaining and provide certainty and predictability.

2. Responses to Comments and the Commission's Findings

a. The Value of Rulemaking

The Commission has the authority to make rules and regulations to carry out the FTC Act's prohibition on unfair methods of competition under sections 5 and 6(g) of the FTC Act as described in Parts II.A through II.C, and the Supreme Court has stated that agencies generally have discretion to choose between rulemaking and adjudication.[1022] Based on the empirical evidence, the comments, and the Commission's expertise, the Commission finds that rulemaking is the appropriate method of addressing non-competes.

The prevalence of non-competes across the economy, described in Part I.B.2, and the scale of the harms they cause, described in Parts IV.B and IV.C, show that it is more efficient to address the harms to competition from non-competes via rulemaking compared to case-by-case adjudication. As the D.C. Circuit stated in ruling that the Commission had the authority to promulgate unfair methods of competition rules, "the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate."[1023] The Commission estimates that there are 2.92 million firms using non-competes in the U.S.[1024] Adjudicating individual cases against even just one-tenth of 1% of these employers would be slow, inefficient, and costly for the Commission, employers, and workers. Rulemaking provides notice of the application of section 5 to non-competes in a clearer and more accessible way than piecemeal litigation and avoids compliance delays.[1025] The final rule will provide all market participants greater clarity about their obligations under section 5 of the FTC Act, facilitating compliance. Additionally,

[1020] NPRM at 3497.

[1021] Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043 at 11.

[1022] *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947); *NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.,* 416 U.S. 267, 293 (1974); Wright & Miller, Federal Practice and Procedure sec. 8117 (2d ed. 2023).

[1023] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 681–82 (D.C. Cir. 1973); *see also id.* at 690 (stating that "the historic case-by-case purely adjudicatory method of elaborating the Section 5 standard and applying it to discrete business practices has not only produced considerable uncertainty" but has also spawned lengthy litigation).

[1024] *See* Part X.F.6 (estimating that 49.4% of the 5.91 million firms in the U.S. use non-competes).

[1025] *See* Wright & Miller, Federal Practice and Procedure sec. 8117 (2d ed. 2023); *Nat'l Petroleum Refiners,* 482 F.2d at 690 ("[W]hen delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on their current practice. As a result, substantive rules will protect the companies which willingly comply with the law against what amounts to the unfair competition of those who would profit from delayed enforcement as to them.") (citation omitted).

the final rule will simplify enforcement proceedings by streamlining the proof required.[1026]

In addition, the principal harms from non-competes arise from their tendency to negatively affect competitive conditions in the aggregate. A single non-compete with a single worker may not do much to inhibit efficient matching between workers and employers across a labor market or suppress new business formation or innovation (and what effects it does have would be difficult to measure), but the Commission finds based on empirical evidence that the use of many non-competes across the labor market does have these aggregate net negative effects.[1027] For this reason, rulemaking is preferable to individual litigation for addressing the negative effects of non-competes. Past Commission experience has also illustrated that case-by-case enforcement, education, and other enforcement mechanisms are not always sufficient to stop widespread harms.[1028] A Federal rulemaking is the most efficient method to address the scale of harm to competitive conditions in labor, product, and service markets caused by non-competes.

Finally, ''utilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication.'' [1029] Rulemaking is particularly beneficial when, as here, ''a vast amount of data had to be compiled and analyzed, and the Commission, armed with these data, had to weigh the conflicting policies.'' [1030] Rulemaking also allows for more fulsome engagement from the public by providing for public comment on a complete regulatory scheme. The Commission greatly benefited from the submitted comments.

[1026] *See Nat'l Petroleum Refiners,* 482 F.2d at 690 (''With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up.'').

[1027] *See* Part IV.B.3.a–b.

[1028] *See, e.g.,* Combating Auto Retail Scams Trade Regulation Rule, 89 FR 590, 600 (Jan. 4, 2024) (stating that rulemaking was necessary because certain unfair and deceptive acts and practices had persisted despite more than a decade of Federal and State enforcement, education, and other action in the motor vehicle dealer marketplace).

[1029] *Nat'l Petroleum Refiners,* 482 F.2d at 683 (citations omitted); *see also* Wright & Miller, Federal Practice and Procedure sec. 8117 (2d ed. 2023).

[1030] *Nat'l Petroleum Refiners,* 482 F.2d at 683 (citations omitted).

b. Case-by-Case Litigation Alone Cannot Address the Negative Effects of Non-Competes on Competition

The Commission finds that case-by-case litigation alone is insufficient to address the harms to competition from non-competes due to the cost of litigation, which deters many workers from challenging non-competes, and the limited resources of public enforcement agencies. In addition, individual litigation is not well-suited to redress the negative externalities non-competes impose on other workers, other employers, consumers, and the economy from their use in the aggregate.

Many commenters addressed the shortcomings of individual litigation as a means for addressing the harms of non-competes. Numerous commenters noted that litigation is costly and many workers cannot afford to litigate their non-competes.[1031] Many commenters, including workers, entrepreneurs, and employment attorneys, shared examples of five-figure and six-figure litigation costs related to non-compete lawsuits. Numerous commenters reported that the fear of litigation costs induced them to refrain from seeking or accepting other work or starting a business, even though they thought the non-compete was likely unenforceable. Many other commenters stated that they complied with a non-compete after they were threatened with enforcement, even though they were unsure about the non-compete's enforceability. One study finds that 53% of workers subject to non-competes are hourly workers,[1032] who are particularly unlikely to be able to afford a court challenge.

Commenters also noted some non-competes include liquidated damages clauses or fee-shifting provisions requiring the worker to pay the employer's attorney and other costs if the employer wins, further increasing the costs (and risks) of challenging a non-compete. In addition, commenters stated that litigation is time-consuming and could take as long or longer than the non-compete period. For example, one commenter shared a decision in the commenter's own case where the appellate court found the non-compete violated public policy by leaving an area with only one surgeon in a specialty—but reached that decision only after the two-year non-compete had already run its course.[1033] Commenters also said workers who sued their employer could experience reputational harm and difficulty finding work going forward.

[1031] *See also* Part IV.B.2.b.ii (describing exploitative and coercive effects of the risk and cost of being subject to a non-compete suit).

[1032] Lipsitz & Starr, *supra* note 72 at 144 (analyzing data from the Starr, Prescott, & Bishara survey).

[1033] *Graham* v. *Cirocco,* 69 P.3d 194, 200 (Kan. App. 2003).

Litigation can be even riskier if a court might reform a non-compete, which leaves the worker subject to some restrictions even if the initial non-compete was impermissibly broad. Several commenters cited a *Harvard Law Review* article that discusses the consequences of allowing courts to sever or reform overbroad non-competes:

> For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable.[1034]

If there is no penalty for drafting overbroad non-competes (as is true in most States),[1035] employers have little incentive to draft non-competes narrowly, particularly if a court is likely to revise it rather than strike it down, or if a worker is unlikely to be able to litigate at all. An employment attorney commented it is particularly difficult to advise workers about whether their specific non-compete is enforceable when it is possible a court may modify the underlying non-compete.

Case-by-case litigation under other antitrust laws alone is also insufficient to address the harms from non-competes. Non-competes restrain trade and therefore are subject to the Sherman Act.[1036] While private litigants may bring private causes of action to enforce the Sherman Act,[1037] the Commission views private litigation under the Sherman Act as an ineffectual response in the context of non-competes based on the history of cases by private litigants arising under that Act, as explained in the NPRM.[1038] For an individual litigant, proving harm to competition in the relevant geographic and product markets is a resource-intensive task that

[1034] Blake, *supra* note 22 at 682–83 (noting that this may not be applicable if the worker has bargaining power and it may be inefficient to tailor non-competes to each worker, and recommending that courts only sever when they determine the employer acted fairly).

[1035] *See* NPRM at 3495.

[1036] *See* Part I.B.1.

[1037] *See* 15 U.S.C. 15.

[1038] NPRM at 3496.

typically requires expert testimony.[1039] This makes an already expensive proposition even less palatable for most workers and further tips the risk-versus-reward calculus away from litigation. In addition, to succeed on a Sherman Act claim, a plaintiff must show harm to competition as a whole, not just to themselves. It may be difficult or impossible for a worker to establish that their individual non-compete—or a single firm's use of a non-compete—adversely affected competition in a labor market or product/service market sufficiently to violate the Sherman Act.[1040] Section 5, on the other hand, is more inclusive than the Sherman Act.[1041] As outlined in Part II.F, section 5 requires a showing of indicia of unfairness and a tendency to negatively affect competitive conditions. It does not require a separate showing of market power or market definition—nor does it require proof of harm to competition by each non-compete.[1042]

Case-by-case litigation by public enforcers, such as the Commission or State attorneys general, is a potential alternative or supplement to private litigation under other antitrust laws. But the ability of public enforcers to engage in effective case-by-case litigation related to non-competes, absent a rule, is limited.

As cited in Parts I.B. and II.C.2, the FTC has previously secured consent orders premised on the use of non-competes being an unfair method of competition under section 5, and the Commission has the authority to determine that non-competes are unfair methods of competition through adjudication. However, FTC resource constraints limit the potential effectiveness of enforcement of section 5 on a purely case-by-case basis. The Commission is an independent agency that works to promote fair and open markets and protect the entire American public from unfair and deceptive business practices. The Commission has fewer than 1,500 employees for its entire body of work related to this mission,[1043] which includes investigating, challenging, and litigating anticompetitive mergers and conduct; processing and reviewing merger filings; and investigating and challenging a wide range of consumer protection issues.[1044]

Similarly, several State Attorneys General commented that the multi-factor common law approaches to non-compete law result in piecemeal decisions that do not address the non-compete problem in a uniform manner.[1045] These State Attorneys General also noted that some State enforcement agencies lack straightforward authority to enforce existing common law protections related to non-competes and argued that the challenges associated with common law enforcement underscore the need for a Federal rule.[1046] And the resource limitations to pursue non-competes comprehensively through enforcement limit States equally—if not more.

The Commission estimates that there are approximately 30 million individual non-competes in the U.S.[1047] In contrast to the large volume of non-competes, the resources of public enforcement agencies are limited. Public enforcers must balance competing demands for resources and priorities when they bring public enforcement actions. Public enforcers cannot conceivably investigate the specific details of every non-compete or initiate litigation concerning more than a small fraction of unlawful non-competes. A Federal rule provides clarity to market participants, engages all stakeholders in the development of the rule, and more effectively ceases an unfair method of competition.

The significant limitations on the ability of private and public litigants to challenge unlawful non-competes have practical implications. Courts cannot strike down an unenforceable non-compete that they never had the opportunity to review. Moreover, as detailed in Part IV.B.2.b, non-compete restrictions may still have significant *in terrorem* effects when workers are uncertain about the enforceability of their non-competes or lack the ability to challenge their use.

Furthermore, case-by-case litigation is insufficient to address negative externalities from non-competes (*i.e.,* harms non-competes cause to persons other than the parties to the non-compete). As described in Parts IV.B and IV.C, non-competes impose significant negative externalities on other workers, other firms, consumers, and the economy. Individual non-compete cases are not well-suited for redressing these harms. For example, while the precise reasonability test for non-competes differs from State to State, the test typically considers the business interest asserted by the employer; the harm to the worker; and the injury to the public from the loss of the worker's services.[1048] This test does not generally account for the harms experienced by other workers, other firms, consumers, and the economy resulting from the negative effects of non-competes on competition.

Furthermore, because the significant harms of non-competes result from their aggregate use, they are unlikely to be captured by an assessment of an individual worker's non-compete or an individual firm's use of non-competes. This is true regardless of whether those non-competes are challenged under State non-compete laws or under other antitrust laws. It is likewise true regardless of whether non-competes are challenged by private litigants or public enforcers. Accordingly, the Commission finds that case-by-case litigation alone is insufficient to address the negative externalities of non-competes.

The Commission, by contrast, is well-positioned to evaluate non-competes holistically. The Commission is an expert agency and has used its expertise to assess the weight of the empirical evidence and comment record to evaluate the aggregate effects of non-competes. The Commission here implements a clear national standard through notice-and-comment rulemaking to protect competition, based on the evidence that the use of non-competes in the aggregate negatively affects competition and harms workers and consumers.

For all these reasons, the Commission finds that case-by-case litigation is not a viable alternative to the final rule.[1049]

[1039] *See, e.g., U.S. Healthcare, Inc.* v. *Healthsource, Inc.,* 986 F.2d 589, 599 (1st Cir. 1993) (''In practice, the frustrating but routine question how to define the product market is answered in antitrust cases by asking expert economists to testify.'').

[1040] *See* NPRM at 3496–97 (discussing non-compete cases that have been brought under the antitrust laws).

[1041] *See* Part II.A.

[1042] *See* Part II.F.

[1043] FTC, *Congressional Budget Justification—Fiscal Year 2025,* at 8 (2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/fy25-cbj.pdf.*

[1044] *Id.*

[1045] Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043 at 7.

[1046] *Id.*

[1047] *See* Part I.B.2.

[1048] *See* NPRM at 3494–95.

[1049] A few commenters suggested that the Commission could create guidelines instead of a rule to explain what factors the agency would look at in an enforcement action. By definition, however, a guidance document would ''not have the force and effect of law.'' *Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 97 (2015) (quoting *Shalala* v. *Guernsey Mem'l Hosp.,* 514 U.S. 87, 99 (1995)). Guidelines would not bind employers or courts and would not provide workers with the same clarity about the enforceability of their non-competes. Moreover, case-by-case litigation itself is not suited to address the negative externalities of non-competes, a concern the issuance of guidelines would not address. The Commission finds that the issuance of guidelines is not a viable alternative to the final rule for the same reasons that it finds that the no-action alternative generally is not a viable alternative to the final rule.

c. State Law Alone Cannot Address the Negative Effects of Non-Competes on Competition

The Commission appreciates that States have enacted legislation in recent years to ban or restrict non-competes and ameliorate their negative effects.[1050] The Commission has long recognized the value of concurrent enforcement of Federal and State law and believes States have an important role to play in restricting the use of non-competes. Indeed, in this final rule, the Commission has revised § 910.4 to ensure that States may continue to enforce laws that restrict non-competes and do not conflict with the final rule. However, the Commission believes that reliance on State law alone is insufficient to address the negative effects of non-competes on competition. The practical ability of States to address the harms to their residents from non-competes is limited by various factors, including employers' use of choice-of-law, forum-selection, and arbitration clauses; significant confusion among both employers and workers resulting from the patchwork of State law, which chills workers from engaging in competitive activity even where non-competes are likely unenforceable under State law and also increases employers' compliance costs, particularly given the increase in interstate remote work; spillover effects from other States' laws; and incentives for States to adopt permissive non-compete policies.

Many States have adopted statutory restrictions or compete bans on non-competes. Four States—California, Minnesota, North Dakota, and Oklahoma—have adopted statutes rendering non-competes void for nearly all workers.[1051] The majority of the remaining 46 States have statutory provisions or case law that ban or limit the enforceability of non-competes for workers in certain specified occupations.[1052] The general language of the test for whether a non-compete is reasonable is fairly consistent from State to State.[1053] However, the specifics of the application of the standard differ from State to State. For example, States vary in how narrowly or broadly they define legitimate business interests and the extent to which courts are permitted to modify an unenforceable non-compete. States also differ with respect to statutory restrictions on non-competes.[1054] As a result, among the 46 States where non-competes may be enforced, variation exists with respect to the enforceability of non-competes.[1055]

State law also differs with respect to the steps courts take when they conclude that a non-compete is unenforceable as drafted. As noted in the NPRM, the majority of States have adopted the ''reformation'' or ''equitable reform'' doctrines, which allow courts to revise the text of an unenforceable non-compete to make it enforceable.[1056]

Because the enforceability of non-competes and courts' positions with respect to unenforceable non-competes vary from State to State, the question of which State's law applies in a legal dispute can determine the outcome of a non-compete case. Non-competes often contain choice-of-law provisions designating a particular State's law for resolution of any future dispute.[1057] Furthermore, some non-competes include forum-selection provisions specifying the court and location where a dispute may be heard.[1058] The default rule under conflict-of-laws principles is that the court honors the parties' choice of law, meaning that the burden is typically on the worker—the vast majority of whom the Commission finds are exploited and coerced when entering into a non-compete—to negotiate for the law of a different forum to apply.[1059]

There is significant variation, however, in how courts apply choice of law rules in disputes over non-competes.[1060] As a result, it can be difficult for employers and workers to predict how disputes over choice of law (and, in turn, the enforceability of the non-compete) will be resolved.[1061] Several commenters agreed that a Federal rule would alleviate these problems.

Choice of law provisions may also mean that workers lose their own State's protections. For example, workers from States where non-competes are banned commented that they faced enforcement of non-competes that selected the law of another State. This raises the concern that choice of law clauses can be used to evade State bans or restrictions by forum shopping.[1062] As two scholars note, when ''the parties or issues involved have connections to multiple jurisdictions,'' the law ''confounds lawyers and commentators because of its complexity and unpredictability.'' [1063]

Employers may also impose arbitration clauses, which require that legal disputes with the employer—including disputes related to non-competes—be resolved through binding arbitration rather than in court.[1064] Where such clauses are valid, the Federal Arbitration Act requires that courts enforce them.[1065] Choice of law, forum selection, and arbitration clauses create opportunities for employers to forum-shop in ways that undermine any given State's ability to effectively regulate non-competes.

Numerous workers, businesses, and other commenters said the patchwork of State laws and confusion about those laws makes it difficult for workers and businesses to understand whether a particular non-compete would be enforceable. The lack of a clear national standard, and resulting confusion,

[1050] *See* NPRM at 3494 (summarizing recent State non-compete legislation).

[1051] *See* Cal. Bus. & Prof. Code sec. 16600; N.D. Cent. Code sec. 9–08–06; Okla. Stat. Ann. tit. 15, sec. 219A. Minnesota banned non-competes signed on or after July 1, 2023, after the comment period closed. Minn. Stat. Ann. sec. 181.988.

[1052] In most States, those limits apply to just one or two occupations (most commonly, physicians). *See* Beck Reed Riden LLP, *Employee Noncompetes: A State-by-State Survey* (Feb. 19, 2024), *https://beckreedriden.com/wp-content/uploads/2024/02/BRR-Noncompetes-20240219-50-State-Noncompete-Survey-Chart.pdf* (hereinafter ''Beck Reed Riden Chart'').

[1053] *See* NPRM at 3494–95.

[1054] *See, e.g.,* Beck Reed Riden Chart, *supra* note 1052.

[1055] NPRM at 3495.

[1056] *Id.*

[1057] Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective,* 31 Comp. Lab. & Pol'y J. 389, 396–402 (2010).

[1058] *Id.* at 402–04.

[1059] *Id.* at 397 (''In general, courts defer to choice of law clauses because they are presumed to represent the express intention of the parties.''). *Cf.* Cal. Lab. Code sec. 925(a) (stating that employers shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would either (1) require the employee to adjudicate outside of California a claim arising in California or (2) deprive the employee of the substantive protection of California law with respect to a controversy arising in California).

[1060] Lester & Ryan, *supra* note 1057 at 394–95.

[1061] *Id.* at 395 (''The state of the law is perhaps characterized more by inconsistency than anything else, so much so that commentators lament the 'disarray' and 'mish-mash' of the law, and criticize courts for their 'post-hoc rationalizing of intuitions' or their use of a 'hodgepodge of factors, often with insignificant explanation of how they decide what weight to give each.''') (internal citations omitted).

[1062] *See generally* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Non-Compete Agreements: Regulatory Risk Management and the Race to the Bottom,* 65 Wash. & Lee L. Rev. 1381, 1386 (2008) (noting ''judicial attempts to preempt other courts from disregarding the parties' choice of law''). Some States have attempted to defend against this by enacting statutes banning selection of a different State's law for a non-compete. *See* Minn. Stat. Ann. sec. 181.988(3)(a) (Minnesota); Cal. Lab. Code sec. 925 (California); Colo. Rev. Stat. sec. 8–2–113(6) (Colorado); Mass. Gen. Laws ch. 149, sec. 24L(e) (Massachusetts); La. Rev. Stats. 23:921(2) (Louisiana). Many of these statutes are relatively recent, however, and it remains to be seen how effective they will be.

[1063] Lester & Ryan, *supra* note 1057 at 389.

[1064] *See, e.g.,* Alexander J.S. Colvin, Econ. Pol'y Inst., Report, *The Growing Use of Mandatory Arbitration* (Apr. 6, 2018).

[1065] *See, e.g., Nitro-Lift Techs.* v. *Howard,* 568 U.S. 17, 20–22 (2012).

contributes to non-competes being used in jurisdictions where they are unenforceable. Starr, Prescott, and Bishara find that employers frequently use non-competes even when they are unenforceable under State law.[1066] Similarly, Colvin and Shierholz find that 45.1% of workplaces in California use non-competes even though they are unenforceable there.[1067] Anecdotally, an economist commented that the Commission's *Prudential Security* case, in which the employer continued using non-competes after they were held unenforceable by a court, was an example of employers enforcing unenforceable non-competes.[1068]

While the Commission has no doubt that many employers aim to ensure their contracts comply with applicable law, the empirical evidence indicates that at least some employers are using unenforceable non-competes, and some workers are turning down jobs where their non-competes are likely unenforceable. Some commenters referenced Starr, Prescott, and Bishara's finding that workers frequently cite non-competes as a factor in turning down job offers in both States that enforce non-competes and in those that do not.[1069] The study also finds that workers are more likely to report that they would be willing to leave for a competitor when they did not believe their employer would attempt to enforce a non-compete in court.[1070] The study suggests that whether a worker's non-compete is enforceable may matter less than whether the employer is willing to try to enforce it.[1071] The Commission notes that this study does not necessarily indicate a causal relationship, but it does indicate that for many workers, the *in terrorem* effect of non-competes may outweigh any State protections.

Furthermore, the ability of States to address harms to their residents from non-competes is limited by spillover effects from other States. The economies of States are closely interconnected. Therefore, even where a State adopts a law that strictly regulates non-competes, such a law can be undermined by permissive non-compete laws in a nearby State.[1072]

Finally, several comments argued that State regulation of non-competes should continue by quoting Justice Brandeis's dissent in *New State Ice Co.* v. *Leibmann:* ''[i]t is one of the happy incidents of the [F]ederal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'' [1073] The Commission disagrees that further laboratory testing by States is needed. States have been experimenting with non-compete regulation for more than a century, with laws ranging from full bans to notice requirements, compensation thresholds, bans for specific professions, reasonableness tests, and more.[1074] Past State experimentation and legal changes yielded a considerable body of empirical research, which as described in Parts IV.B and IV.C, demonstrates that non-competes negatively affect competitive conditions in labor markets and in product and service markets. This evidence supports the Commission's finding that non-competes are an unfair method of competition.

Individual States' non-compete policies can cause spillover effects that negatively affect competitive conditions in other States. Individual States' non-compete policies can also affect the operation of legal regimes in other States. Choice of law provisions cause confusion for workers even in States where non-competes are unenforceable. There are incentives for some States to adopt extremely permissive non-compete policies to attract employers that favor non-competes, and potentially even to enable employers to ''export'' those permissive policies to other States through choice-of-law provisions.[1075] In short, States are interconnected with respect to non-competes. Without a uniform standard through the final rule, States are forced to balance the benefit to their residents of laws regulating non-competes against the fear that some employers may shift jobs to States where non-competes are more enforceable. One benefit of the Commission's rulemaking is it resolves this problem. The rulemaking record shows banning non-competes will improve competitive conditions in all States and will benefit workers in all States.

X. Regulatory Analysis

A. Introduction

The Commission has examined the economic impacts of the final rule as required by section 22 of the FTC Act (15 U.S.C. 57b–3). Section 22 directs the Commission to issue a final regulatory analysis that analyzes the projected benefits and any adverse economic effects and any other effects of the final rule. The final regulatory analysis must also summarize and assess any significant issues raised by comments submitted during the public comment period in response to the preliminary regulatory analysis.[1076]

B. Preliminary Analysis

Pursuant to section 22 of the FTC Act, the Commission issued a preliminary regulatory analysis of its proposed rule.[1077] The preliminary regulatory analysis contained (1) a concise description of the need for, and objectives of, the proposed rule; (2) a description of any reasonable alternatives to the proposed rule that may accomplish the stated objective of the final rule in a manner consistent with applicable law; and (3) for the proposed rule and for each of the alternatives described, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects.[1078]

In the preliminary regulatory analysis, the Commission described the anticipated effects of the proposed rule and quantified the benefits and costs to the extent possible. For each benefit or cost quantified, the analysis identified the data sources relied upon and, where relevant, the quantitative assumptions made. The preliminary analysis measured the benefits and costs of the proposed rule against a baseline in which the Commission did not promulgate a rule regarding non-competes and included in the scope of the analysis the broadest set of economic actors possible. Several of the benefits and costs were quantifiable, but not monetizable—especially with respect to differentiating between transfers, benefits, and costs. The Commission preliminarily found that others were not quantifiable. The

[1066] Starr, Prescott, & Bishara, *supra* note 68 at 53, 81.

[1067] Colvin & Shierholz, *supra* note 65 at 5–6.

[1068] *See* FTC, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re Prudential Sec., Inc. et al.,* Matter No. 211 0026 at 1, 5–7 (Dec. 28, 2022).

[1069] Starr, Prescott, & Bishara, *supra* note 68 at 633, 663.

[1070] *Id.* at 633, 652, 664.

[1071] *Id.*

[1072] *See, e.g.,* Johnson, Lavetti, & Lipsitz, *supra* note 388 (finding that increases in non-compete enforceability in one State have negative impacts on workers' earnings in bordering States, and that the effects are nearly as large as the effects in the State in which enforceability changed, but taper off as the distance to the bordering State increases).

[1073] *New State Ice Co.* v. *Leibmann,* 285 U.S. 262, 311 (1932) (Brandeis, dissenting).

[1074] *See* Beck Reed Riden Chart, *supra* note 1052.

[1075] *See, e.g.,* Glynn, *supra* note 1062 at 1385–86 (stating that ''because employers typically are the first movers in [non-compete] litigation, they often can litigate in a hospitable judicial forum,'' and noting a rise in interjurisdictional disputes related to non-compete enforcement and ''judicial attempts to preempt other courts from disregarding the parties' choice of law'').

[1076] 15 U.S.C. 57b–3(b)(2)(C), (E).

[1077] NPRM at 3521–31.

[1078] *See* 15 U.S.C. 57b–3(b)(1)(A) through (C).

preliminary analysis discussed any bases for uncertainty in the estimates.

The Commission preliminarily found substantial positive effects of the proposed rule: an increase in workers' earnings by $250–$296 billion annually (with some portion representing an economic transfer from firms to workers); an increase in new firm formation and competition; a reduction in health care prices (and prices in other markets may also fall); and an increase in innovation. The Commission noted that several of these benefits overlap (*e.g.,* increases in competition may fully or in part drive decreases in prices and increases in innovation). The Commission also preliminarily found some costs of the proposed rule. Direct compliance and contract updating would result in $1.02 to $1.77 billion in one-time costs, and firm investment in human capital and capital assets would fall.

The Commission preliminarily concluded that the substantial labor market and product and service market benefits of the proposed rule would exceed the costs. Furthermore, the Commission preliminarily found the benefits would persist over a substantially longer time horizon than most costs of compliance and contract updating.

C. Public Comments on the Preliminary Regulatory Impact Analysis

Based on the comments received, the final regulatory analysis reflects greater quantification where possible and includes sensitivity analyses to reflect different assumptions, including assumptions commenters suggested. The final regulatory analysis concludes, consistent with the preliminary analysis, that the benefits of the final rule justify the costs.

Some commenters urged the Commission to quantify the costs and benefits to a greater degree. In the final analysis, the Commission incorporates greater quantification where possible. That some effects cannot be quantified or monetized does not, however, undermine the Commission's conclusion that the benefits justify the costs.

Some commenters focused on the methodology used to estimate earnings effects in the preliminary analysis, stating that extrapolating estimated effects on earnings based on linear predictions may result in incorrect estimates. These commenters stated that linear predictions might be particularly unreliable outside the range observed in the data. While as a general matter, linear extrapolation may not be appropriate in all circumstances, especially in the absence of data supporting such an approach, the Commission notes the linear effect of non-compete enforceability on earnings was statistically tested in the economic literature.[1079]

Nevertheless, to test and confirm the robustness of the conclusions drawn in the preliminary analysis from the linear approach, in this final analysis, the Commission uses several estimation approaches. For its primary analysis, the Commission adopts an approach that does not rely on extrapolation. Specifically, the Commission assumes that the historical average change[1080] in non-compete enforceability observed at the State level represents the total change in enforceability that results from the rule. This approach is hereafter referred to as the ''average enforceability change approach.'' It likely underestimates the effects of the rule because the State-level changes that would occur under the rule (which adopts a near comprehensive ban) would be substantially larger than the changes observed historically. The Commission also conducted sensitivity analyses with two other approaches—described further in Parts X.C and X.F.6.a—that use linear extrapolation to scale up the effects estimated in the literature to estimate the effects of the final rule (*i.e.,* a near comprehensive ban).

Some commenters alleged the proposed rule would increase inflation. Some commenters also stated the proposed rule would harm shareholders by decreasing corporate profits. In response, the Commission notes that the regulatory analysis attempts to quantify and monetize real costs and benefits of the final rule as opposed to nominal costs and benefits. Therefore, net benefits are benefits that represent increased economic efficiency resulting from the final rule rather than increases in the dollar value of output that may be due to inflation. Additionally, earnings increases are due, at least in part, to increased economic efficiency, which would likely lower prices. Accordingly, the Commission does not expect that prices will rise because of the rule. Indeed, empirical evidence shows that in physician clinics, prices fall with decreased non-compete enforceability.[1081] Similarly, while the effect of the final rule on corporate profits is unclear,[1082] the Commission's analysis is focused on overall gains or losses in economic surplus—*i.e.,* the net benefits to society, not to individual corporations.

Some commenters stated that certain costs may be missing from the preliminary analysis, including costs related to worker misconduct and litigation over the validity of the final rule. The Commission finds no evidence or compelling arguments directly linking non-competes to worker misconduct and therefore does not consider such costs.[1083] Costs related to litigation over the validity of the rule are outside the scope of the regulatory analysis under section 22, which is concerned with costs and benefits should the final rule be implemented.

Some commenters stated the rule may have beneficial tax ramifications for businesses and workers with non-competes that are no longer enforceable, including based on changes in amortization schedules. In response, the Commission notes that any tax savings under the final rule represent transfers from the government to firms that previously used non-competes. Significantly, the Commission is allowing existing non-competes with senior executives, who may be most likely to have non-competes with tax implications, to remain in effect. This will mitigate the need for tax-related administrative work. In response to comments on the tax ramifications of clawed back pay, the final rule does not encourage or require firms to ''claw back'' compensation and given the exclusion for senior executives' existing non-competes in the final rule, situations in which a firm would be in a position to consider clawing back pay are likely to be extremely limited, if any.

Some commenters stated workers may be harmed if firms claw back workers' earnings, if workers lose long-term incentive payments, retention bonuses, and severance payments, or if workers must pay for training out of pocket in response to the rule. First, in Parts IV.B.3.a.iiv and X.F.6.a, the Commission finds earnings increases overall associated with decreases in non-compete enforceability. With respect to existing non-competes, non-competes

[1079] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 17.

[1080] In other words, taking all changes in non-compete enforceability between 1991 and 2014 (the range studied in the relevant literature) into account, the Commission considers a change whose magnitude is equal to the average of the magnitudes of all those changes. *See* Johnson, Lavetti, & Lipsitz, *supra* note 388 for more details.

[1081] Hausman & Lavetti, *supra* note 590.

[1082] The evidence in the empirical literature is mixed. Younge & Marx (*supra* note 755) find an increase in firm value when non-competes became enforceable in Michigan. Hiraiwa, Lipsitz, & Starr (*supra* note 502) find no effect on firm value when non-competes were prohibited for the majority of workers in Washington.

[1083] *See* Part V.D.3.

with senior executives, which are most likely to be structured with incentive payments, bonuses, and severance, may remain in effect under the final rule. To the extent any other existing non-competes with such structures are not excluded from the final rule, as noted in Parts III.D and IV.D, deferred compensation and other structured payments generally have many material contingencies other than a non-compete, which means incentive payments and retention bonuses will continue to retain value for the employer. Going forward, under the final rule, agreements for deferred compensation and other structured payments may be permissible as long as they do not fall within the definition of non-compete clause in § 910.1. With respect to payments for training, the Commission notes evidence that worker-sponsored training is unaffected by legal enforceability of non-competes,[1084] and it is therefore unlikely that workers will incur costs related to training as a result of the final rule.

Some commenters disagreed with the Commission's use of patenting activity as a proxy for innovation in the preliminary analysis, stating that the value of innovation may not be captured in patenting, in part because employers may use patents as a substitute for non-competes. First, the Commission agrees that innovation likely has value above and beyond patenting. That patenting does not capture the full value of innovation is not a basis for dismissing its value as a proxy altogether. Second, while it is theoretically possible firms may substitute from the use of non-competes to the use of patents to protect intellectual property, the empirical literature shows increases in innovation do not follow from the simple substitution of protections between non-competes and patents. Specifically, the empirical literature confirms the innovations prompted by decreased non-compete enforceability are qualitatively valuable, and—examining the relationship between non-compete enforceability and patenting for drugs and medical devices, where patenting is ubiquitous[1085]—it shows the patents reflect true net increases in innovation (as opposed to substitutions). One commenter stated there can be difficulty ascertaining the value of patenting. The Commission finds that there are several estimates of the private value of a patent (*e.g.,* the value to the patenting firm) in the literature, but no estimates of the social value of a patent, as further discussed in Part X.F.6.b. The Commission therefore stops short of monetizing this benefit. The final analysis addresses effects on innovation in greater detail in Part X.F.6.b.

Some commenters asserted the research related to investment in human capital does not distinguish between two different types of training: core training, *i.e.,* training required to perform job duties, and advanced training, *i.e.,* training with potential to increase productivity beyond the baseline requirements for job performance.[1086] Commenters stated that when non-competes are more enforceable, workers may receive additional core training rather than advanced training. In other words, when non-competes are more enforceable, labor mobility decreases and workers may also move to new industries to avoid potentially triggering non-compete clause violations (as discussed in Part IV.B.3.b.ii), both of which make experienced workers less often available for hire. Firms therefore may need to train workers at a greater rate because they will hire inexperienced workers who require more core training. Research finding increases in training associated with increases in non-compete enforceability therefore may not imply increases in advanced training—*i.e.,* the kind of training that increases productivity of workers already able to perform job duties, with net benefits for society as a whole. In response, the Commission agrees that decreases in training under the final rule may represent decreases in core, rather than advanced, training. It is not possible to discern whether the observed effects on training in the literature represent core versus advanced training because evidence that would facilitate such an analysis does not exist. Importantly, a decrease in core training would be economically beneficial because it would reflect a more efficient use of the labor force. Therefore, to the extent a decrease in training reflects a change in core training, this would be a net benefit of the final rule—not a cost. On the other hand, to the extent a decrease in training is due to a change in advanced training, this would represent a net cost of the final rule. The Commission further discusses investment in human capital in Part X.F.7.a.

Some commenters stated that costs associated with rescinding existing non-competes and updating contractual practices may be greater than estimated in the NPRM and attributed the greater cost to the need for high-cost outside counsel. In response, the Commission finds it likely that many firms will not need to use costly outside counsel (or indeed, any counsel) to comply with the final rule. This is especially true since the final rule allows non-competes for senior executives to remain in effect, since it does not require rescission of any existing contracts, and since it provides a model safe harbor notice for other workers and makes other adjustments to simplify the notice process. In response to commenters stating that firms will need more time to implement than estimated in the NPRM, the Commission conducts an updated analysis in Part X.F.7.b. The Commission notes that the model language provided in the final rule and allowing employers to use the last known address, mail or electronic, will significantly simplify the notice process for employers. Additionally, the Commission performs two sensitivity analyses in Part X.F.7.b. The first assumes an attorney's time is more costly—it replaces the primary estimate of the average hourly productivity of an attorney ($134.62 per hour, based on BLS earnings data) with an estimated rate of the cost of outside counsel who is a tenth-year attorney ($483 per hour).[1087] The second makes different assumptions about the time spent by employers related to existing non-competes that will be no longer be enforceable and updating contractual practices. Finally, the Commission clarifies the definition of ''non-compete clause'' in Part III.D to reduce confusion and give employers and workers a clearer understanding of what is prohibited. This, in turn, will reduce compliance costs and potential litigation costs over what constitutes a non-compete.

One commenter from the retail industry claimed the cost of implementing the proposed rule could

[1084] Starr, *supra* note 445.

[1085] See Part IV.B.3.b.ii, discussing Johnson, Lipsitz, & Pei, *supra* note 526.

[1086] Commenters used the words ''requisite'' and ''discretionary'' in lieu of ''core'' and ''advanced,'' respectively.

[1087] This estimate is drawn from the Fitzpatrick Matrix, which is a fee schedule used by many U.S. courts for determining the reasonable hourly rates in the District of Columbia for attorneys' fee awards under Federal fee-shifting statutes. It is used here as a proxy for market rates for litigation counsel in the Washington, DC area, which likely represent the high end of rates for litigation counsel in the U.S. The estimate is therefore adjusted to reflect a national rate by multiplying by the ratio of the hourly wage of attorneys nationwide to the hourly wage of attorneys in the Washington, DC metro area, based on BLS Occupational Employment and Wage Statistics data. The Commission conservatively uses the rates of a tenth-year attorney—a much more experienced attorney than is likely to be needed (and indeed no attorney at all may be needed). *See* Fitzpatrick Matrix, *https://www.justice.gov/usao-dc/page/file/1504361/dl?inline. See* BLS Occupational Employment and Wage Statistics, *https://www.bls.gov/oes/data.htm.*

be $100,000 to $200,000 per firm but did not support this assertion with any evidence. The Commission disagrees with this assertion, which does not align with its careful estimates based on empirical evidence and significant expertise presented in Part X.F.7.b.ii. The Commission's estimates also acknowledge and account for potentially heterogeneous costs across firms.

Some commenters stated that employers would need to spend substantial resources to litigate trade secret disputes and violations of post-employment restrictions other than non-competes. One commenter stated that the cost of a trade secret case may range from $550,000 to $7.4 million, depending on the monetary value of the trade secret claim. The Commission analyzes costs of litigation in Part X.F.7.c. The Commission agrees with commenters that trade secret litigation, and litigation over post-employment restrictions other than non-competes, may be costly. However, the Commission notes that no evidence exists to support the hypothesis that litigation on these fronts will increase because of the final rule. Indeed, recent evidence suggests that trade secret litigation does not increase following bans on non-competes.[1088] Moreover, the final rule, with its clear and bright-line standard (as compared to the current patchwork of State laws), would likely decrease litigation attempting to enforce non-competes, including litigation initiated by former employers against workers who start their own business or who find a new employer. While the Commission does not have evidence on the frequency of these different types of litigation, it expects the decrease in non-compete litigation would likely offset potential increases in other litigation.

Positing that firms will be reluctant to share trade secrets with workers under the rule, some commenters also stated that the costs of lessened sharing of trade secrets should be taken into account. Since no data exists on the effect of non-competes on the monetary value of shared trade secrets, the Commission does not quantify or monetize this effect. Moreover, there is no evidence that employers will lessen the extent to which they share trade secrets under the final rule, much less that any change would be material. As detailed in Part IV.D, employers have less restrictive alternatives to non-competes that mitigate these concerns.

Some commenters reference the Starr, Balasubramanian, and Sakakibara study[1089] and the Commission's interpretation of it in the NPRM to assert that firms founded because of the rule may be of lower quality than existing firms in terms of average employment and survival rates, and adjustments should be made to the Commission's analysis to account for these differences. Upon further review, the Commission interprets the authors' findings to show that within-industry spinouts resulting from lessened non-compete enforceability tend to be lower quality than non-within industry spinouts resulting from lessened non-compete enforceability. However, both types of spinouts are better, on average, than spinouts that form under stricter non-compete enforceability. The study's results therefore suggest that, if anything, the Commission underestimates the final rule's benefits from new business formation, because the estimates do not adjust for quality.

Some commenters asserted that, because of the positive effects of the proposed rule on labor mobility, firms may face greater costs associated with turnover (especially firms that currently use non-competes) due to the cost of finding a replacement, the cost of training a replacement, and the cost of lost productivity. Based on Pivateau (2011),[1090] one commenter estimated that turnover costs 25% of the annual salary of a worker. Some commenters also argued that some firms may face decreased costs of turnover, because more plentiful availability of labor can reduce the cost of hiring. The Commission finds that there may be distributional effects of increased turnover—benefits for firms that face a lower cost of hiring and costs for firms losing workers who had been bound by non-competes—and assesses the same in Part X.F.9.c.

Some commenters offered additional empirical evidence not discussed in the NPRM that was not specific to the proposed regulatory analysis. The Commission responds to those comments in Part IV.

D. Summary of Changes to the Regulatory Analysis

In the final regulatory analysis presented in Part X.F, the Commission updates its analyses based on the parameters of the final rule, comments received, supporting empirical evidence raised by commenters, changes in the status quo regarding regulation of non-competes, and reanalysis of evidence presented in the NPRM.[1091] This includes the Commission's attempt to quantify and monetize, to the extent feasible, all costs and benefits of the final rule, as well as transfers and distributional effects. The Commission additionally analyzes hypothetical scenarios to assess what otherwise unmonetized benefits and costs would lead to a final rule that is net beneficial. Finally, the Commission elects to include an analysis of an alternative the Commission considered, namely an analysis of fully excluding senior executives.[1092]

Under the final rule, existing non-competes with senior executives may remain in effect. While this change likely affects some costs and benefits associated with the final rule temporarily, the Commission does not specifically quantify or monetize those effects. The effect on persistent costs and benefits would be temporary, as senior executives will eventually move out of their jobs and retire or move into new jobs, to which the final rule will apply. The Commission notes throughout its analysis, however, how different estimates may be affected by this differential treatment of senior executives even if it cannot quantify the precise effect.

E. Summary of Benefits and Costs

The Commission considered several effects of the final rule on economic outcomes: earnings, innovation, entrepreneurship, distributional effects on workers, investment in human capital, capital investment, legal and administrative costs, prices, labor mobility and turnover, and litigation costs.

The Commission describes the primary estimates of benefits, transfers, costs, and distributional effects associated with each of these outcomes in Table 1. Table 1 also reports whether the outcome for each effect is quantifiable or monetizable and

[1088] Greenwood, Kobayashi & Starr, *supra* note 757. The Commission notes that this study supplements—but is not necessary to support—its finding that no evidence supports the conclusion that litigation costs will increase under the final rule. That finding is based on the Commission's expertise and the rulemaking record, including relevant comments. This study was published after the close of the comment period.

[1089] Starr, Balasubramanian, & Sakakibara, *supra* note 518.

[1090] Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage,* 4 J. Bus. Entrepreneurship & L. 319 (2010).

[1091] As described in detail in this Part X, the Commission's final analysis, including its quantification and monetization of effects, therefore is not precisely the same as its preliminary analysis.

[1092] The Commission is not required to analyze costs and benefits of regulatory alternatives in its final regulatory analysis. *See* 15 U.S.C. 57b–3(b)(2)(B).

discusses important nuance or uncertainty.

TABLE 1

Category	Extent of characterization	Description of estimate	Discussion
Earnings	Quantified	The estimated ten-year present discounted value of increased worker earnings is $400-$488 billion. Effect on earnings partially represents a transfer and partially represents a benefit of the final rule.	The extent to which the estimated increase in worker earnings represents a benefit versus a transfer is unclear, though there is evidence to suggest that a substantial portion is a benefit.
Innovation	Quantified	Annual count of new patents estimated to rise by 3,111–5,337 in the first year, rising to 31,110–53,372 in the tenth year. Annual spending on R&D estimated to fall by $0-$47 billion. Effect on innovation represents a benefit of the final rule.	Estimates of the societal value of innovation are not available. The two effects on innovation together represent a benefit because more output (amount of innovation) is produced with less input (R&D spending).
Prices	Partially Quantified	The estimated ten-year present discounted value of decreases in spending on physician and clinical services is $74-$194 billion. Prices in other sectors may decrease as well but are not quantified. The effect on prices partially represents a transfer and partially represents a benefit of the final rule.	Price changes encompass transfers (from firms to consumers) and benefits (since price changes are likely due to increased competition); however, the exact split is not clear. Increased competition may also increase consumer quantity, choice, and quality. Prices outside of physician and clinical services may fall due to changes in competition because of new entrants; however, the literature has not quantified this effect.
Investment in Human Capital	Monetized	The estimated ten-year present discounted value of the net effect of the final rule on investment in human capital ranges from a benefit of $32 billion to a cost of $41 billion. The effect on investment in human capital may represent a cost or benefit of the final rule.	The range in estimates reflects uncertainty over whether decreased investment in human capital under the final rule reflects reductions in advanced investment (which the firms opt into to increase productivity) or core investment (which is no longer necessary if more experienced workers are hired) and uncertainty over the workers for whom investment in human capital (all workers or workers in occupations which use non-competes at a high rate) is affected.
Legal and Administrative Costs	Monetized	One-time legal and administrative costs are estimated to total $2.1–$3.7 billion. Legal and administrative costs represent a cost of the final rule.	
Litigation Effects	Not quantified or monetized	The final rule may increase or decrease litigation costs. Effects on litigation costs may represent a cost or benefit of the final rule.	Estimates of the effect of the final rule on total litigation costs are not quantifiable. Litigation costs may rise or fall depending on firms' subsequent use of other contractual provisions and trade secret law and how the costs of such litigation compare to the cost of non-compete litigation, as well as the decreased uncertainty associated with a bright-line rule on non-competes.

TABLE 1—Continued

Category	Extent of characterization	Description of estimate	Discussion
Firm Expansion and Formation	Quantified	The final rule is estimated to increase new firm formation by 2.7–3.2% and decrease capital investment at incumbent firms by 0–7.9%. These effects represent a shift in productive capacity from incumbent firms to new firms. The overall effect on firm expansion and formation represents a distributional effect of the final rule.	New firm formation is generally a benefit, but may also crowd out incumbent firms and is therefore not a pure benefit. Decreased capital investment at incumbent firms may be counterbalanced by increased capital investment at new firms or rebalancing across industries, and therefore may or may not be a cost in net.
Distributional Effects on Workers	Not quantified or monetized	The rule may reduce the gender and racial earnings gap, may disproportionately encourage entrepreneurship among women, and may mitigate legal uncertainty for workers, especially relatively low-paid workers. The differential effect on different groups of workers represents a distributional effect of the final rule.	
Labor Mobility	Partially Monetized	Some firms may save on turnover costs (due to easier hiring as more potential workers are available), while some firms may have greater turnover costs (due to lost workers newly free from non-competes). The latter is estimated to be no more than $131 per worker with a non-compete, while estimates are not available to monetize the former. While it is unclear whether labor mobility costs represent a net cost or benefit of the final rule, they likely represent a distributional effect (costing firms which use non-competes and helping firms which do not) of the final rule.	The estimate of the increase in turnover costs for firms using non-competes is an upper bound, since it encompasses effects on investment in workers' human capital, hiring workers, and lost productivity of workers, all of which are expected to diminish under the final rule.

Note: Present values are calculated using discount rates of 2%, 3%, and 7%.

The Commission finds that, even in the absence of a full monetization of all costs and benefits of the final rule, the final rule has substantial benefits that clearly justify the costs. While data limitations make it challenging to monetize all the expected effects of the final rule, the Commission believes it has quantified the effects of the final rule likely to be the most significant in magnitude, and thus, potentially drive whether and the extent to which the final rule is net beneficial. This includes both benefits and costs. Based on those quantifications, the Commission is able to make conservative assumptions, based on its expertise, under which the final rule would be net beneficial. In this context, by conservative assumption, the Commission means that it is presuming the benefits it quantifies to be relatively low in value for purposes of this analysis, *i.e.,* lower than it believes is likely the case. With respect to costs, the Commission assumes costs are on the higher end of the estimated range, which is higher than the Commission believes is likely to be the case. Through this analysis, provided in detail in Part X.F.10, the Commission further bolsters its finding that the benefits of the final rule justify the costs.[1093]

Specifically, the Commission finds that even if only 5.5% of the estimated $400–$488 billion increase in worker earnings represents increased productivity resulting from improved, more productive matches between workers and employers, the benefits will outweigh the costs. In Part X.F.6.a, the Commission explains that the economic literature does not provide a way to separate increased productivity from the total effect on earnings (*i.e.,* transfers versus benefits in the regulatory impact analysis sense). However, the Commission finds that based on the literature, some part of the increase in worker earnings represents increased productivity and believes that 5.5%, and likely more, represents increased productivity. Similarly, even presuming that no part of the effect on earnings is a benefit (as opposed to a transfer), the Commission finds that if the social value of a patent were at least $297,144, then the monetizable benefits will exceed monetized costs. Notably, the literature finds that the average private value of a patent may be as high

[1093] The Commission notes that it does not believe there is a likely scenario in which firm exit and lost capital investment, especially when balanced against firm entry and gained capital investment at new firms, would change this outcome. Firm exit and lost capital investment, which are not quantified and are discussed as distributional effects in Part X.F.9, would not, for example, result in costs large enough to overcome the break-even analyses (even if, for example, the value of earnings representing productivity increases or the social value of patents had to be marginally higher) or the finding that the benefits justify the costs.

as $32,459,680, again making this assumption regarding the social value of a patent quite conservative. Finally, even presuming none of the earnings are benefits (rather than transfers) and that the social value of a patent is zero (an implausibly low estimate), if all the lost investment in human capital is core, the monetized benefits would also exceed monetized costs. Notably, in conducting these analyses, in each instance, the Commission further makes the very conservative assumption that monetizable benefits other than the benefit being analyzed are zero. That is, the Commission assumes that patents have no social value and that no reduced investment in human capital is core when considering how much of earnings must represent increased productivity in order for the monetized benefits to exceed the monetized costs. This break-even analysis shows that while data limitations making it challenging to monetize all of the expected benefits of the rule, the Commission finds that the final rule can be shown to be net beneficial even under very conservative assumptions.

F. Final Regulatory Analysis

1. Background

As discussed in Part IV.B.3.a, non-competes inhibit worker mobility, creating worse matches between workers and firms and decreasing workers' productivity and therefore their earnings. Non-competes also prevent firms from hiring talented and experienced workers; inhibit new business formation; and reduce the flow of innovative workers between firms, harming innovation. The final rule increases competition in labor markets by allowing workers to move more freely between jobs and increases competition in product and service markets by ensuring that firms are able to hire appropriate workers, that workers are able to create new entrepreneurial ventures, and that worker flow between firms enhances innovation.

2. Economic Rationale for the Final Rule

The final rule addresses two primary economic problems. First, non-competes tend to harm competitive conditions in labor markets. Non-competes increase barriers to voluntary labor mobility and prevent firms from competing for workers' services, thus creating frictions and obstructing the functioning of labor markets. These frictions inhibit the formation of optimal and efficient matches in the labor market, resulting in diminished worker and firm productivity and in lower wages.

The second economic problem is that non-competes tend to harm competitive conditions in product and service markets. Non-competes create a barrier to new business formation and entrepreneurial growth, which negatively affects consumers by lessening competition in product and service markets. Non-competes also make it difficult for competitors to hire talented workers, which reduces these competitors' ability to effectively compete in the marketplace. Additionally, non-competes impede innovation by preventing the churn [1094] of innovative workers between firms, limiting the spread and recombination of novel ideas, which may negatively affect technological growth rates.

3. Purpose of the Final Rule

The final rule provides that, with respect to a worker other than a senior executive, it is an unfair method of competition—and thus a violation of section 5 of the FTC Act—for a person to enter into or attempt to enter into a non-compete; enforce or attempt to enforce a non-compete; or represent that the worker is subject to a non-compete.[1095] The final rule also provides that, with respect to senior executives, it is an unfair method of competition—and thus a violation of section 5 of the FTC Act—for a person to enter into or attempt to enter into a non-compete; enforce or attempt to enforce a non-compete entered into after the effective date; or represent that the worker is subject to a non-compete, where the non-compete was entered into after the effective date.[1096]

4. Baseline Conditions

a. Estimate of the Affected Workforce

As described in Part II.E, some workers may not be subject to the final rule to the extent they are employed by an entity or in a capacity that is exempted from coverage under the FTC Act. The Commission estimates the fraction of the workforce who would be covered under the final rule (the "coverage rate") by applying conservative assumptions to individual-level data on the characteristics of the workforce from the American Community Survey (ACS) for 2017 to 2021.[1097] Residents of four States (California, Minnesota, North Dakota, and Oklahoma) are excluded from the sample used for the computation, since these States already generally do not enforce non-compete agreements.

To estimate the coverage rate, workers are classified according to three criteria: (1) whether the individual is identified as working for the government; (2) whether the individual is identified as working for a non-profit organization; and (3) whether the individual works in an industry or in a capacity that is likely to be outside the jurisdiction of the FTC Act. Government employment consists of employment with local, State, and Federal governments, in addition to individuals on active duty in the U.S. Armed Forces or Commissioned Corps. Nonprofit status is self-reported by survey respondents. Industries are defined based on the North American Industry Classification System (NAICS).

Such a classification of workers is necessarily imperfect as the FTC's jurisdiction does not exclude all workers that may be identified in the data as government employees or map directly into the data on non-profit status or the NAICS classifications that are available within the ACS. For example, the FTC Act is likely to exempt some firms that are classified as non-profits but not others, as described in Part II.E. Also, in some instances, only a subset of a given NAICS category (and not the entire category) appeared likely to fall outside the jurisdiction of the FTC Act. When ambiguity arose, the Commission was overinclusive in excluding workers. For example, the Commission classified all nonprofits as outside the coverage of the final rule for the purposes of estimating the coverage rate. Moreover, in estimating the coverage rate, the Commission excluded entire industries in calculating the coverage rate when some subset of that industry appeared to be outside the Commission's jurisdiction. This over-inclusiveness has the effect of underestimating the coverage rate of the final rule, and thus the overall net effect of the final rule will be conservative.

Using data from the ACS and the assumptions detailed in Part X.F.4, the Commission estimates that the final rule is likely to cover 80% of the private U.S. workforce.

b. Non-Compete Enforceability

For regulatory analyses, the effects of the final rule are measured against a baseline representing conditions that would exist in the absence of the rule. The extent of the final rule's costs and benefits depends on the degree to which it will change the enforceability of non-competes relative to what it would be in the baseline. Currently, non-competes are broadly prohibited in four States:

[1094] Churn in this context means turnover that is neither job creation nor job destruction—essentially the movement of workers among jobs.

[1095] *See* § 910.2(a)(1).

[1096] *See* § 910.2(a)(2).

[1097] The preliminary analysis in the NPRM did not estimate or apply a coverage rate based on jurisdiction.

California, North Dakota, Oklahoma, and Minnesota. In some other States, non-competes are prohibited for some, but not all, workers. For non-competes that are not prohibited expressly by statute, some version of a reasonableness test is used under State law to determine whether a given non-compete is enforceable or not. These reasonableness tests examine whether the restraint is greater than needed to protect an employer's purported business interest. Non-competes can also be found unreasonable where the employer's need for the non-compete is outweighed by the hardship to the worker or the likely injury to the public. Because these cases arise in the context of individual litigation, courts focus the ''likely injury to the public'' inquiry on the loss of the individual worker's services and not on the aggregate effects of non-competes on competition in the relevant market or overall in the economy.[1098]

Researchers have used various scoring systems to capture the enforceability of non-competes State by State over time. As described in Part IV.A.2, the Commission gives greatest weight to studies that measure enforceability granularly (*i.e.,* not using a binary score but, for example, an integer scale) and along various dimensions (*e.g.,* the employer's burden of proof in non-compete litigation and the extent to which courts are permitted to modify unenforceable non-competes to make them enforceable). The scoring system which fits these criteria best[1099] has been used to study the effect of non-compete enforceability on several economic outcomes. This score, which varies across States and across years, measures non-compete enforceability along a scale which runs from zero to one.[1100] A score of zero indicates enforceability equal to that of the State which enforces non-competes least (North Dakota). A score of one indicates enforceability equal to that of the State which enforces non-competes most readily (Florida). The final analysis relies on this score heavily as a granular and reliable scoring system that allows the Commission to consider the effect of non-compete enforceability on several economic outcomes. The studies that use this score form much of the basis for the final regulatory analysis.

5. Estimating the Effect of the Rule on a State-Level Enforceability Metric

In the absence of the rule, the average State enforceability score—in States that do not broadly prohibit them—when measured on a scale of 0 (lowest enforceability) to 1 (highest enforceability), is 0.78. The final rule will result in State-level enforceability of non-competes falling from its level in the absence of the rule to zero (*i.e.,* an average decrease of 0.78, excluding States that broadly prohibit non-competes).[1101] Using data on scores from 1991 to 2014, researchers report that the average magnitude of a change in the score (*i.e.,* the size of the change, regardless of whether it was a score increase or decrease) from year to year was 0.081.[1102] In other words, when a State's score changed from one year to the next, the average magnitude of that change was 0.081, on a scale of zero to one. Since the decrease that will result from the final rule is significantly larger than the average decrease considered in the literature (0.78 v. 0.081), the Commission considered different methods for the primary estimate in this final analysis. Consistent with the NPRM, this final analysis could attempt to scale up, or extrapolate, estimated effects to account for this larger decrease. As discussed in Part X.C, some commenters criticized this approach, stating that it may result in unreliable estimates absent evidence that the economic effects the Commission is attempting to measure would scale up linearly.

The Commission notes in X.C that empirical studies show a linear extrapolation is appropriate for measuring earnings effects.[1103] However, similar evidence supporting the use of linear extrapolation is not available for all economic outcomes the Commission is measuring in this final analysis. To maintain consistent reporting across economic outcomes and to avoid extrapolation, the final analysis considers the effect of a change equal to 0.081 when possible.[1104] That is, for the purposes of the final analysis, the Commission conservatively assumes the projected effects on economic outcomes due to the final rule are equal to the effects the economic literature associates with an average magnitude change in the non-compete enforceability score from year to year. The economic literature reports enforceability changes as simply increases or decreases in some studies,[1105] and the magnitude of those legal changes in this final analysis is assumed to mirror the average magnitude change of 0.081. The Commission makes these assumptions to avoid the possibility of inadvertently inflating the effects of changes in the enforceability score. The final rule will result in greater changes in enforceability than the changes examined in empirical studies. There is a possibility that the magnitude of change for particular economic outcomes will not be the same in response to every reduction in enforceability. For example, it is possible that for some economic outcomes, as enforceability gets closer to zero, the changes in the outcome being measured will be lower with each change in enforceability.

At the same time, the Commission notes that this may result in underestimating benefits of the final rule—the average magnitude change of 0.081 is much smaller than the average 0.78 change it would take for enforceability to reflect the final rule. To reflect this possibility, the final analysis includes sensitivity analyses which extrapolate beyond an average magnitude change. In these sensitivity

[1098] *See* NPRM at 3493–97 (describing the law governing non-competes at the time the NPRM was published). Minnesota prohibited non-competes after the publication of the NPRM. *See* Minn. Stat. Ann. sec. 181.988.

[1099] Bishara, *supra* note 501 at 751.

[1100] Different researchers have rescaled this score in different ways (*e.g.,* from zero to 470, or scaled such that the mean score is zero and the standard deviation of the score is one). The Commission uses the scaling from zero to one because that is the way it is used in the majority of the studies which are relied on in the final analysis, as well as for easy interpretability and consistency across the final analysis.

[1101] Calculated using data from 2009, the most recent year with publicly available data, and rescaled to a zero to one scale. *See* Starr, *supra* note 445.

[1102] Changes of zero (*i.e.,* years in which the score in a given State was the same as the prior year) were excluded from this calculation. The Commission notes that the study which reports this average (Johnson, Lipsitz, & Pei, *supra* note 526) was released after publication of the NPRM. The Commission also notes that the data underlying this calculation were used in other studies discussed in the NPRM; Johnson, Lipsitz, & Pei report the average score in the most accessible fashion and is therefore used here. The average they report is the average change in the analysis sample they select, which is chosen for analytical reasons to ensure accuracy of their estimates. Use of the underlying data to re-calculate the average score or use of scores provided by other researchers would not change the overall outcomes, conditional on sample selection. Moreover, the Commission reports the estimates resulting from a full extrapolation in this final analysis, which does not use this average score change in its sensitivity analysis, and is the method used in the NPRM. As noted, the Commission believes that the full extrapolation method is a valid, but potentially less precise method. Accordingly, the use of this score supplements—but is not necessary to support—the Commission's ultimate finding that the benefits to the final rule justify the costs.

[1103] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 17.

[1104] When considering studies which do not report the relationship between non-compete enforceability and economic outcomes based on a numeric score, the Commission is unable to scale the effect to reflect the average magnitude change of 0.081.

[1105] *See, e.g.,* Jeffers, *supra* note 450.

analyses, the estimated effects from the empirical literature are scaled up on a State-by-State basis (rather than taking the average) to account for the estimated size of the decrease in each State's score. The Commission notes that linear extrapolation provides a robust estimate of earnings changes based on the empirical literature, but for consistency, the Commission reports effects based on the average magnitude change as its primary analysis.

6. Benefits of the Rule

The Commission finds several benefits attributable to the final rule, as reflected in part by the effects of the rule on earnings and prices, and all the effects on output and innovation, as summarized in Table 1 in Part X.E.

a. Earnings

The Commission finds labor markets will function more efficiently under the final rule, which will lead to an increase in earnings or earnings growth. Specifically, in this regulatory analysis, the Commission finds that the estimated ten-year present discounted value of increased worker earnings is $400–$488 billion. The final rule will result in additional earnings stemming from improvements in allocative efficiency due to more productive matching between businesses, which are economic benefits. In other words, the increase in worker mobility will allow employers to hire workers who are a better, more productive fit with the positions they are seeking to fill, which in turn will increase productivity overall. A portion of the additional earnings are transfers from firms to workers resulting from more plentiful employment options outside the firm,[1106] as workers who are not bound by non-competes will be in a different bargaining position with their employer. To the extent other better opportunities with different employers exist for a given worker, their current employers will now be competing with those other employers and may increase worker compensation to keep those workers. The Commission finds that the economic literature does not provide a way to separate the total effect on workers' earnings into transfers and benefits.

The increase in worker earnings resulting from the final rule is calculated as follows:

*Increase in worker earnings = (% Increase in Earnings caused by the change in enforceability of non-competes) * (Total Affected Earnings)*

The primary approach in this analysis is to estimate the percentage increase in earnings assuming that the effect of the final rule will be the same as the effect of an average magnitude change in non-compete enforceability, as discussed in Part X.F.5. The Commission estimates the percentage increase in workers' earnings to be 0.86%.[1107] The Commission estimates total affected annual earnings to be $6.2 trillion (in 2023 dollars).[1108]

Multiplying the percentage effect (0.86%) by overall affected annual earnings ($6.2 trillion) results in an annual earnings effect of $53 billion. The ten-year effect on earnings, discounted separately by 2%, 3%, and 7%, is reported in the first row of Table 2.[1109]

This primary approach requires no extrapolation (*i.e.,* it does not scale the effect on economic outcomes to account for the fact that the effect of the rule on enforceability scores will be greater than the changes studied in the economic literature). However, it may understate the increase in workers' earnings resulting from the final rule. Thus, the Commission conducts two sensitivity analyses to assess how the estimated effect of the rule would change if effects are extrapolated to represent changes in enforceability scores greater than those examined in the literature.

The first sensitivity analysis, hereafter referred to as the ''full extrapolation'' approach, calculates the effect on worker earnings in an identical fashion to the primary analysis but relies on an estimate of the percentage increase in worker earnings which extrapolates to the effect of a complete prohibition on the use of non-competes. This results in an effect on worker earnings equal to 3.2% (instead of 0.86% in the primary analysis).[1110] For this estimate, total affected earnings are equal to $7.3 trillion in 2023 dollars.[1111] The estimated effect on earnings across the workforce for this first sensitivity analysis is therefore given by the percentage effect on earnings (3.2%) multiplied by the total annual wages in the U.S. for the affected population ($7.3 trillion). This results in an annual

[1106] By transfers, the Commission refers to ''a gain for one group and an equal-dollar-value loss for another group.'' *See* Off. of Mgmt. & Budget, *Circular A–4* (Nov. 9, 2023), 57, *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.*

[1107] Calculated as $-(e^{-0.107*0.081}-1)$, where −0.107 is the estimated coefficient of earnings on non-compete enforceability score in Johnson, Lavetti, & Lipsitz (*supra* note 388), and 0.081 represents the size of an average magnitude change calculated in Johnson, Lipsitz, & Pei (*supra* note 526) which scales the effect to represent the effect of an average sized change in the non-compete enforceability score.

[1108] This figure represents total annual earnings in the U.S. in the most recent year with data available (2022), adjusted to 2023 dollars: see *https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2022&qtr=A&own=5&ind=10&supp=0.* Earnings from California, North Dakota, Oklahoma, and Minnesota (States which broadly do not enforce non-competes) are subtracted out, since enforceability in those States will be broadly unaffected by the rule. The estimate is additionally adjusted to account for the proportion of the workforce the Commission estimates are currently covered by the Commission's jurisdiction (80%), as discussed in Part X.F.4.a. Numerically, $6.2 trillion is calculated as ($9.1 trillion − $1.6 trillion) * 80% = $6.0 trillion, adjusted to $6.2 trillion to adjust to 2023 dollars. $9.1 trillion is total private earnings in 2022 in the U.S. (the most recent year with data available), and $1.6 trillion is total private earnings in 2022 in CA, ND, OK, and MN.

[1109] For illustrative purposes, State-specific estimates are displayed in Appendix Table A.1. In this table, the estimated number of covered workers is calculated as 80% * (total employed population in the State); the estimated increase in total earnings is calculated as 0.86% * (estimated total covered earnings), where estimated total covered earnings is calculated as (estimated number of covered workers) * (average annual earnings); and the estimated increase in average earnings is calculated as 0.86% * (average annual earnings). Total employed population and average annual earnings are taken from the Census Bureau Quarterly Census of Employment and Wages for 2022 (see *https://www.bls.gov/cew/data.htm*).

[1110] The percentage effect, 3.2%, is reported by Johnson, Lavetti, & Lipsitz (*supra* note 388) as the lower end of a range of possible effects of a ban on non-competes, relative to non-compete enforceability in 2014. The estimate is constructed by calculating the change in the enforceability score in each State which would bring that State's score to zero (representing no enforceability of non-competes) and scaling the estimated effect on worker earnings by that amount. The Commission uses the low end of the reported range in order to exercise caution against extrapolation, since the estimate uses an out-of-sample approximation: the changes in most States necessary to arrive at a score of zero are greater than the changes examined in the study (though this approximation is consistent with the results of a test in Johnson, Lavetti, and Lipsitz which shows that the effect of enforceability on earnings is roughly linear: namely, a change in enforceability that is twice as large results in a change in earnings that is twice as large). The Commission also notes that the estimated range is based on enforceability in 2014. Since then, some changes in State law have made non-competes more difficult to enforce for subsets of their workforces so that a prohibition on non-competes today is likely to have a slightly lesser effect than a prohibition would have had in 2014.

[1111] This estimate differs from total affected earnings for the primary analysis because the estimate of 3.2% takes into account enforceability in California, North Dakota, and Oklahoma. Earnings in those States is therefore added back into total affected earnings. However, earnings in Minnesota are still omitted, since the prohibition in that State was enacted after the conclusion of the study period in Johnson, Lavetti, and Lipsitz (2023): see Minn. Stat. sec. 181.988. Total annual earnings in the U.S. for the affected population excluding MN are calculated as ($9.1 trillion − $0.2 trillion) * 80%, updated to adjust to 2023 dollars. $9.1 trillion is earnings for all workers in the US in 2022 (the most recent year with available data) and $0.2 trillion is earnings for workers in MN. *See https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2022&qtr=A&own=5&ind=10&supp=0.*

estimated earnings gain of $234 billion.[1112] The ten-year effect, discounted at 2%, 3%, and 7%, is displayed in the second row of Table 2.

The second sensitivity analysis, hereafter referred to as the ''partial extrapolation'' approach, uses the same formula as the other two analyses (% effect on earnings * total affected earnings) but is more conservative in its estimate of the percent effect on earnings than the full extrapolation estimate. The full extrapolation approach assumes that enforceability scores fall to zero. The partial extrapolation approach instead assumes that enforceability scores fall to the minimum observed enforceability score ignoring scores in States that broadly prohibit non-competes (a more moderate extrapolation). The minimum observed enforceability score excluding States that broadly prohibit non-competes is 0.53 (on a scale of zero to one), which is the enforceability score in New York.[1113] This analysis calculates the change in each State's score that would bring it to 0.53, and scales the effect on worker earnings estimated in the empirical literature by that amount.[1114] For example, West Virginia's enforceability score is 0.59. To change to New York's enforceability score would imply a decrease in West Virginia's score of 0.06 (calculated as 0.59—0.53). This implies a percent effect on earnings in West Virginia of 0.64%.[1115]

Total affected earnings in each State are calculated by multiplying total earnings in that State (adjusted to 2023 dollars) by the estimated percentage of covered workers (80%). For example, in West Virginia, total earnings are estimated to be $0.24 trillion.[1116]

Next, the percent increase in earnings in each State is multiplied by total affected earnings in that State. In West Virginia, this results in an earnings increase of 0.64% * $0.24 trillion = $152 million. Finally, the earnings increases are added across States. The overall estimated effect is an annual increase in earnings of $161 billion. The ten-year effect, discounted at 2%, 3%, and 7%, is displayed in the third row of Table 2.

TABLE 2

	Estimated ten-year increase in earnings ($ billions), assuming:		
	2% Discount rate	3% Discount rate	7% Discount rate
Primary estimate (average enforceability change)	$488	$468	$400
Estimate (full extrapolation)	2,148	2,060	1,762
Estimate (partial extrapolation)	1,488	1,427	1,221

The estimated effects on earnings in Table 2 are based on estimates of the percentage change in earnings from a study in the empirical literature that aligns with the metrics outlined in Part IV.A.2. Another study in the literature estimates earnings effects using a comparison between workers in occupations that use non-competes at a high rate versus a low rate.[1117] After adjusting the finding from that study to the average magnitude enforceability change, the estimated effect on worker earnings is 0.5%,[1118] or $31 billion annually.[1119]

The Commission notes that, as discussed in Part X.E, earnings of senior executives who continue to work under non-competes are included in the calculations in this Part X.F.6.a. If the Commission were able to identify those senior executives, their omission from the calculations would decrease the earnings effect of the final rule, since the earnings effect for those senior executives (and others, because of spillovers) would be pushed further into the future, causing steeper discounting. However, while senior executives are paid relatively highly, there are relatively few of them: for example, based on BLS data on earnings by occupation, Chief Executives' earnings comprise just 0.5% of all earnings.[1120] Therefore, the impact on the earnings calculations of omitting or pushing forward the earnings of senior executives who would continue to work under a non-compete is limited.

Discussion of Transfers Versus Benefits

It is difficult to determine the extent to which the earnings effects represent transfers versus benefits. Transfers, in this context, refer to ''a gain for one group and an equal-dollar-value loss for another group.'' [1121] Such transfers do not represent a net benefit or cost to the economy as a whole for purposes of regulatory impact analysis.

To the extent a prohibition on non-competes leads to greater competition in the labor market and a more efficient allocation of labor by allowing workers to sort into their most productive

[1112] This estimate is comparable to the estimate of $250 billion per year reported in the NPRM. *See* NPRM at 3523. The estimate in the NPRM was based on earnings in 2020 (as opposed to 2022 in this final regulatory analysis), included earnings in Minnesota (which has since passed a bill prohibition non-competes), and did not adjust for the estimate of the affected workforce discussed in Part X.F.4.a.

[1113] Enforceability score data come from Starr (2019), which reports scores for 2009 (the most recent data available). Scores are adjusted to a scale of zero to one.

[1114] In particular, for each State, the Commission calculates the percentage effect on earnings as $e^{(0.107*\Delta Enf)} - 1$, where ΔEnf is equal to the enforceability score in that State minus the lowest observed enforceability score, excluding CA, ND, OK, and MN (0.53).

[1115] Calculated as $-(e^{-0.107*0.064} - 1)$, where −0.107 is the estimated coefficient of earnings on non-compete enforceability score in Johnson, Lavetti, & Lipsitz (*supra* note 388), and 0.064 represents the scaling factor due to West Virginia's score change.

[1116] Calculated as $0.29 trillion * 80%, where $0.29 trillion is earnings in WV in 2022 (the most recent year with data available) adjusted to 2023 dollars. See *https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2022&qtr=A&own=5&ind=10&supp=0.*

[1117] For further discussion of this study, see the discussion in Part IV.B.3.a.ii of Starr, *supra* note 445.

[1118] The change in enforceability which generates the estimate in Starr (*supra* note 445) is a one standard deviation change, as measured using non-compete enforceability scores for all 50 States and the District of Columbia in 1991, which is a change on a scale of zero to one of approximately 0.17, calculated as 1/[1.60 − (−4.23)]. Scaling the estimate, a change equal to 0.081 would result in an earnings effect of 0.5%, calculated as $e^{(0.0099*0.081/0.172)} - 1$.

[1119] Calculated as $6.2 trillion * 0.5%.

[1120] Calculated as (199,240 * 246,440)/(147,886,000 * 61,900), where 199,240 and 147,886,000 are employment for Chief Executives and All Workers, respectively, and 246,440 and 61,900 are dollar earnings for Chief Executives and All Workers, respectively, in 2022. See Occupation Employment and Wage Statistics, BLS, *https://www.bls.gov/oes/tables.htm.* The Commission notes that Chief Executives are used as an illustrative example, and are an imperfect proxy for senior executives: some Chief Executives (as classified by BLS) may not be senior executives under the final rule, and some senior executives under the rule may not be Chief Executives.

[1121] Off. of Mgmt. & Budget, *Circular A–4* (Nov. 9, 2023) at 57.

matches with firms (including new firms that may be formed), then the resulting earnings increases may reflect higher productivity and so represent a net benefit to the economy. However, some increases in earnings when non-competes are prohibited may simply represent a transfer of income from firms to workers (or, if firms pass labor costs on to consumers, from consumers to workers).

Several pieces of evidence support the Commission's finding that at least part of the increase in earnings represents a social benefit or net benefit to the economy, rather than just a transfer. As described in Part IV.B.3.a.ii, two studies have sought to estimate the external effect of non-compete use or enforceability: that is, the effect of use or enforceability on individuals other than those directly affected by non-compete use or enforceability.

One study directly estimates the external effect of a change in non-compete enforceability.[1122] While use of non-competes is not observed in the study, the effects of changes in a State's laws are assessed on outcomes in a neighboring State. Since the enforceability of the contracts of workers in neighboring States are not affected by these law changes, the effect must represent a change related to the labor market which workers in both States share. The estimate suggests that workers in the neighboring State experience effects on their earnings that are 76% as large as workers in the State in which enforceability changed.[1123] In other words, two workers who share a labor market would experience nearly the same increase in their earnings from a prohibition on non-competes, even if the prohibition only affects one worker. While the study does not directly estimate the differential effects by use, the effects on workers unaffected by a change in enforceability may be similar to the effects on workers not bound by non-competes.

A second study demonstrates that when the use of non-competes by employers increases, wages decrease for workers who do not have non-competes but who work in the same State and industry. This study also finds that this effect is stronger where non-competes are more enforceable.[1124] Since the affected workers are not bound by non-competes themselves, the differential in earnings likely does not completely represent a transfer resulting from a change in bargaining power between a worker bound by a non-compete and their employer.

Overall, these studies suggest there are market-level dynamics governing the relationship between earnings and the enforceability of non-competes: specifically, restrictions on the enforceability of non-competes affect competition in labor markets by alleviating frictions and allowing for more productive matching. Changes in enforceability or use of non-competes have spillover effects on the earnings of those workers who should not be directly affected because they do not have non-competes or they work in nearby labor markets that did not experience changes in enforceability. If non-competes simply changed the relative bargaining power of workers and firms, without affecting market frictions or competition, then these patterns are less likely to be observed. Additionally, new business formation when non-competes are less enforceable (see Part IV.B.3.b.i for a discussion of the evidence) may create new productive opportunities for workers.

Due to the uncertainty related to earnings as transfers versus benefits, the Commission analyzes various scenarios that allocate the percent of the earnings effect to a benefit at different levels in Part X.F.10. This does not represent a finding that no part or only a small part of the effect on earnings is a benefit; rather, it is to ensure that the total estimated effect of the final rule is robust for the purposes of the regulatory impact analysis to the possibility that a small percentage of the effect on earnings represents a net benefit.[1125]

b. Innovation

The Commission finds that an additional benefit of the rule would be to increase the annual count of new patents by 3,111–5,337 in the first year, rising to 31,110–53,372 in the tenth year. By alleviating barriers to knowledge-sharing that inhibit innovation, and by allowing workers greater opportunity to form innovative new businesses, the final rule will increase innovation. Studies have sought to directly quantify this effect, primarily focused on patenting activity. The Commission therefore considers the effect on patenting in support of its findings related to innovation. Lacking an estimate of the social value of a patent, the Commission does not monetize this benefit. The Commission also finds that the rule will reduce expenditure on R&D by $0 to $47 billion per year. In light of the increase in overall innovation, this reduction is a cost savings for firms, but may not reflect a market-level effect because it does not measure potential expenditure on R&D by new firms formed as a result of the final rule. The change in patenting due to the rule for each year is calculated as follows:

*Increase in # of Patents = (% Increase in Patenting) * (Total # of Affected Patents)*

The Commission estimates the percentage increase in patenting to average 10.9%–18.7% annually over a ten-year period,[1126] which is the percentage effect on patenting of an average magnitude change in non-compete enforceability, as discussed in Part X.F.5. The Commission assumes that the full effect on patenting phases in over the course of a ten-year period, resulting in an effect of 2.0%–3.4% in the first year, increasing to 19.8%–34.0% by the tenth year.[1127] The total number of affected patents in each year is 156,976.[1128]

The results of the analysis, for the top and bottom end of the reported range of percentage increases in patenting, are displayed in Table 3.

As a sensitivity analysis, mirroring the analysis in Part X.F.6.a, the Commission assumes that enforceability scores in each State will fall to the lowest observed score among States which do not broadly prohibit non-competes. The Commission calculates the percentage change in patenting in each State by extrapolating the

[1122] Johnson, Lavetti, & Lipsitz, *supra* note 388.

[1123] *Id.* (note: a new version of this paper, posted in 2023 after the NPRM was published, revised this estimate slightly).

[1124] Starr, Frake, & Agarwal, *supra* note 469.

[1125] The Commission notes that Part IV.B.3.a.ii does not measure or consider whether earnings are transfers or benefits because to the extent that the earnings that are transfers represent firms' ability to suppress earnings using an unfair method of competition, the transfer of such earnings from firms to workers through the use of non-competes still reflect the tendency of non-competes to negatively affect competitive conditions in the labor market.

[1126] These values represent the range reported in Johnson, Lipsitz, & Pei, *supra* note 526, considering both raw patent counts and patent counts weighted by a measure of their quality: the number of citations received in the five years after the patent is granted. The findings by Johnson, Lipsitz, & Pei are qualitatively confirmed in the literature, with similar estimates generated by He (*supra* note 560)—a study discussed in the NPRM—and Rockall & Reinmuth (*supra* note 564).

[1127] This analysis assumes that the effect on patenting increases by an identical amount each year (2.0–3.4%), ensuring that the overall average annual change is equal to that reported in Johnson, Lipsitz, & Pei (*supra* note 526).

[1128] This is the number of granted utility patents, which are patents for new or improved innovation and are the types of patents studied by Johnson, Lipsitz, & Pei (*Id.*). The figure comes from 2020, which is the most recent data available from the U.S. Patent and Trademark Office. It excludes States in which non-competes are not enforceable (California, Oklahoma, North Dakota, and Minnesota). Data available at *https://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_20.htm.*

percentage increase in patenting to reflect the size of the change in that State's enforceability score. For example, as noted in Part X.F.6.a, West Virginia's score would fall from 0.59 to 0.53 as a result of this analysis. The percentage change in patenting in West Virginia would therefore average 9.0%–16.6%,[1129] resulting in an increase of 1.9%–3.6% in the first year, rising to 19.2%–35.6% by the tenth year.

The annual State-specific percentage changes are multiplied by the number of annual patents granted in each State.[1130] Finally, the changes in patenting across States are combined across States for a national estimate. The results are reported in Table 3. As States have broadly decreased legal enforceability of non-competes in recent years, the changes necessary to move to lower enforceability are likely overestimated in this sensitivity analysis. This causes the values estimated by this method to likely overestimate the true extent of the benefit.

TABLE 3

Year relative to publication of the rule	Estimated annual count of additional patents using low estimate of innovation effect	Estimated annual count of additional patents using high estimate of innovation effect	Estimated annual count of additional patents using low estimate of innovation effect and extrapolation approach	Estimated annual count of additional patents using high estimate of innovation effect and extrapolation approach
1	3,111	5,337	8,927	19,306
2	6,222	10,674	17,853	38,611
3	9,333	16,012	26,780	57,917
4	12,444	21,349	35,706	77,222
5	15,555	26,686	44,633	96,528
6	18,666	32,023	53,560	115,833
7	21,777	37,360	62,486	135,139
8	24,888	42,697	71,413	154,444
9	27,999	48,035	80,339	173,750
10	31,110	53,372	89,266	193,055

The Commission is not aware of estimates that assess the overall social value of a patent and therefore the Commission does not monetize the estimated effects on innovative output. Estimates of the effect of a patent on a firm's value in the stock market exist in the empirical literature,[1131] as do estimates of the sale value of a patent at auction.[1132] However, those estimates do not include the effects on follow-on innovation, consumers (who may benefit from more innovative products), competitors, or the rents that are shared with workers, and instead reflect solely the private effect of a patent to the relevant firms.

The Commission notes that patent counts may not perfectly proxy for innovation. However, by using citation-weighted patents, as well as other measures of quality, the study by Johnson, Lipsitz, and Pei shows that patent quality, not just patent quantity, increase when non-competes become less enforceable.[1133] Similarly, the study by He shows that the value of patents also increases when non-competes become less enforceable.[1134]

The second effect of the final rule associated with innovation is a possible change in spending on R&D. The change in R&D spending due to the final rule is calculated as follows:

Reduction in R&D Spending = (% Reduction in Spending) * (Total Affected Spending)

The Commission estimates that the percentage reduction in spending is 0–8.1%, with the broad range reflecting disagreement in the empirical literature.[1135] Total affected spending is $575 billion (in 2023 dollars).[1136] Multiplying the percentage effect by total affected spending, the overall annual effect is a reduction of $0-$47 billion in R&D spending in 2023 dollars.

The Commission notes that, in light of the increases in innovation identified in this Part X.F.6.b, reductions in R&D spending represent a cost savings for firms. Put differently, reductions in R&D spending may cause commensurate reductions in innovative output. Insofar as reductions in R&D spending resulting from the rule could have countervailing effects on innovation, the estimated increase in innovative output represents the net effect, which would otherwise be even larger, if R&D spending were held constant.

Notably, empirical estimates of R&D spending are based on observed changes among incumbent firms and therefore may not reflect market-level effects. Decreased investment at the firm level (the level of estimation in the studies that report effects of enforceability on R&D spending) does not necessarily mean that investment would decrease at the market level, since new firms entering the market may contribute additional R&D spending not captured in the referenced studies. For these reasons, the Commission stops short of classifying the effect on R&D spending as a benefit of the final rule.

The Commission notes that, as discussed in Part X.E, the estimated effects on innovation do not take into account that some senior executives

[1129] Calculated as $e^{(1.43*0.06)}-1$ and $e^{(2.56*0.06)}-1$, where 1.43 and 2.56 represent the coefficients reported in Johnson, Lipsitz, & Pei (*Id.*) as the lower and upper bounds of the reported coefficient range, and 0.06 is the decline in the enforceability score in West Virginia.

[1130] Data available at *https://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_20.htm.*

[1131] Leonid Kogan, Dimitris Papanikolaou, Amit Seru, & Noah Stoffman, *Technological Innovation, Resource Allocation, and Growth,* 132 The Quarterly J. of Econ. 665 (2017).

[1132] Ariel Pakes, *Patents as Options: Some Estimates of the Value of Holding European Patent Stocks,* 54 Econometrica 755 (1986).

[1133] Johnson, Lipsitz, & Pei, *supra* note 526.

[1134] He, *supra* note 560.

[1135] Johnson, Lipsitz, & Pei (*supra* note 526) find a negative effect on R&D spending of 8.1% due to an average magnitude change in non-compete enforceability, while Jeffers (*supra* note 450) finds no economically or statistically significant effect on R&D spending.

[1136] Total U.S. R&D spending was estimated by the NSF in 2019, the most recent available year with finalized estimates, excluding nonprofits, higher education, and nonfederal and Federal government. Nat'l Ctr. for Sci. and Engrg. Stats., *New Data on U.S. R&D: Summary Statistics from the 2019–20 Edition of National Patterns of R&D Resources* (Dec. 27, 2021), *https://ncses.nsf.gov/pubs/nsf22314;* Nat'l Ctr. for Sci. and Engrg. Stats., *U.S. R&D Increased by $51 Billion in 2020 to $717 Billion; Estimate for 2021 Indicates Further Increase to $792 Billion* (Jan. 4, 2023), *https://ncses.nsf.gov/pubs/nsf23320.* Note that the data are not broken out by State, and therefore the final analysis cannot exclude CA, ND, OK, and MN.

may continue to work under non-competes under the rule. The Commission is unable to separate the effects of senior executives' non-competes from other workers' non-competes on innovation. Some effects estimated in this Part X.F.6.b may occur further in the future than assumed in this analysis, based on the extent of continued use of non-competes for senior executives.

Overall, the Commission finds that the final rule will significantly increase innovation. Furthermore, the increase in innovation may be accompanied by a decrease in spending on R&D that would, thus, be a cost saving to firms.

c. Prices

The Commission finds that consumer prices may fall under the final rule because of increased competition. The only empirical study of this effect concerns physician practice prices. Based on this study, the Commission estimates the ten-year present value reduction in spending for physician and clinical services from the decrease in prices is $74–$194 billion. The Commission finds some of the price effects may represent transfers from firms to consumers and some may represent benefits due to increased economic efficiency. Some of the benefits may overlap with benefits otherwise categorized, such as benefits related to innovation.

The decrease in prices for physician services because of the final rule is calculated as follows:

*Decrease in Prices = (% Decrease in Prices) * (Total Affected Spending)*

The Commission estimates the percentage decrease in prices for physician services to be 3.5%.[1137] Total spending on physician and clinical services was $801 billion in 2023 dollars, excluding States that broadly do not enforce non-competes.[1138] The Commission separately multiplies spending by 35%, 61.9%, and 75% (estimates of the proportion of hospitals covered by the Commission's jurisdiction as a proxy for total physician and clinical services spending covered by the Commission's jurisdiction) to arrive at total affected spending.[1139] The ten-year sum of discounted spending decreases for these analyses are presented in Table 4.

As a sensitivity analysis, mirroring the analysis in Part X.F.6.a, the Commission assumes that enforceability scores in each State will fall to the lowest observed score among States which do not broadly prohibit non-competes. The Commission calculates the percentage change in prices in each State by extrapolating the percentage decrease in prices to reflect the size of the change in that State's enforceability score. As noted in Part X.F.6.a, West Virginia's score would fall from 0.59 to 0.53 as a result of this analysis. The percentage decrease in prices in West Virginia would therefore be 2.5%.[1140] This percentage decrease is multiplied by State-specific physician spending, adjusted by the relevant multiplier to account for the Commission's jurisdiction, and summed over States.

The ten-year present discounted value of the spending decreases estimated by this analysis are presented in Table 4.

TABLE 4

	Assumed percent of physicians covered (%)	Estimated spending reduction over ten years (billions of dollars) assuming:		
		2% Discount rate	3% Discount rate	7% Discount rate
Primary estimate (average magnitude enforceability change)	35	$90	$87	$74
	61.9	160	153	131
	75	194	186	159
Sensitivity analysis (partial extrapolation approach)	35	257	247	211
	61.9	455	437	373
	75	552	529	459

Several effects of the final rule, including changes in capital investment, new firm formation, and innovation, may possibly filter through to consumer prices. Prices, therefore, may act as a summary metric for the effects on consumers. The Commission notes, however, that prices are an imperfect measure for the effect on consumers. For example, increased innovation catalyzed by the final rule could result in quality increases in products, which might increase prices (all else equal), but nevertheless, consumers may be better off. New firm formation may result in a broader set of product offerings, even if prices are unaffected. Finally, some portion of this effect may represent a transfer from physician practices to consumers. For all these reasons, as well as to avoid double-counting (since prices may reflect changes in innovation, investment, market structure, wages, and other outcomes that are measured elsewhere), the Commission considers evidence on prices to be corroborating evidence, rather than a unique cost or benefit, though some portion of the total effect likely represents a standalone benefit of the rule. The Commission also notes increased competition brought about by the final rule will likely increase

[1137] 3.5% is calculated as $-(e^{(0.427 * 0.081)} - 1)$, where 0.427 is the coefficient relating non-compete enforceability and physician prices in Hausman & Lavetti (*supra* note 590), and 0.081 represents the average magnitude non-compete enforceability score, as described in Part X.F.5.

[1138] See *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/National HealthAccountsStateHealthAccountsProvider.* Spending in 2020, the most recent year with available data, was $679 billion, which is $801 billion adjusted to 2023 dollars. CA, ND, OK, and MN are omitted.

[1139] In the absence of data on the percentage of physician practices that are non-profit, the Commission uses a range of three different assumptions on the share of covered hospitals. In the first two scenarios, the Commission assumes that the set of covered hospitals is all hospitals that are not non-profit. The first scenario uses 2020 data from the American Hospital Association indicating that 65% of hospitals report that they are non-profits (based on data available at *https://www.ahadata.com/aha-dataquery*). The second scenario uses 2017–2021 data from the American Community Survey indicating that 38.1% of hospital employment is at non-profits (see *https://www.washingtonpost.com/business/2023/05/12/force-behind-americas-fast-growing-nonprofit-sector-more).* Finally, consistent with the Commission's findings in Part V.D.4, the percentages of firms that report themselves as nonprofit in the data, which reflects registered tax-exempt status under IRS regulations, does not equate to the Commission's jurisdiction. It is likely the Commission may have jurisdiction over some hospitals and other healthcare organizations identified as nonprofits. Therefore, the third scenario assumes that 75% are covered.

[1140] Calculated as $e^{(0.427 * 0.06)} - 1$, where 0.427 is the coefficient reported in Hausman and Lavetti (*supra* note 590), and 0.06 is the decline in the enforceability score in West Virginia.

consumer quantity, choice, and quality. These effects are not quantified in the literature.

To draw inferences to other industries, the Commission notes that if the relationship between non-compete enforceability and prices observed in healthcare markets holds in other industries, then under the final rule prices would likely decrease, and product and service quality would likely increase. Insofar as such effects may be driven by increases in competition, as discussed in Part IV.B.3.b.iii, *e.g.,* because of new firm formation, it is likely output would also increase. However, the evidence in the literature addresses only healthcare markets and therefore the Commission cannot say with certainty that similar price effects would be present for other products and services.

In many settings, it is possible that increases in worker earnings from restricting non-competes may increase consumer prices because of higher firms' costs.[1141] There is no empirical evidence that enforceability of non-competes increase prices due to increased labor costs. Additionally, greater wages for workers freed from non-competes may result from better worker-firm matching, which could simultaneously increase wages and increase productivity, leading to lower prices.

The Commission notes that, as discussed in Part X.E, the estimates of the effect of the rule on prices do not separately account for the effect of senior executives who may continue to have non-competes under the rule. The Commission is unable to monetize or quantify these effects separately because there is no accounting in the applicable literature of why, nor to which groups of workers, the observed price effects occur. If such non-competes have a large impact, some of the effects estimated in this section may occur further in the future than described in this Part X.F.6.c.

7. Costs of the Final Rule

The Commission finds costs associated with the final rule, including legal and administrative costs, and possibly costs related to investment in human capital and litigation, as summarized in Table 1 in Part X.E. The Commission notes the final analysis includes effects on investment in human capital and litigation costs in this Part X.F.7 discussing costs associated with the final rule, though it is not clear whether effects associated with investment in human capital are costs or benefits, and it is not clear whether litigation costs would rise or fall under the final rule.

a. Investment in Human Capital

The Commission estimates the ten-year present discounted value of the net effect of the final rule on investment in human capital (*i.e.,* worker training) ranges from a benefit of $32 billion to a cost of $41 billion. The Commission notes that this wide range represents substantial uncertainty in the interpretation of the estimates that exist in the economic literature. The estimates contained in this Part X.F.7.a are separated along lines created by that uncertainty.

There are two primary sources of uncertainty. The first pertains to the extent to which lost investment in human capital is ''core'' versus ''advanced.'' As discussed in Part IV.B.3.b.ii, when non-competes are enforceable, fewer workers will be available due to decreased labor mobility, including workers who would be a good skills match for a particular job, as well as workers moving to new industries to avoid triggering a potential non-compete clause violation. This may require retraining of workers forced into a new field that would not otherwise be necessary for an experienced worker within the same industry. The departure of experienced workers from the industry also means firms will be required to invest in the human capital of inexperienced workers who replace them. This type of investment in training to address a skills mismatch—which is referred to as the ''core'' training scenario—contrasts with what is referred to as the ''advanced'' training scenario, which is investment in training that builds upon the productivity of workers who may already be experienced in an industry. Insofar as reductions in investment in human capital due to the final rule represent reductions in core investment, the rule will save firms money and will additionally not require workers to forgo time spent producing goods and services to train. Therefore, such reductions would represent a benefit of the final rule. However, insofar as reductions in investment in human capital from the final rule represent reductions in advanced investment, there may be productivity losses for workers. The estimates in the literature do not allow the Commission to distinguish between the types of forgone human capital investment in the final analysis. This final analysis therefore separately estimates the effects assuming lost investment in human capital is core and assuming it is advanced.

The second source of uncertainty pertains to the specific estimates of the effect of non-compete enforceability on investment of human capital. Starr (2019) estimates the differential effect of non-compete enforceability on training in occupations which use non-competes at a high rate versus those that use non-competes at a low rate but does not estimate the absolute effect on investment across the workforce. Therefore, this final analysis separately estimates the effects on training under two different assumptions—that the increase in training due to greater non-compete enforceability affects all workers, or only workers in high-use occupations—to demonstrate how this uncertainty affects the estimates.[1142]

The Commission notes that some of the estimates described in this Part X.F.7 may overlap with estimates reported in other sections of the regulatory analysis. For example, if decreased enforceability of non-competes decreases investment in workers' human capital, and this decreased investment would be reflected in lower wages for workers, then the estimate of the wage increase resulting from the final rule will already account for the extent to which decreased investment decreases wages. That is, if investment were held constant, the earnings increase associated with the final rule may be even larger.

i. Estimates Assuming Lost Investment in Human Capital Is Core Training

The first set of estimates assumes that all lost training is core. This results in estimated effects of the final rule that represent upper bounds on the benefits associated with the final rule's effect on investment in human capital. In these scenarios, the final rule will allow firms to hire experienced workers instead of needing to provide costly training to workers new to the industry or a position. The change in investment in core training brought about by the rule is calculated as follows:

Effect of Decreased Investment in Core Training = Additional Output of

[1141] Sebastian Heise, Fatih Karahan, & Ayşegül Şahin *The Missing Inflation Puzzle: The Role of the Wage-Price Pass-Through,* 54 J. Money, Credit & Banking 7 (2022).

[1142] Whether this assumption yields an overestimate or underestimate depends on what happens to training of workers in occupations with a low-rate of non-competes use when the enforceability of non-competes changes. If the effect of a change in non-compete enforceability on workers in occupations that use non-competes at a low rate is small, this assumption yields an overestimate of the overall effect on training. If the effect on those workers is large, it results in an underestimate.

Workers Resulting From Less Time Spent Training + Reduced Direct Outlays on Training

Additional Output of Workers Resulting From Less Time Spent Training

The first component is additional output of workers resulting from less time spent on otherwise unnecessary training if they were better matched with firm and industry. The change in the output of workers from less time spent training because of the final rule is calculated as follows:

*Additional Output of Workers Resulting From Less Time Spent Training = (Total # of Affected Workers) * (Percentage Point Decrease in Trained Workers) * (Average Hours Spent Training Per Worker) * (Average Hourly Output of Workers)*

The Commission estimates the total number of affected workers as 101.1 million workers, assuming all workers are affected, and 45.3 million workers, assuming only workers in high-use occupations are affected.[1143] The percentage point decrease in trained workers is estimated to be 0.4.[1144] Average hours spent training per worker is estimated to be 85 hours per year.[1145] Average hourly output of workers is estimated to be $60.77.[1146]

The total additional output due to forgone training time is therefore calculated as $1.9 billion per year when all workers are assumed to be affected, or $0.8 billion per year when only workers in high-use occupations are assumed to be affected.

Reduced Direct Outlays on Human Capital Investment

The second component of the economic effect calculated in the final analysis is reduced direct outlays on human capital investment—or the out-of-pocket cost to firms for training. The change in direct outlays on human capital investment resulting from the rule is calculated as follows:

*Reduced Direct Outlays = [(Total Direct Outlays)/(# of Workers Receiving Training)] * [(Total # of Affected Workers) * (Percentage Point Decrease in Trained Workers)]*

Total direct outlays on human capital investment are estimated to be $105 billion in 2023 dollars.[1147] The estimated number of workers receiving training is 23.5 million workers.[1148] The Commission estimates the total number of affected workers as 101.1 million workers, assuming all workers are affected, and 45.3 million workers, assuming only workers in high-use occupations are affected.[1149] The percentage point decrease in trained workers is estimated to be 0.4.[1150]

This calculation results in annual cost savings of $1.6 billion, assuming the training rates of workers in all occupations are affected and $0.7 billion assuming the training rates of workers only in high-use occupations are affected. The ten-year present value effects of the final rule on investment in human capital, assuming that lost investment is core investment, discounted at 2%, 3%, and 7% and separately assuming effects on workers in all occupations versus just workers in occupations that use non-competes at a high rate, are presented in the first two rows of Table 5.

ii. Estimates Assuming Lost Investment in Human Capital Is Advanced Training

The second set of estimates of the effects on human capital investment in the final analysis assumes all training is advanced. The Commission begins with the same approach (calculated in Part X.F.7.a.i) to estimate the direct gain in output of workers and reduced direct outlays from foregone advanced human capital investment because such investment is costly for firms and results in decreased time spent on productive activities by workers, regardless of whether the investment is core or advanced. The major difference is that the Commission nets out an additional component which represents lost long-term productivity of workers caused by lost investment in their human capital. The Commission nets out this additional component based on the assumption that advanced human capital investment results in some increased long-term productivity in workers (because it assumes that firms would not otherwise make such a costly investment). This results in estimated effects of the final rule that represent upper bounds on the costs associated with changes in investment in human capital. Therefore, the estimated effect of the rule on advanced human capital investment is calculated as follows:

Effect of Decreased Investment in Advanced Training = Additional Output of Workers Resulting from Less Time Spent Training + Reduced Direct Outlays on Training − Lost Output Resulting from Foregone Advanced Training

The first two components—additional output of workers due to less time spent training and reduced direct outlays on training—are calculated in Part X.F.7.a.i. The lost output of workers due to lost investment in their human

[1143] Excluding States which broadly prohibit non-competes (CA, ND, OK, and MN), the BLS reports employment of 126.4 million individuals in May 2022 (the most recent year with occupation-specific data available), 56.6 million of whom work in occupations that use non-competes at a high rate, as defined in Starr, *supra* note 445; see *https://www.bls.gov/oes/tables.htm.* The Commission estimates that 80% of employed individuals are covered by the Commission's jurisdiction (see Part X.F.4.a), resulting in 101.1 million covered workers, 45.3 million of whom work in high-use occupations. The Commission notes that these estimates include public employment, as data on occupation-specific employment at the State level are not available by firm ownership. Occupation-specific employment data are necessary to split workers into low- and high-use occupations. Workers including those estimated to be bound by non-competes and those who are not are included in this estimate, since the empirical estimate of the increase in training reflects a sample representative of the full workforce, not just those bound by non-competes.

[1144] The coefficient reported by Starr (*supra* note 445), 0.77%, corresponds to a one standard deviation increase on Starr's scale, and represents the percentage point effect on the percentage of workers trained (rather than the amount of training they receive). Rescaling to a scale of zero to one, a one standard deviation increase is equal to a change in the enforceability measure of 0.17. Since estimates for earnings and innovation use a mean enforceability change of 0.081 on a scale of zero to one, the coefficient in Starr is rescaled to 0.77 * (0.081/0.17) = 0.364%, which represents the change in the fraction of covered workers receiving training due to an average magnitude change of 0.081.

[1145] 85 hours per year is calculated as 5.7 weeks per year * 20.1 hours per week * 73.9%, where 73.9% is the percentage of training that is firm-sponsored (the type of training likely to be affected by the final rule). These three estimates (5.7 weeks per year, 20.1 hours per week, and 73.9% of training being firm sponsored) are estimated in Harley J. Frazis & James R. Spletzer, *Worker Training: What We've Learned from the NLSY79,* 128 Monthly Lab. Rev. 48 (2005).

[1146] The Commission assumes that the average hourly output of workers is twice their average earnings and estimates average earnings to be $30.38 per hour, which is the average hourly earnings for workers in training ages 22–64 currently holding one job in the Survey of Income and Program Participation for all waves from 1996 to 2008. The dollar value is adjusted to 2023 dollars.

[1147] 2022 Training Industry Report, Training Magazine (Nov. 2022) at 17.

[1148] Calculated as 15.8% * 148.9 million, where 15.8% is the percentage of workers who receive training, according to Frazis & Spletzer *supra* note 1145 at 48. 148.9 million is the estimated number of workers in the U.S. in May 2022 according to *https://www.bls.gov/oes/tables.htm.* Note that all workers are included in this estimate (not just workers in States which enforce non-competes) because the estimate of training expenditures also covers all workers.

[1149] Excluding States which broadly prohibit non-competes (CA, ND, OK, and MN), the BLS reports employment of 126.4 million individuals in May 2022 (the most recent year with occupation-specific data available), 56.6 million of whom work in occupations that use non-competes at a high rate, as defined in Starr (*supra* note 445) (*see https://www.bls.gov/oes/tables.htm*). The Commission estimates that 80% of employed individuals are covered by the Commission's jurisdiction (see Part X.F.4.a), resulting in 101.1 million covered workers, 45.3 million of whom work in high-use occupations. *See supra* note 1143.

[1150] As discussed in Part X.F.7.a.i.

capital due to the rule in each year is calculated as follows:

*Lost Output from Lost Investment in Human Capital = (Total # of Affected Workers) * (Percentage Point Decrease in Trained Workers) * (Average Hourly Output of Workers) * (Average Hours Worked per Year) * (% Productivity Loss)*

The Commission estimates the total number of affected workers as 101.1 million workers, assuming all workers are affected, and 45.3 million workers, assuming only workers in high-use occupations are affected.[1151] The percentage point decrease in trained workers is estimated to be 0.4.[1152] Average hourly output of workers is estimated to be $60.77.[1153] The average number of hours worked per year is 1,784.[1154] The Commission assumes the percent productivity loss to be 6.4%.[1155]

In the first year, this yields a total estimate of lost output from lost investment in human capital of $1.5 billion or $0.7 billion (under the separate assumptions of all workers being affected and only high-use occupation workers being affected). Since the returns to advanced training persist to some extent over time, in the second year, returns to advanced training from the first year are assumed to depreciate by 20%,[1156] and the calculation is redone according to the depreciated return to advanced training. In the third year, training from the first year again depreciates, and so on until the tenth year (the end of the horizon considered).

Additionally, in the second year, a new round of advanced training is forgone. An additional $1.5 billion or $0.7 billion in lost output is therefore incurred in the second year under the final rule, and the depreciation calculations are again repeated for the new round of advanced training until year ten. New rounds of advanced training are forgone in each year through the tenth. Lost output from lost advanced training in the tenth year is therefore the sum of a depreciated return to training from each of the prior nine years plus lost output from lost training in the tenth year itself.

To arrive at estimates of overall lost productivity due to lost advanced training, lost productivity in each year (separately due to lost training in each prior year) is added together. Finally, lost productivity due to lost advanced training is subtracted from the two components calculated in Part X.F.7.a.i (additional output of workers from less time spent training and reduced direct outlays). The ten-year discounted effects of the final rule on investment in human capital, assuming lost investment is advanced training investment, discounted at 2%, 3%, and 7%, and separately assuming workers in all occupations versus just workers in occupations that use non-competes at a high rate, are presented in the last two rows of Table 5.

TABLE 5

	2% Discount rate	3% Discount rate	7% Discount rate
Estimated discounted ten-year effect assuming lost training is core and workers in all occupations are affected	$32	$31	$27
Estimated discounted ten-year effect assuming lost training is core and workers in high-use occupations are affected	14	14	12
Estimated discounted ten-year effect assuming lost training is advanced and workers in all occupations are affected	−41	−39	−31
Estimated discounted ten-year effect assuming lost training is advanced and workers in high-use occupations are affected	−19	−17	−14

Note: All values in billions of 2023 dollars. Negative values represent net cost estimates, while positive values represent net benefit estimates.

As discussed in Part X.E, the Commission notes that the estimates in this Part X.F do not account for senior executives who continue to work under non-competes under the rule. If the effects on training are due to effects on such senior executives, then the effects discussed herein would occur further into the future than discussed.

b. Legal and Administrative Costs Related to Compliance

The Commission finds that firms with existing non-competes will have related legal and administrative compliance costs as a result of the final rule. The Commission quantifies and monetizes these costs and conducts related sensitivity analyses.

i. Legal Costs

The Commission finds one-time legal costs related to firms' compliance with the final rule are estimated to total $2.1-$3.7 billion. The Commission estimates two main components of legal costs: (1) updating existing employment agreements or terms to ensure new hire employment terms comply with the final rule; and (2) advising employers about potential operational or contractual changes for workers who will no longer have enforceable non-competes. The latter includes determination of workers whose non-competes are no longer enforceable

[1151] Excluding States which broadly prohibit non-competes (CA, ND, OK, and MN), the BLS reports employment of 126.4 million individuals in May, 2022 (the most recent year with occupation-specific data available), 56.6 million of whom work in occupations that use non-competes at a high rate, as defined in Starr (*Id.*) (see *https://www.bls.gov/oes/tables.htm*). The Commission estimates that 80% of employed individuals are covered by the Commission's jurisdiction (see Part X.F.4.a), resulting in 101.1 million covered workers, 45.3 million of whom work in high-use occupations. *See supra* note 1143.

[1152] As discussed in Part X.F.7.a.i.

[1153] The Commission assumes that the average hourly output of workers is twice their average earnings and estimates average earnings to be $30.38 per hour, which is the average hourly earnings for workers in training ages 22–64 currently holding one job in the Survey of Income and Program Participation for all waves from 1996 to 2008. The dollar value is adjusted to November 2023 dollars using *https://www.bls.gov/data/inflation_calculator.htm.*

[1154] See *https://fred.stlouisfed.org/release/tables?rid=50&eid=6462#snid=6449,* which reports average weekly hours and overtime of all employees on private nonfarm payrolls by industry sector, seasonally adjusted. The reported value, 34.3, is multiplied by 52 to get annual hours worked.

[1155] This figure is the midpoint of two estimates in the literature: Harley Frazis & Mark A. Loewenstein, *Reexamining the Returns to Training: Functional Form, Magnitude, and Interpretation,* 40 J. Hum. Res. 453 (2005) [3.7%] and Gueorgui Kambourov, Iourii Manovskii, & Miana Plesca, *Occupational Mobility and the Returns to Training,* 53 Can. J. of Econ. 174 (2020) [9.1%].

[1156] There is no perfect estimate of the rate of human capital depreciation in the economic literature. Studies typically make assumptions they deem reasonable to estimate this rate, with 20% representing neither the low end nor the high end of the range of such assumptions. *See, e.g.,* Rita Almeida & Pedro Carneiro, *The Return to Firm Investments in Human Capital,* 16 Lab. Econs. 97 (2009), who assume that the human capital depreciation rate may range from 5% to 100%.

under the rule, as opposed to those that fall under the exemption for senior executives.

For the first component, firms must consider what changes to their contractual practices are needed to ensure that incoming workers are not offered or subject to non-competes and what revisions to human resources materials and manuals are needed to ensure they are not misused on a forward-going basis. Firms may respond by removing specific non-compete language from standard contracts and human resources (H.R.) materials and manuals used for future employees. The second component involves strategic decisions and changes in response to the final rule. For example, firms may adjust other contractual provisions such as NDAs. This legal work is not mandated or required by the rule; it would be undertaken only by the subset of firms and workers for whom firms conclude that such alternatives would be desirable. Additionally, such adjustments are likely unnecessary for senior executives whose non-competes continue to be enforceable under the rule. Therefore, this component additionally involves identifying senior executives whose existing non-competes are unaffected. For any such legal work, firms may use in-house counsel or outside counsel.

Legal costs are therefore calculated as follows:

Legal Costs = Modify Standard Contract Language/H.R. Materials and Manuals Costs + Revise Contractual Practices Costs

One component of the legal cost will be due to the modification of standard contracts to remove prohibited language regarding non-competes which is calculated as follows:

*Modify Standard Contract Language/ H.R. Materials and Manuals = (Average Hours Necessary for Modification) * (Cost per Hour) * (# of Affected Businesses)*

The Commission estimates that, on average, modifying standard contract language and H.R. materials and manuals would take the equivalent of one hour of a lawyer's time.[1157] The estimated cost per hour is $134.62 in 2023 dollars,[1158] and the number of affected businesses is 3.4 million.[1159] This results in a total one-time modification cost of $457 million.

Another component of legal costs relates to any firm-level revision to their contractual practices, including identification of senior executives, which is calculated as follows:

*Revise Contractual Practices Costs = (Average Hours Necessary to Update Contractual Practices) * (Cost per Hour) * (# of Affected Businesses)*

The Commission estimates the average firm employs the equivalent of four to eight hours of a lawyer's time to update its contractual practices and determine which employees may fall under the final rule's exemption.[1160] The Commission estimates the cost of a lawyer's time to be $134.62 as discussed in this Part X.F.7.b.i. The number of affected businesses is estimated to be 2.9 million.[1161]

Under the assumption that the average firm that uses a non-compete employs the equivalent of four to eight hours of a lawyer's time, the total one-time expenditure on revising contractual practices would range from $1.6 billion (assuming four hours are necessary) to $3.1 billion (assuming eight hours are necessary).

Some commenters indicated that some firms may use outside counsel, which is more costly to firms, to remove non-competes from contracts of incoming workers and to update contractual practices. While commenters did not provide data to support this assertion, as a sensitivity analysis, the Commission replaces the estimate of the hourly earnings of a lawyer with an estimate of the cost of outside counsel ($483 per hour), conservatively overestimating costs by using the estimated rate of a tenth-year lawyer.[1162] Under this sensitivity analysis, the Commission estimates the total cost of ensuring that incoming workers' contracts do not contain non-competes would be $1.6 billion and the cost of updating contractual practices would be $5.6-$11.3 billion. Some commenters stated that the hourly cost of lawyers' time may be even greater than the value assumed in the sensitivity analysis ($483 per hour). The Commission finds that the sensitivity analysis assuming a rate of $438 per hour provides a reasonable estimate of the costs under the assumption that outside counsel would be used, and that higher rates (*e.g.,* $749 per hour, as stated by one commenter) are unreasonably high, especially as an average across many firms.

The Commission believes the exclusion of existing non-competes with senior executives could result in lower net legal costs than the Commission's estimate. First, for senior executives who currently work under a non-compete, firms will have a longer time period during which they may update

[1157] This process would likely be straightforward for most firms (*i.e.,* simply not using non-competes or removing one section from a boilerplate contract). There may be firms for which it is more difficult and requires more time. This analysis uses an average time spent of one hour, which conservatively represents the *average* time spent to do so, and accounts for variation across firms.

[1158] According to BLS, the median wage for a lawyer was $65.26 per hour in 2022, or $67.31 in 2023 dollars. See *https://www.bls.gov/ooh/legal/lawyers.htm.* As in Part X.F.7.a, the Commission doubles this number to reflect the lost productivity of the worker.

[1159] Calculated as 6.88 million * 0.494. Here, 6.88 million is the number of establishments in the U.S. (excluding California, North Dakota, Oklahoma, and Minnesota, where non-competes are broadly unenforceable) in 2021 (the most recent year with data available): see *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.* This value is multiplied by 49.4%, the percentage of firms using non-competes in the U.S. according to Colvin & Shierholz (*supra* note 65).

[1160] The Commission emphasizes that this is an average to underscore there would likely be large differences in the extent to which firms update their contractual practices. Many firms, including those that use non-competes only with workers who do not have access to sensitive information, or those which are already using other types of restrictive employment provisions to protect sensitive information, may opt to do nothing. There is evidence indicating firms that use non-competes are already using other types of restrictive employment provisions: Balasubramanian et al. (2024) find that 95.6% of workers with non-competes are also subject to an NDA, 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and that 74.7% of workers with non-competes are also subject to all three other types of provisions. See Balasubramanian, Starr, & Yamaguchi (*supra* note 74). Other firms may employ several hours or multiple days of lawyers' time to arrive at a new contract. The estimated range of four to eight hours represents an average taken across these different possibilities. For example, if two-thirds of firms that currently use non-competes opt to make no changes to their contractual practices (for example, because they are one of the 97.5% of firms which already implement other post-employment restrictions, or because they will rely on trade secret law in the future, or because they are using non-competes with workers who do not have access to sensitive information), and one-third of such firms spend (on average) the equivalent of 1.5 to 3 days of an attorney's time, this would result in the estimate of 4–8 hours on average.

[1161] Calculated as 5.91 million * 0.494. Here, 5.91 million is the number of firms in the U.S. (excluding California, North Dakota, Oklahoma, and Minnesota, where non-competes are broadly unenforceable) in 2021 (the most recent year with data available): *see https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.* This value is multiplied by 49.4%, the percentage of firms using non-competes in the U.S. according to Colvin & Shierholz (*supra* note 65). The Commission notes that this analysis assumes that decisions regarding protection of sensitive information and contract updating are made at the firm (a collection of establishments under shared ownership and operational control), rather than establishment, level, since sensitive information is likely shared across business establishments of a firm. This explains the difference between the number of businesses used here (2.9 million) versus the number used to calculate the cost of contract revision (3.4 million).

[1162] This estimate is drawn from the Fitzpatrick Matrix. *See supra* note 1087 and accompanying text. Note that the Commission does not double this number to reflect productivity, since the cost of outside counsel's time likely already reflects the productivity of that worker.

contractual practices. For example, for a senior executive who does not change jobs for 5 years after the compliance date of the final rule, the firm will have 5 years to determine how it wants to update contractual practices for an incoming senior executive who replaces the current one. Delaying costs in this way reduces their economic effect due to discounting. Additionally, if a senior executive remains in their job for over ten years, then the cost of updating contractual practices would fall outside the scope of the Commission's estimates altogether.

At the same time, when the final rule goes into effect, firms will need to identify senior executives whose existing non-competes are not covered by the final rule in order to determine which contractual practices they may need to update immediately. The Commission does not include a separate legal cost for identifying senior executives and estimates the range of attorney time for revising contractual practices under the final rule, which encompasses identifying senior executives, to be the same as the estimate for the proposed rule—4 to 8 hours. This is in part because the strategic considerations involved in revision of contractual practices will likely include such identification. Moreover, the Commission believes the identification of such workers will not be difficult or time consuming. Firms can use the compensation threshold to rule out the vast majority of workers from the exemption and the definition of senior executive in § 910.1 includes clear duties to determine whether any executives who meet the compensation threshold are senior executives under the final rule. It also provides that the CEO and/or president of a firm is a senior executive without the need to conduct any duties analysis.

Another reason the Commission does not add to its estimate of 4 to 8 hours to account for identification of senior executives is that excluding existing non-competes with senior executives would otherwise decrease this estimate, likely to a greater degree than the cost of identifying senior executives. As noted, a significant amount of time spent by attorneys as estimated in the NPRM was intended to account for revising contractual practices for more complex agreements. Commenters noted that employment terms with senior executives are often individualized so that attorney and firm time would be spent on their agreements regardless of whether a non-compete may be included. Since firms use non-competes for senior executives at a high rate,[1163] revising contractual practices for senior executives may constitute a significant portion of the overall estimate of the cost of revising contractual practices, and given their exclusion, the Commission finds that the cost estimate for revising contractual practices likely represents an overestimate overall. The Commission does not, however, reduce its final cost estimates to account for this change. As noted in Part X.D, this final analysis generally does not account for the temporal difference in coverage of non-competes for senior executives. The same is true here and, to be consistent across the estimates in this final regulatory analysis, the Commission does not estimate a reduction in legal cost but notes potential bases for differences in estimates where relevant.

Overall, the Commission acknowledges that there may be substantial heterogeneity in the costs for individual firms; however, these numbers may be overestimates. For firms whose costs of removing non-competes for incoming workers is greater, the work of ensuring that contracts comply with the law would overlap substantially with the costs of updating contractual practices.

ii. Administrative Costs for Notification Requirement

The Commission finds the total one-time costs for implementing the notification requirement are estimated to be $94 million. These costs relate to the provision of notice to workers other than senior executives as required by § 910.2(b). Notably, firms may use the model notice language provided by the Commission, and the form of this model notice enables firms to choose to send the notice to workers regardless of whether they have non-competes as described in Part IV.E. The notice provision cost is calculated as follows:

Notice Provision Cost = Digital Notice Provision Costs + Mailed Notice Provision Costs

The first component, digital notice provision costs, are calculated as follows:

*Digital Notice Provision Costs = (Average Hours Necessary to Compose and Send Notice) * (Cost per Hour) * (# of Affected Businesses)*

The Commission estimates that 20 minutes (⅓ of one hour) are necessary for a human resources specialist to compose and send this notice in a digital format to all of a firm's workers who are not senior executives[1164] and applicable former workers, on average.[1165] The cost per hour is estimated to be $63.70.[1166] The estimated number of affected businesses is 3.4 million.[1167] The digital notice provision cost is therefore estimated to be $72 million.

Businesses may not have digital contact information for some workers. The cost of mailed notice provision would include the cost of postage and the cost of a human resource professional's time. Mailed notice provision costs are therefore calculated as follows:

*Cost of Mailed Notice Provision = Number of Workers with Non-competes Receiving Physical Notice * (Cost of One Printed Page + Mailing Cost + Cost of Human Resource Professional's Time)*

The number of workers with non-competes receiving physical notice is the total number of covered workers (101.1 million; see Part X.F.7.a.i) times the percentage of workers who have non-competes (18.1%) times the percentage of workers who require mailed notice (assumed to be 66% of workers[1168]), for a total of 12.3 million workers. The Commission notes that the percentage of workers who require mailed notice is likely a substantial overestimate, since it is estimated based on the percentage of individuals who receive health information digitally. The Commission believes employers are more likely to have digital means of providing the notice to their current workers especially, but also to their

[1163] More than 60%; *see* Part I.B.2.

[1164] The Commission notes that identification of such workers is accounted for in revision of contract costs calculated in Part X.F.7.b.i.

[1165] *See, e.g.,* the supporting statement for the Notice of Rescission of Coverage and Disclosure Requirements for Patient Protection under the Affordable Care Act (CMS–10330/OMB Control No. 0938–1094) at 5, which estimates time spent customizing and sending similar notice. Available at *https://www.reginfo.gov/public/do/DownloadDocument?objectID=119319401.*

[1166] According to BLS, the median wage for a human resources specialist was $30.88 per hour in 2022, which is equivalent to $31.85 in November 2023 dollars, updated for inflation using *https://www.bls.gov/data/inflation_calculator.htm.* See *https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm.* As in Part X.F.7.a, the Commission doubles this number to reflect the lost productivity of the worker.

[1167] As calculated in Part X.F.7.b.i., the Commission conservatively assumes that each establishment—a physical location of a business—must engage in its own communication, and that each establishment has digital contact information for at least one worker, and will therefore engage in digital notice provision.

[1168] See *infra* note 1165 (CMS Supporting Statement assumes 66% of workers require mailed notice from their health insurance companies).

former workers. The Commission adopts this estimate as an upper bound.

The cost per worker is estimated as 5 cents for one printed page plus mailing cost of 70 cents plus one minute of an HR professional's time, at $63.70 per hour, for a total of $1.81 per notice. The overall cost of mailed notice provision is therefore estimated to be $22 million. The total cost of the notice provision is therefore $94 million.

Commenters stated that it may take two hours of a legal professional's time to provide notice. The Commission finds this estimated time to be a substantial overestimate and reiterates that this analysis incorporates a legal professional's time necessary to identify senior executives and to strategize updates to firm contractual practices into its estimate of legal costs in X.F.7.b.i. The model notice language alleviates the need for a legal professional's time and the Commission finds it unreasonable to assume such a notice would need to actually be sent by a legal professional. While firms may opt to use original language drafted by an attorney to notify workers, the Commission notes that the model language satisfies the notification requirement and therefore does not include the cost of original language as a regulatory cost estimate in the final analysis. However, under these assumptions, the cost of providing the notice is estimated at $5.2 billion.

The Commission notes that communication is conducted at the establishment level and time costs do not vary based on the number of existing senior executives with non-competes that the final rule does not cover. While establishments with only senior executives with non-competes would not incur any notification costs because the final rule does not cover existing non-competes with senior executives, without an estimate of the percentage of firms for which this is true, the Commission conservatively assumes that all establishments estimated to use non-competes engage in this notification.

Legal and administrative costs are summarized in Table 6. The Commission notes that, since all costs are assumed to be borne in the first year, there is no discounting applied and therefore only one estimate for each analysis is presented.

TABLE 6

	$ billions
Cost of modifying standard contract language/H.R. materials and manuals	
Primary	$0.5
Sensitivity analysis (outside counsel cost of $483)	1.6
Cost of reviewing and revising contractual practices	
Primary, four hours	1.6
Primary, eight hours	3.1
Sensitivity analysis (four hours, outside counsel cost of $483)	5.6
Sensitivity analysis (eight hours, outside counsel cost of $483)	11.3
Administrative Costs for Notification Requirement	
Primary	0.09

c. Litigation Effects

Theoretically, under the final rule, certain litigation costs may fall. Litigation related to non-competes may decrease because the final rule creates bright line rules, reducing uncertainty about the enforceability of non-competes. On the other hand, litigation costs may rise if firms turn to litigation to protect trade secrets and if that litigation is more expensive than enforcing (or threatening to enforce) non-competes, and/or if firms elect to litigate over what constitutes a non-compete.

The Commission finds there are plausible but directionally opposite theoretical outcomes for the different types of litigation that may be affected by the final rule. In fact, some recent evidence suggests trade secret litigation falls as a result of bans on non-competes taking effect.[1169] The Commission finds no evidence increased litigation will result in increased costs associated with the final rule. The Commission cannot quantify or monetize the overall effect as a cost or benefit, but estimates the magnitude of any change would be sufficiently small as to be immaterial to the Commission's assessment of whether the benefits of the rule justify its costs.

8. Transfers

As discussed in Part X.F.6.a, some portion of the earnings effect associated with the final rule represents a transfer: while workers may earn more with greater productivity resulting from the rule, some of their earnings increase may result from enhanced bargaining power, which constitutes a transfer from firms to workers.

Similarly, some portion of the price effects associated with the final rule represents a transfer: while consumers may achieve greater surplus with increased competition, the price decrease itself is partially a transfer from firms to consumers.

9. Distributional Effects

The Commission finds several distributional effects associated with the final rule, including those associated with firm expansion and formation, distributional effects on workers, and labor mobility, as summarized in Table 1 in Part X.E.

a. Firm Expansion and Formation

When non-competes are prohibited, new firms may enter the market but incumbent firms may opt to invest less in capital, leaving the overall effect on total capital investment unclear. Similarly, while new firms may enter the market, it is theoretically possible that incumbent firms may exit the market without the ability to use non-competes (though no evidence of this

[1169] Greenwood, Kobayashi, & Starr, *supra* note 757. The Commission notes that this study supplements—but is not necessary to support—its finding that no evidence supports the conclusion that litigation costs will increase under the final rule. That finding is based on the Commission's expertise and the rulemaking record, including relevant comments. This study was published after the close of the comment period.

effect exists) or contract. Research finds that decreased non-compete enforceability increases new firm formation by 2.7% and may have no effect on capital investment or may decrease capital investment at incumbent firms by up to 7.9%. To the extent there may be a decrease in capital investment at incumbent firms as a result of the final rule, it may represent a shift in productive capacity from incumbent firms to new firms. As discussed in Part IV.D, another purported justification for non-competes is that they allow firms to protect trade secrets, which in theory might allow firms to share those trade secrets more freely with workers, and so improve productivity. However, no empirical evidence substantiates this claim or would allow quantification or monetization of this effect.

Empirical evidence has studied parts, but not all, of the contrasting effects on capital investment and new firm formation. Studies have examined effects of non-competes on capital investment by large, publicly traded firms, who are likely incumbents.[1170] However, no study examines the effect of capital investment economy-wide, nor does any study specifically examine capital investment for new firms. Similarly, studies have examined new firm formation, but no studies look at firm exit among incumbents.

It is thus not possible to measure the benefit and costs of the full economy-wide effects on firm expansion and formation. The calculations that may be performed using available data will necessarily omit components of the tradeoff. The final analysis therefore quantifies the effects that the literature has examined but does not monetize those effects.

i. Capital Investment

Research finds that capital investment for incumbent firms at the firm level may decrease under the final rule for the economy as a whole, though effects for high-tech industries may be positive, negative, or close to zero. The Commission notes that the capital investment discussed in this Part X.F.9 relates to tangible capital, does not reflect capital investment by newly-formed firms, and is distinct from R&D spending, which is discussed in Part X.F.6.b.

One estimate of the overall effect of non-compete enforceability on capital investment by incumbent firms, which some commenters pointed to, is estimated with substantial uncertainty and is statistically indistinguishable from zero (*i.e.,* statistically insignificant): a decline in capital investment of 7.9% for the average incumbent publicly-traded firm.[1171] Another study finds no effect on capital investment, but includes the use of non-competes in its estimating procedure, leading to concerns that the finding does not support a causal interpretation, as explained in Part IV.A.2.[1172]

The Commission notes two additional estimates specific to high-tech or knowledge firms: a decline in capital investment among incumbent publicly-traded firms of 34%–39% (an estimate which corresponds to the estimate of a decline of 7.9% when all publicly traded firms are examined),[1173] and an increase in capital investment of 3.1% for the average publicly-traded high-tech firm (an estimate that is statistically insignificant).[1174] The Commission notes the study finding an increase in capital investment of 3.1% uses a more granular measure of non-compete enforceability than the study finding a decrease of 34%–39%, and the Commission therefore gives it more weight.[1175]

The Commission reiterates that any change in investment at the firm level does not necessarily mean investment would change at the market level, since increased firm entry may also increase the employed capital stock and investment in that capital stock, which may offset any possible decreases in investment for incumbent firms. These potential positive offsetting effects are not captured in the estimates herein.

ii. New Firm Formation

Research finds that new firm formation increases by 2.7% across the economy due to decreases in non-compete enforceability.[1176] The Commission also notes an estimate specific to high-tech industries: that decreases in non-compete enforceability led to a 3.2% increase in the establishment entry rate.[1177]

The benefits associated with new firm entry may include added surplus for consumers (*e.g.,* from increased competition) or workers (from expanded labor demand). However, the Commission is unable to quantify those beneficial effects, though some may be captured by the effect on prices discussed in Part X.F.6.c. Nor is it able to quantify whether existing firms might exit or contract in response to this new firm entry (*i.e.,* whether the new firms' output would be wholly additive or crowd out some amount of existing firms' output). New firm entry may also drive some of the innovative effects of the final rule if new firms are engaging in substantial innovation.

Overall, the Commission finds that the rule will likely result in a 2.7% increase in new firm formation and is unable to quantify the net effects of this on the productive capacity of the economy. Benefits from new firm entry and possible costs from decreased capital investment may offset each other but the degree to which this happens is not quantifiable. The effect of the final rule on firm expansion and formation likely results in productive capacity shifting from incumbent firms to new firms. Consistent with findings in Part IV.B.3.b.iii, productive capacity shifting from incumbent to new firms may decrease concentration, possibly contributing to decreases in prices, as discussed in Part X.F.6.c.

[1170] Jeffers, *supra* note 450; Johnson, Lipsitz, & Pei, *supra* note 526.

[1171] The increase, 7.9%, is calculated as 0.00317/0.04, where 0.00317 is the reported coefficient (Table 4, Panel A, Column 1), and 0.04 is the mean investment per million dollars of assets ratio, across all firms (Table 2, Panel C). Due to statistical uncertainty, the estimate cannot rule out (with 95% confidence) values ranging from a *gain* in capital investment equal to 6.7% to a *loss* in capital investment equal to 22.5% for the average firm. See Jeffers, *supra* note 450.

[1172] Shi, *supra* note 84.

[1173] Jeffers, *supra* note 450. The estimate pertains to firms in Technology and Professional, Scientific, and Technical Services.

[1174] Johnson, Lipsitz, & Pei, *supra* note 526. The estimate pertains to firms classified as high-technology by the National Science Foundation: see *https://nsf.gov/statistics/seind14/index.cfm/chapter-8/tt08-a.htm.*

[1175] The two studies are otherwise identical in the extent to which they satisfy the criteria for assessing empirical research laid out in Part IV.A.2.

[1176] Jeffers (*supra* note 450) does not report an effect for the economy as a whole. However, Jeffers reports coefficients of −0.103 for the effect of increased non-compete enforceability on firms founded per million people in knowledge-sector industries and 0.008 for non-knowledge sector industries, with respective sample sizes of 78,273 and 190,665 (Table 9, Panel A, Columns 1 and 2). Using the sample sizes as weights, the Commission estimates a weighted average of these coefficients of −0.024. Applying this estimate to the average number of firms founded per million people (Table 2, Panel B) results in an estimated increase in new firm formation of 2.7%. The Commission did not calculate the effect for the economy as a whole in the NPRM. The NPRM reported that increases in non-compete enforceability decreased new firm entry by "0.06 firms per million people (against a mean of 0.38) for firms in the knowledge sector," NPRM at 3526, which was consistent with the version of the Jeffers study cited in the NPRM. The final rule cites the updated version of the Jeffers study, published in 2024. The Commission notes that estimation of the uncertainty in the combined estimate requires information on the covariance of the estimated coefficients, which is not reported in Jeffers' study. See Jeffers, *supra* note 450.

[1177] Johnson, Lipsitz, & Pei, *supra* note 526. The estimate pertains to firms classified as high-technology by the National Science Foundation: see *https://nsf.gov/statistics/seind14/index.cfm/chapter-8/tt08-a.htm.*

b. Distributional Effects on Workers

The Commission finds that the final rule may reduce gender and racial earnings gaps, may especially encourage entrepreneurship among women, and may mitigate legal uncertainty for workers, especially relatively low-paid workers.

Specifically, the Commission finds gender and racial wage gaps may close significantly under a nationwide prohibition on non-competes, according to economic estimates.[1178] Another estimate indicates that the negative effect of non-compete enforceability on within-industry entrepreneurship is significantly greater for women than for men.[1179]

The Commission finds the rule may be especially helpful for relatively low-paid workers, for whom access to legal services may be prohibitively expensive. Workers generally may not be willing to file lawsuits against deep-pocketed employers to challenge their non-competes, even if they predict a high probability of success. The Commission finds that the bright-line prohibition in the final rule, which the Commission could enforce, may mitigate uncertainty for workers.[1180]

c. Labor Mobility

The Commission finds the overall effect of the final rule on turnover costs due to increased labor mobility is ambiguous and represents a distributional effect of the rule. The Commission finds turnover costs for firms seeking new workers may fall with a greater availability of experienced labor. For firms losing workers newly freed from non-competes, the Commission estimates the effect of the final rule to be $131 per worker with a non-compete. The Commission therefore finds the effect on turnover costs represents a distributional effect of the final rule because it costs firms that use non-competes to constrain workers and benefits firms that do not.

To calculate the potential $131 increase in turnover costs for workers whose non-competes are no longer enforceable after the rule, this final analysis calculates:

*Additional Turnover Cost per Worker with a Non-compete = (Baseline Turnover Rate) * (% Increase in Turnover) * (Rate of Use of Non-competes in Affected Industries) * (Overall Earnings of Affected Workers) * (Cost of Turnover as % of Earnings)/(Number of Workers in Affected Industries with Non-competes)*

The Commission estimates the baseline turnover rate, *i.e.,* the turnover rate in the status quo, to be 47% annually.[1181] The estimated percent increase in turnover from the final rule is 1.0%.[1182] The estimated rate of use of non-competes in affected industries is 23.9%.[1183] Estimated overall earnings of affected workers is $5.25 trillion.[1184] The estimated cost of turnover as a percentage of earnings is 25%.[1185] Finally, the estimated number of workers in affected industries with non-competes is 11.8 million.[1186]

The annual estimated increase in turnover costs per worker with a non-compete is $131.

The Commission notes the actual costs of turnover to businesses may be substantially lower under the final rule than this estimate reflects. This is because the specific components of turnover costs—finding a replacement, training, and productivity—are likely to be affected by the final rule. An increased availability of experienced workers results when non-competes no longer constrain those workers, and finding replacements will be less costly to firms. Additionally, training should not be counted in the costs of turnover presented in this Part X.F.9.c, since it is separately accounted for in Part X.F.7.a, but is nevertheless included in the 25% estimate used to arrive at the estimate of $131 per worker with a non-compete, since there is no reliable way to remove training costs from that estimate; it is thus double-counted. Finally, because the Commission finds increased labor mobility will likely increase worker productivity due to better matching between workers and firms, the cost of lost productivity will be lower. The cost of lost productivity will also be lessened because the pool of workers available to firms may be more talented or experienced, since such workers would no longer be bound by non-competes (relative to new entrants to the workforce, who are not experienced and also are not bound by non-competes). This would allow firms to recruit workers who are more likely to be highly productive upon entry at a new job.

The Commission reiterates its finding that the costs of turnover for many firms may diminish due to a more plentiful supply of available labor. Without estimates of the effect of the final rule on the cost of recruiting a worker, the net effect of the final rule on turnover costs is not quantified.

10. Break-Even Analysis

The Commission believes it has quantified the effects of the final rule that are likely to be the most significant in magnitude, but data limitations make it challenging to monetize all the expected effects of the final rule, *i.e.,* to numerically estimate the impact of particular effects on the economy as a whole. Most of the estimated costs of the final rule are monetized in Part X.F.7. However, the Commission is unable to monetize the estimated benefits of the final rule without additional assumptions. Two of the major benefits—innovation and earnings—are quantified but they are not monetized because a particular parameter or data point that would allow the Commission to estimate their effect in dollars is unavailable. For earnings, this parameter is an estimate of the percentage of the effect on earnings that represents a benefit versus a transfer.[1187] For innovation, this parameter is an estimate of the social value of a patent. Making an assumption about these parameters allows the Commission to monetize the benefits associated with the effect on earnings and innovation. A break-even analysis based on such assumptions confirms the Commission's finding that the benefits of the rule clearly justify the costs.

The analysis in this Part X.F.10 calculates the sum of the monetizable costs of the rule, separately under the assumption that lost investment in human capital is core training (in which case monetizable costs are direct

[1178] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 38.

[1179] Marx (2022), *supra* note 524 at 8.

[1180] NPRM at 3531.

[1181] Based on annual worker mobility rates (separations divided by employment) in 2022 as calculated using the Job Openings and Labor Turnover Survey, conducted by BLS.

[1182] Calculated as $-e((^{-0.241+0.112)*0.081)} -1)$, where −0.241+0.112 represents the estimated effect in Johnson, Lavetti, and Lipsitz (*supra* note 388) on workers in high use industries. The corresponding estimate for other industries is statistically indistinguishable from zero and those industries are therefore omitted from calculations. The multiplier 0.081 is the average magnitude change in non-compete enforceability, as discussed in Part X.F.5.

[1183] Calculated as the average usage rate in high-use industries in Starr, Prescott & Bishara (*supra* note 68).

[1184] Based on data from BLS for industries classified as high-use in Starr, Prescott & Bishara (*supra* note 68), excluding CA, ND, OK, and MN. See *https://data.bls.gov/cew/apps/data_views/data_views.htm#tab=Tables.*

[1185] See Pivateau, *supra* note 1090.

[1186] Calculated as 49.4 million * 23.9%. 49.4 million is equal to 0.8 * 61.8 million, where 0.8 is the coverage rate (see Part X.F.4.a) and 61.8 million is the number of workers in high-use industries (*https://data.bls.gov/cew/apps/data_views/data_views.htm#tab=Tables*). 23.9% is the average usage rate in high-use industries in Starr, Prescott, & Bishara (*supra* note 68).

[1187] Though the estimated effect on earnings is presented in dollars, the Commission considers this value to be quantified, but not monetized, since some part of the estimate may represent a transfer and not a benefit.

compliance costs and the cost of updating contractual practices), and under the assumption that lost investment in human capital is advanced training (in which case monetizable costs are the net cost of lost productivity from decreased human capital investment, direct compliance costs, and the cost of updating contractual practices). The analysis conservatively assumes that training for all workers is affected (versus just those in high-use occupations, as described in Part X.F.7.a).

If the Commission assumes the decrease in human capital investment is a decrease in core training, the final rule results in net benefits without monetizing or counting any positive effects on the economy from earnings or innovation. The savings or benefit to the economy from reduced core training would be greater than the combined monetized costs of the final rule in X.F.7.b. In other words, even if the benefit to the economy from earnings and innovation were assumed to be zero (an implausible and extremely conservative assumption), the final rule would be net beneficial under the assumption that estimates of reduced training reflect better matching of workers and firms and therefore a reduced need to provide workers with core training.

Under the assumption that lost human capital investment is advanced, the Commission calculates values of the social value of a patent and the benefit percentage of the earnings effect that would fully offset the net monetizable costs of the final rule.

a. Estimate of Net Benefit Assuming Lost Human Capital Investment Is Core Training

Under the assumption that lost human capital investment is core, the sum of the present discounted value of direct compliance costs and the cost of contractual updating (the monetizable costs of the rule), using a 3% discount rate, is $3.7 billion. In this case, the final rule is net beneficial even ignoring the benefits associated with innovation and earnings. This is because the net monetized cost ($3.7 billion) is less than the monetized benefit associated with investment in human capital ($31 billion or $13.9 billion, when all occupations are assumed to be affected versus just high-use occupations, respectively). The net monetizable benefit of the final rule—even ignoring benefits associated with innovation and earnings—is therefore $27.3 billion or $10.2 billion, respectively.

b. Estimate of Net Benefit Assuming Lost Human Capital Investment Is Advanced Training

In this Part X.F.10.b, the Commission calculates the net monetizable costs and benefits of the final rule assuming that lost human capital investment is advanced training, and under varying assumptions about the values of the two monetization parameters identified (the social value of a patent and the percentage of the earnings effect that represents a benefit). Then, the Commission calculates break-even points: values for the monetization parameters which would fully offset the net monetizable costs of the final rule.

Break even points are calculated by finding the values of the social value of a patent and the benefit percent of the earnings increase such that:

*(Net Costs Associated with Investment in Human Capital) + (Direct Compliance Costs) + (Costs of Updating Contracts) = (Earnings Increase) * (Benefit % of Earnings Increase) + (Patent Increase) * (Social Value of Patent)*

As calculated in Part X.F.7, assuming a 3% discount rate, the net cost associated with investment in human capital is $39.0 billion.[1188] Direct compliance costs plus the cost of updating contracts are estimated to be $3.7 billion.[1189] Net monetizable costs therefore total $42.7 billion.

The estimated earnings increase of the final rule over ten years, discounted at 3% is $468 billion. The estimated effect of the rule on innovation (using the low end of the primary estimate) ranges from an additional 3,111 patents per year to 31,110 patents per year, increasing as time goes on.[1190]

The Commission presents estimates that demonstrate break-even points by making an assumption for the value of one of the two monetization parameters, and calculating the value of the other which implies equal monetized costs and benefits. Based on estimates of the private value of a patent, the Commission separately assumes that the social value of a patent is $94,886, $234,399, $5,865,833, or $32,459,680.[1191] In addition to spanning a wide range of possible valuations, these values all represent the private value of a patent to certain actors (*e.g.,* the purchaser or seller of a patent, or shareholders of a patenting company). These values do not account for innovative spillovers (*e.g.,* follow-on innovation) or product market spillovers to competitors (who may lose business to innovating firms), and therefore do not necessarily represent the social value of a patent. However, they serve as benchmarks against which to assess the breakeven points of the analysis of the final rule.

No studies have assessed what percentage of the earnings effect of non-compete enforceability is a benefit versus a transfer. The Commission separately assumes that the percentage is equal to 0%, 5%, 10%, and 25%.

The computed breakeven points are reported in Table 7, under the assumption that lost investment in human capital is advanced. Panel A reports necessary benefit percentages, under each of the four assumed social values of a patent, that would cause the rule to result in zero net monetized benefit. A reported value of 0% indicates that the assumed value of a patent itself covers the net monetized costs of the final rule. Panel B reports the necessary social value of a patent, under each of the four assumed benefit percentages, that would cause the rule to result in zero net monetized benefit. A reported value of $0 indicates that the benefits associated with earnings cover the net monetized costs of the final rule on their own.

TABLE 7

Assumed social value of a patent	Necessary benefit percentage on earnings
Panel A	
$94,886	5.5
$234,399	1.7
$5,865,833	0.0

[1188] Note that this calculation considers the net cost of lost investment in human capital (*i.e.,* the cost of lost productivity, minus the savings on direct outlays and gained output due to less time spent training). The Commission reiterates that this calculation assumes that lost human capital investment is advanced, rather than core.

[1189] This calculation assumes that updating contractual practices takes, on average, eight hours per firm.

[1190] The estimates presented here conservatively assume zero effect on R&D spending.

[1191] The Commission points out that the economic literature has not explored the *social* value of a patent, but has explored the *private* value of a patent, with highly varied conclusions (all reported here adjusted to 2023 dollars). Serrano estimates the average value of a patent (in terms of its sale price at auction) to be between $234,399 and $289,022. Pakes estimates the average value of a patent (in terms of stock market reactions to announcements) to be $5,865,833. Kogan et al. estimate the average value of a patent (also in terms of stock market reactions to announcements) to be $32,459,680. Outside of the academic literature, a Richardson Oliver Insights report notes that the average sale price of U.S. issued patents on a brokered market was $94,886. *See* Carlos J. Serrano, *Estimating the Gains from Trade in the Market for Patent Rights,* 59 Int'l Econ. Rev. 1877 (2018); Pakes, *supra* note 1132; Kogan, et al., *supra* note 1131; Richardson Oliver Insights Report (2022): *https://www.roipatents.com/secondary-market-report.*

TABLE 7—Continued

Assumed social value of a patent	Necessary benefit percentage on earnings
$32,459,680	0.0
Assumed benefit percentage on earnings	**Necessary patent value**
Panel B	
0%	$297,144
5%	134,202
10%	0
25%	0

Panel A shows that, even assuming a value of patenting ($94,886) that is substantially lower than the estimates in the economic literature, only 5.5% of the earnings effect must be an economic benefit (as opposed to a transfer) for the benefits associated with innovation and earnings to outweigh the monetized costs of the rule. Panel B shows that, even if no part of the earnings effect of the final rule reflects an economic benefit (which the Commission finds to be unlikely, in light of the evidence discussed in Part IV.B.3.a.ii), the social value of a patent would need to be only $297,144 in order to cover the monetized costs of the rule—well within the range of (private) values of a patent found in the literature.

The Commission additionally notes that Table 7 omits other benefits of the rule. The estimated benefits do not include the benefits arising from decreased consumer prices or increased workforce output. The estimates also omit possible changes in litigation costs associated with the rule. The Commission finds it likely that the omitted benefits substantially exceed the omitted costs, and additionally reiterates that the estimated values in Table 7 assume that lost investment in human capital is fully advanced. Therefore, the Commission views the values reported in Table 7 as conservative estimates of the breakeven points of the rule under those scenarios.

11. Analysis of Alternative Related to Senior Executives

The Commission elects to provide an analysis of the effects of an alternative with more limited coverage. Specifically, the Commission provides an analysis of a rule that would cover—and therefore ban—non-competes with all workers except senior executives. As compared to the final rule, under this alternative, it would not be an unfair method of competition to enter into non-competes with senior executives after the effective date. The Commission finds that excluding all non-competes with senior executives from coverage under the rule (as opposed to the final rule, which excludes only existing non-competes with senior executives) would diminish both costs and benefits, but would still result in substantial benefits on net.

a. Analysis of Lost Benefits and Costs if Senior Executives Are Excluded

Several costs and benefits may be affected if senior executives are excluded from coverage by the final rule. The Commission now discusses each of those costs and benefits relative to the final rule.

The Commission finds that some benefits related to labor market competition and workers' earnings would be lost if senior executives were entirely excluded from the final rule. This is especially true because those workers have high earnings, meaning that a given percentage increase in their earnings yields a greater overall effect compared with relatively lower earning individuals. However, those workers make up a small portion of the workforce—approximately 0.75% of the workforce, based on data from the American Community Survey.[1192] The overall change in the earnings benefit is therefore limited, but would exceed senior executives' share of the workforce. Support for this finding is discussed in Part IV.C. Garmaise (2011) finds that earnings of senior executives are negatively affected by non-competes. Countervailing evidence exists, but it is based on evaluation of the use of non-competes, which the Commission gives less weight.[1193] The Commission notes the definition of senior executive used in Garmaise (2011) does not map perfectly to the definition of senior executives in this final rule, though there is likely substantial overlap.

The Commission is unable to quantify the lost benefits related to innovation if senior executives were excluded from coverage under the final rule but finds their exclusion would diminish the innovation benefits of the final rule. Senior executives are involved in determination of the strategic path of the firm and its execution, which likely has a substantial effect on innovation. The Commission cannot quantify what percentage of the innovation effect is due to senior executives versus other workers, though it is likely shared by both groups.

The Commission finds that benefits related to consumer prices would fall significantly if senior executives were excluded from coverage. By increasing competition, increases in new firm formation and increased ability to hire talented workers may be key drivers of the effect of the final rule on consumer prices. As discussed in Part IV.C, senior executives have the knowledge and skills necessary to found new firms, or to be key members of other firms. Therefore, if senior executives are excluded from the final rule, some benefits associated with new firm foundation and innovation would be lost, though the exact proportion cannot be estimated. The Commission notes that benefits associated with lower prices through increased competition might also be lost but cannot be quantified.

Turning to costs, the Commission finds that costs associated with investment in human capital may fall if senior executives were excluded from the rule. The productivity of senior executives may benefit from investment in their human capital.[1194] The precise monetary contribution of investment in senior executives' human capital to the productivity of firms has not been estimated, nor has the empirical literature separately assessed the effect of non-competes on human capital investment for senior executives. If senior executives benefit from advanced, rather than core, training investment (as described in Part X.F.7.a), their exclusion will reduce costs. Because senior executives are a small part of the workforce and must be highly skilled, locking them up with non-competes could theoretically mean that firms would need to invest in relatively more core training for senior executives if they were excluded from the final rule.

The Commission finds that the direct costs of compliance with the final rule may be partially affected if senior executives were categorically excluded. The final rule allows employers to enforce existing non-competes for senior executives, so there are no notice and re-negotiation costs for senior executives. However, in this scenario, costs associated with ensuring incoming

[1192] In particular, 0.75% represents the percentage of employed individuals from 2017–21 ages 22–64, excluding residents of CA, ND, OK, and MN, and excluding workers reporting working for non-profits or the government, whose earnings are above the inflation-adjusted threshold and who are coded as having occupation ''Top Executive.'' The Commission notes that this estimate may not exactly match the definition in the final rule but the Commission believes that this provides a reasonable estimate.

[1193] *See* Part IV.A.2 (explaining the Commission's concerns with these types of studies).

[1194] Solomon Akrofi, *Evaluating the Effects of Executive Learning and Development on Organisational Performance: Implications for Developing Senior Manager and Executive Capabilities,* 20 Int'l. J. of Training and Dev. 177 (2016).

senior executives' contracts do not have non-competes would be substantially reduced. Because senior executives' contracts are generally more complex than other workers' contracts, this reduction may be relatively large, even though there are relatively few senior executives in the workforce (approximately 0.75%). With respect to the costs of updating contractual practices, commenters noted the costs of updating senior executives' contracts may be greater than for other workers because of the complexity of their contracts. Therefore, excluding senior executives categorically might reduce costs associated with updating contractual practices substantially. At the same time, senior executives' contracts may already be bespoke and individualized to such an extent that removing a non-compete would not considerably raise the costs associated with revising contractual practices. Moreover, these contracts may be even more likely than other workers to already include NDAs and other similar provisions.

Finally, the Commission finds exclusion of senior executives may reduce litigation costs from the final rule, though the overall effect is unclear. Senior executives are highly likely to have access to sensitive business information. To the extent costs associated with trade secret litigation or litigation over other restrictive covenants increase under the final rule, though no evidence supports this possibility, then exclusion of senior executives may substantially reduce these costs. Litigation related to whether a worker meets the definition of a senior executive may also increase if senior executives are categorically excluded.

Overall, excluding senior executives from the final rule would substantially reduce the benefits of the rule—especially those associated with new firm formation, innovation, and prices—but would also likely reduce costs, especially those associated with investment in human capital and updating contractual practices. The Commission finds that the benefits of a rule excluding senior executives would justify the costs of such a rule.

b. Analysis of Benefits and Costs to Workers Other Than Senior Executives

Now, the Commission turns to an analysis of the benefits and costs that remain if senior executives are excluded from the rule.

The Commission finds there would be substantial benefits to labor market competition and workers' earnings even if senior executives were categorically excluded. The evidence on earnings discussed in Part IV.B.3.a.ii does not exclude senior executives, but based on the percentage of the population that represents senior executives, the evidence largely pertains to workers other than senior executives. Therefore, while studies focused on senior executives (largely) do not apply, studies of the entire workforce mostly reflect the effects of non-competes on other workers. In addition to the broader evidence on earnings discussed in Part IV.B.3.a.ii, one study analyzes a population exclusively comprised of hourly workers, nearly all of whom are highly likely not to be senior executives, supporting the finding that even with senior executives excluded from a rule, there would be substantial benefits to labor market competition and workers' earnings.[1195]

The Commission is unable to quantify to what extent the estimated effects on innovation are driven by senior executives versus other workers, but still finds that a final rule excluding these senior executives would result in substantial benefits to innovation. First, there is evidence that productivity of inventors decreases when they take career detours because of non-competes.[1196] Second, insofar as effects on innovation are driven by increased idea recombination, having access to those ideas (which innovators actively engaged in R&D must) implies that moving to new firms would increase innovation. Empirical studies have not quantified the size of these effects relative to the overall effect of banning non-competes for workers including senior executives on innovation, however.

The Commission finds that a rule excluding senior executives would still yield substantial benefits with respect to consumer prices. Many entrepreneurs were not formerly senior executives, meaning that encouraging entrepreneurship among workers who are not senior executives by prohibiting non-competes will yield more business formation. That business formation increases competition, which may lead to lower prices. Additionally, firms will not be foreclosed access to talent (which is likely important across the spectrum of workers, though evidence only specifically exists for senior executives), which may also lead to lower prices. In the absence of empirical evidence demonstrating which workers' non-competes affect consumer prices, the Commission cannot estimate how much of the effect is due to coverage of which workers.

The Commission finds that a rule excluding senior executives would result in decreased levels of investment in workers' human capital. The empirical literature has not separately assessed the effect of non-competes on investment in human capital for senior executives versus other workers, though the study finding that training decreases with greater non-compete enforceability includes both workers who are and are not senior executives. The Commission therefore believes that some or much of any cost or benefit of the rule from changing investment in human capital would pertain to workers who are not senior executives. However, the Commission notes that, as discussed in Part X.F.7.a, if lost training under the rule is lost "core" (as opposed to "advanced") training, then the final rule will cause a cost *savings* for firms, which will have greater access to experienced workers and will therefore spend less on "core" training.

The Commission finds that the direct costs of compliance with the final rule may be partially diminished if senior executives were excluded. First, the Commission reiterates that notice is not required for senior executives under the final rule. Therefore, that component of the direct costs of compliance would not be affected. However, even with those senior executives excluded, costs associated with ensuring incoming workers' contracts do not have non-competes would still be present. Insofar as senior executives' contracts may be more complex than other workers' contracts, this cost may be substantially diminished, however. Similarly, with respect to the costs of updating contractual practices, as noted by commenters, these costs may be substantially greater for the contracts of senior executives due to the complexity of their contracts and the sensitivity of the information they possess. Therefore, while some costs associated with updating contractual practices would survive if senior executives were excluded, their exclusion may reduce costs associated with the rule disproportionately to their (relatively low) share of the workforce.

Finally, some litigation costs may still be present if senior executives are excluded. Litigation costs associated with non-competes would still likely fall for workers other than senior executives due to the bright-line coverage in the rule. Costs associated with litigation other than non-compete litigation may rise if firms turn to those methods, though no evidence suggests they will.

Overall, a rule that excludes senior executives will likely result in

[1195] Lipsitz & Starr, *supra* note 72.

[1196] Mueller, *supra* note 569.

substantial benefits, as well as some costs. While the Commission largely cannot quantify the extent to which benefits and costs would fall if senior executives were excluded from coverage under the rule, the Commission finds that the benefits quantified and monetized elsewhere in this impact analysis would likely be diminished relative to the final rule as adopted, especially those associated with innovation and prices, but costs would also be diminished, especially those associated with investment in human capital and updating contractual practices. The Commission finds that, even in the absence of a full monetization of all costs and benefits of the final rule, the final rule has substantial benefits that clearly justify the costs, which remains true even if senior executives were excluded from coverage.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') and Final Regulatory Flexibility Analysis (''FRFA'') of any final rule subject to notice-and-comment requirements, unless the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[1197] In the NPRM, the Commission provided an IRFA, stated its belief that the proposal will not have a significant economic impact on small entities, and solicited comments on the burden on any small entities that would be covered.[1198] In addition to publishing the NPRM in the **Federal Register**, the Commission announced the proposed rule through press and other releases,[1199] as well as through other outreach including hosting a public forum on the proposed rule [1200] and attending the U.S. Small Business Administration Office of Advocacy's (''SBA Advocacy'') roundtable on the proposed rule with small entities,[1201] in keeping with the Commission's history of small business guidance and outreach.[1202]

The Commission thereafter received over 26,000 public comments, many of which identified themselves as being from small businesses, industry associations that represent small businesses, and workers at small businesses.[1203] The Commission greatly appreciates and thoroughly considered the feedback it received from such stakeholders in developing the final rule. The Commission made changes from the proposed rule in response to such feedback and will continue to engage with small business stakeholders to facilitate implementation of the final rule. Further, the Commission is publishing compliance material to assist small entities in complying with the final rule.

Specifically, based on the Commission's expertise and after careful review and consideration of the entire rulemaking record—including empirical research on how non-competes affect competition and over 26,000 public comments—the Commission adopts this final rule, including with changes relative to the proposal to reduce compliance burdens on small business and other entities. For example, the Commission allows existing non-competes with senior executives to remain in force,[1204] amends the safe harbor notice requirement to ease compliance,[1205] removes the requirement to rescind existing non-competes, and removes the ownership threshold from the sale of business exception.[1206] In light of the comments, the Commission has carefully considered whether to certify that the final rule will not have a significant impact on a substantial number of small entities. The Commission continues to believe the final rule's impact will not be substantial in the case of most small entities, and in many cases the final rule will likely have a positive impact on small businesses. However, the Commission cannot fully quantify the impact the final rule will have on such entities. Therefore, in the interest of thoroughness and an abundance of caution, the Commission has prepared the following FRFA with this final rule.

Although small entities across all industrial classes—*i.e.,* all NAICS codes—would likely be affected, the estimated impact on each entity would be relatively small. The Small Business Administration (''SBA'') states that, as a rule of thumb, the impact of a rule could be significant if the cost of the rule (a) eliminates more than 10% of the businesses' profits; (b) exceeds 1% of the gross revenues of the entities in a particular sector; or (c) exceeds 5% of the labor costs of the entities in the sector.[1207] As calculated in Part XI.F, the Commission estimates that legal and administrative costs would result in costs on average of $712.45 to $1,250.93 for single-establishment firms with 10 workers.[1208] These costs would exceed the SBA's recommended thresholds for significant impact only if the average profit of regulated entities with 10 workers is $7,125 to $12,509, average revenue is $71,245 to $125,093, or average labor costs are $14,249 to $25,019, respectively. Furthermore, while there are additional nonmonetizable costs associated with the final rule, there are also nonmonetizable benefits which would at least partially offset those costs, as explained in Part X.F.6.

A. Reasons for the Rule

The Commission describes the reasons for the final rule in Parts IV.B and IV.C.

B. Statement of Objectives and Legal Basis

The Commission describes the objectives and legal basis for the final rule in Part IV.B and IV.C and the legal authority for the final rule in Part II.

[1197] 5 U.S.C. 603–605.

[1198] NPRM at 3531.

[1199] FTC, Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.*

[1200] FTC, FTC Forum Examining Proposed Rule to Ban Noncompete Clauses (Feb. 16, 2023), *https://www.ftc.gov/news-events/events/2023/02/ftc-forum-examining-proposed-rule-ban-noncompete-clauses.*

[1201] Commission staff attended the February 28, 2023, roundtable. *See also* Comment from SBA Off. of Advocacy, FTC–2023–0007–21110 at 2.

[1202] Each year since FY2002, the Small Business Administration (SBA) Office of the National Ombudsman has rated the Federal Trade Commission an ''A'' on its small business compliance assistance work. *See, e.g.,* SBA Office of the Nat'l Ombudsman, 2021 Annual Report to Congress at 47.

[1203] The Commission received over 26,000 comment submissions in response to its NPRM. *See Regulations.gov, Non-Compete Clause Rule* (Jan. 9, 2023), *https://www.regulations.gov/document/FTC-2023-0007-0001.* To facilitate public access, 20,697 such comments have been posted publicly at *www.regulations.gov. Id.* (noting posted comments). Posted comment counts reflect the number of comments that the agency has posted to *Regulations.gov* to be publicly viewable. Agencies may redact or withhold certain submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, *https://regulations.gov/faq.*

[1204] *See* Part IV.C.3.

[1205] *See* Part IV.E.

[1206] *See* Part V.A.

[1207] SBA, *A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act,* at 19 (Aug. 2017) *https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/* (hereinafter ''RFA Compliance Guide'').

[1208] Ten workers is chosen as an illustrative example. For this example, the Commission calculates the cost of notification based on 10 workers and applies legal costs consistent with the average per establishment cost calculated in X.F.7.

C. Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

1. Comments [1209] on Benefits to Small Businesses and the Commission's Findings [1210]

a. Comments

Numerous small businesses and small business owners generally supported the proposed rule and shared two primary reasons, among others, that the rule may uniquely benefit small business owners. First, because non-competes are expressly designed to prevent workers from starting new businesses within the industry and geographic market that worker is experienced in, commenters said non-competes prevent new business formation and threaten new small businesses. Thus, consistent with the empirical evidence,[1211] commenters said a ban on non-competes will drive small business creation as entrepreneurial employees will be free to compete against their former employers. Second, commenters said non-competes harm small businesses by preventing them from hiring experienced workers. The Commission considered all comments related to small businesses and addresses many of them in Parts IV.B and IV.C and throughout this document.

Many comments from small businesses align with the findings in Part IV.B.3.b.i, namely that non-competes inhibit new business formation. A vast majority of such new businesses will be small businesses. For example, Kang and Fleming find that when Florida made non-competes more enforceable, larger businesses entered the State and increased employment while small businesses entered less frequently, and employment for them did not change.[1212] An economist stated the NPRM's findings show that non-competes harm small business formation and that firms struggle to hire and grow in States that are more likely to enforce non-competes. Another commenter identified an additional study showing that Hawaii's ban on non-competes in the technology industry increased the number of technology startups.[1213]

Some commenters cited the Small Business Majority's polling data on non-competes. The survey finds that 67% of small businesses that currently use non-competes support the proposed ban [1214] and 46% of small business owners have been subject to a non-compete that prevented them from starting or expanding their own businesses.[1215] Additionally, 35% of small business respondents reported that they have been prevented from hiring an employee because of a non-compete.[1216] The survey also finds that of the 312 small businesses that responded, 59% expressed agreement that NDAs could likely protect confidential information or trade secrets as effectively as a non-compete.[1217] The online survey had a small sample size of 312 small business owners and decision-makers, and had a margin of error of +/−6%.[1218] An economist commented that these survey findings provide specific evidence underlying the mechanisms identified in the empirical studies finding that non-competes decrease new business formation and prevent new firms from hiring and growing. While the survey has too small of a sample size to be fully representative of small businesses, the survey illustrates that non-competes have prevented or delayed small businesses from starting or expanding.

Small businesses stated non-competes hindered their small business, including through costly lawsuits from former employers. Many commenters said non-competes were preventing them from starting a business.[1219] One technology startup organization cited the thousands of startups formed by alumni of five leading tech companies as well as key within-industry spinoffs in the aerospace industry and suggested the number of spinoffs could be greater with a nationwide ban on non-competes. The commenter stated that even delays in founding a startup slow innovation. The commenter looked at the employment history of these aerospace startup founders and stated that, while it could not determine whether they had non-competes, their work history suggested they were not constrained in the labor market.

Many small businesses commented that non-competes prevented them from hiring the right talent and harmed their businesses, often because small businesses could not afford a lawsuit or even the legal costs of determining whether a non-compete with a perspective employee was unenforceable.[1220] A technology startup organization stated that startups are much more likely to survive with experienced counselors and mentors.[1221] A policy organization stated that non-competes favor established and large companies, because they can use non-compete litigation strategically to chill movement of experienced executives to startups and smaller firms that lack the resources to contest the non-competes in court. The policy organization also stated workers with non-competes often go to an established competitor that has the resources to protect them in case of a suit rather than a small firm, meaning small firms are disadvantaged in hiring. Similarly, a law firm commenter stated that small firms are less able to compensate new hires who have forfeiture-for-competition clauses compared to larger firms.

Commenters made several other arguments in favor of the rule covering small businesses. Several commenters pointed out that small businesses have not struggled to thrive in States where non-competes have long been prohibited, including California, Oklahoma, and North Dakota. A startup organization agreed with data cited in the NPRM indicating non-competes disproportionately reduce entrepreneurship for women, and argued that disproportionate financial challenges for women mean women entrepreneurs have fewer resources to withstand other harms from non-competes, including lack of access to talent.[1222] A law firm stated that a small business exception to the rule would lead to an inefficient ''cliff'' effect, where small businesses who previously fell within the exception would need to

[1209] The U.S. SBA publishes a Table of Small Business Size Standards based on the North American Industry Classification System (NAICS), determining the maximum number of employees or annual receipts allowed for a concern and its affiliates to be considered small. 13 CFR 121.201; *see also* Small Bus. Admin., *Table of Size Standards, https://www.sba.gov/document/support-table-size-standards.* Because commenters did not provide their NAICS number or annual receipts, and many did not provide the number of workers, the Commission is unable to determine whether each individual commenter meets the SBA's definition of a small business. Instead, for purposes of considering comments from small businesses, the Commission relies on the commenter's self-description of being a small business or start-up.

[1210] This section captures comments related to the potential benefits of the final rule for small businesses. These comments do not directly address the IRFA. Comments on the IRFA are captured in Part XI.G. Many comments and issues concerning small businesses are also discussed in Part IV.B.3.b.i.

[1211] *See* Part IV.B.3.b.i.

[1212] Kang & Fleming, *supra* note 536.

[1213] *See* Glasner, *supra* note 528.

[1214] Sm. Bus. Majority, Opinion Poll, *Small Business Owners Support Banning Non-Compete Agreements* 2 (Apr. 13, 2023). The survey also finds that 51% of small businesses that do not use non-competes support the proposed ban.

[1215] *Id.*

[1216] *Id.*

[1217] *Id.* at 3 (finding that 24% strongly agreed and 35% somewhat agreed).

[1218] *Id.* at 2.

[1219] *See* Part IV.B.3.b.i (summarizing these comments).

[1220] *Id.*

[1221] *Id.*

[1222] *See also* Marx (2022), *supra* note 519.

rescind their existing non-competes after surpassing a threshold. Finally, and importantly, numerous workers at small businesses reported substantial harms from non-competes consistent with the harms cited in Part IV.B.2 and IV.B.3.a, just as workers for large employers did.

b. Responses to Comments

As the Commission explained in Parts IV.B.3.b and IV.C.2.c, the weight of the empirical evidence supports the conclusion that non-competes inhibit new business formation and foreclose small and other businesses from accessing the talent they need to grow and succeed. Most new businesses are small, and non-competes are expressly designed to prevent workers from starting new businesses in the fields they know best. The Commission appreciates the small businesses and entrepreneurs who shared their experiences in the comments. These comments and the many comments discussed in Parts IV.B.2 and IV.B.3 from small businesses align with and bolster the empirical evidence. The comments illustrate the real-world impacts of non-competes on entrepreneurs and would-be entrepreneurs, both before and after formation of a business. Moreover, the labor market effects—including reducing labor mobility and artificially suppressing wages and job quality—are not different or mitigated when a worker works for a small business rather than a large one. Studies finding harm from non-competes examined both large and small businesses, and the Commission believes that small businesses' use of non-competes causes the same harms set forth in Parts IV.B and IV.C, including harm to other small businesses.

Based on these and other comments, the Commission believes that many small businesses are blocked from hiring workers that could help their business grow and have fewer resources than larger businesses to evaluate the risk of hiring a worker subject to a non-compete, to pay to ''release'' a worker they want to hire from a non-compete, such as a forfeiture-for-competition clause, and defend themselves from a non-compete suit.

In response to the comments on small business successes in States where non-competes are banned, the Commission notes that it recognizes that there are many successful small businesses in States that ban non-competes, but is not aware of any empirical evidence considering success rates of small businesses based on enforceability of non-competes.

In response to the comment discussing startups in the aerospace industry, the Commission notes that the conclusions of the commenter align with the empirical evidence that the most successful startups are within-industry spinoffs.[1223] However, the Commission notes that according to the data presented in the comment, some of the founders the comment described as being unrestrained in the labor market have significant gaps in their work history, though the Commission cannot determine the cause of any gaps.

As explained in Part IV.C, the Commission adopts a partial exception in § 910.2(a)(2) for senior executives under which their existing non-competes—non-competes entered into before the effective date—are not covered by the final rule. Employers cannot, however, enter into new non-competes with senior executives as of the effective date. The evidence and comments describing the importance of freeing senior executives from non-competes with respect to founding and supporting new and small businesses contributed to the Commission's decision to ban future non-competes for senior executives instead of excepting senior executives entirely from the final rule. The Commission is aware that existing non-competes with senior executives will reduce some of the benefits for new and small businesses as fewer senior executives will be free to join or found those businesses beginning on September 4, 2024. However, senior executives are a small, narrowly defined group, meaning there will still be numerous experienced workers freed from non-competes that can found or support small businesses, and senior executive non-competes will eventually become phased out. In addition, the Commission expects small businesses to receive the other anticipated benefits of the final rule.

2. Comments Arguing the Rule Will Harm Small Businesses and the Commission's Findings[1224]

a. Comments

Some small businesses and industry groups stated they believe a ban on non-competes would harm small businesses. Several commenters requested an exception for small businesses or certain types of small businesses, such as independent medical practices. The Commission addresses these comments in this Part XI.C.2 and addresses direct potential costs in Part XI.E. The Commission appreciates the small businesses and entrepreneurs who shared their experiences in the comments.

Commenters raised concerns that eliminating non-competes for all businesses would allow larger businesses and incumbents to easily hire away talent from smaller competitors and startups. Other small businesses said they had been harmed in the past by former workers competing against them, including by recruiting clients and other workers, or by large competitors hiring their workers. Similarly, some industry associations and small businesses said non-competes protect independent businesses, including medical practices, from dominant consolidators, as high recruitment, retention, and other costs may induce small businesses to sell their business to consolidators. Relatedly, some healthcare organizations argued a ban that does not cover nonprofit hospitals and health systems would provide those large nonprofits with an unfair advantage over independent medical practices.

Some small businesses offered the same justifications as other businesses for using non-competes but emphasized the heightened potential damage to smaller businesses less able to bear costs, including being forced to close or sell.[1225] Many of these comments asserted that small businesses relying on legitimate trade secrets would be especially harmed if a worker took that information to a competitor or new business, particularly because they would be least equipped to detect theft or retain sophisticated legal counsel to litigate potential trade secrets or NDA claims, thus reducing investment and innovation.[1226] A law firm argued that trade secrets litigation often costs millions, and few attorneys are willing to work on contingency, so startups would struggle to litigate against larger well-financed firms, especially as large firms can drive costs up to force the startup out of the litigation. SBA Advocacy asserted that if competitive information is not protected, some small businesses could face a serious risk of loss or potential closure and could not afford alternative means of protection.

One industry organization stated more generally that protecting information is a high priority for emerging growth companies. Some small businesses

[1223] *See* Part IV.B.3.b.i.

[1224] This section captures comments that do not directly address the IRFA but that are related to the potential costs of the final rule for small businesses. Comments directly addressing the IRFA are captured in Part XI.G. Many comments concerning small businesses are also discussed in Part IV.B.3.b.i.

[1225] *See, e.g.,* SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1226] *Id.*

stated if non-competes are banned, they might silo workers and information to limit the potential harm from a worker leaving for a larger competitor and would harm the business. One business stated that while banning non-competes might allow more market entrants, those new entrants will be more likely to fail without the protection of non-competes for worker retention and confidential information. Some business associations stated small business owners often rely on independent contractors and sole proprietors such as marketers to build their businesses and share proprietary information with them (meaning contractors may have access to information from multiple competitors) and covering such groups under the rule would harm their growth.

Small businesses also stated they use non-competes to protect investments, including in training, to prevent workers from taking clients or customers, and to increase retention and stability. For example, some small businesses shared that they started using non-competes after workers they had trained extensively went to a larger competitor or started their own business. One small business organization stated the proposed requirement to relate ''costs incurred'' to TRAPs would be harder for small businesses who are more likely to train on the job. A physician practice stated a partner leaving for a hospital would destabilize and increase costs for the practice, but a non-compete that is bought out helps practices afford those extra costs or otherwise prevents destabilization.

Commenters provided additional reasons small businesses use non-competes. A business stated that they could not afford to pay workers as much as larger businesses, so will be unable to find workers. A small business association stated that banning non-competes would exacerbate the labor shortage for small businesses by decreasing investment in training, when there are already insufficient qualified applicants. A commenter stated that the NPRM did not provide any examples of small businesses using non-competes in an unfair way. SBA Advocacy also stated that some small business employment contracts compensate workers for non-competes. One business stated small businesses may not be able to afford to fight larger businesses using borderline *de facto* non-competes.

A banking association stated new businesses that cannot protect their business would be less able to attract capital than more established businesses, while a community bank similarly said it may be unable to lend to small businesses that cannot protect their workers, customers, and proprietary information with non-competes. A small business stated that NDAs and non-solicitation clauses were too difficult to enforce, as it was told by judges that in order to win a non-solicitation suit against a former worker who purportedly took clients, the business would need to subpoena its own former clients to testify, which would damage the business's reputation.

A physician said they were able to start an independent practice while complying with a non-compete and hire others in compliance with their non-competes. One small business said they were able to work out solutions when hiring a worker subject to a non-compete to avoid violating it.

SBA Advocacy relayed the concern of one 8(a) [1227] small business that feared if entities in the 8(a) business development program cannot control their talent, the money the Federal government has spent helping these companies would be wasted. Accordingly, SBA Advocacy asserted that the proposed rule conflicted with the Congressional law creating the 8(a) program.[1228]

A small Federal contractor stated that larger companies could poach workers who are skilled and/or who are already cleared by the government to work on projects from small businesses, potentially putting them out of business, and would damage contractors' ability to provide stability to the agencies.

Some commenters expressed concern that the proposed 25% threshold [1229] for the sale of business exception would cause small businesses to lose value when acquired because owners and key workers are critical contributors to the business and non-competes are intangible assets, making buyers less likely to buy. Some commenters requesting a small business exception suggested various definitions of ''small business,'' including based on the number of employees.

Finally, SBA Advocacy encouraged the Commission to adopt an approach addressing the different concerns of small entities and consider, analyze, and tailor alternatives to the size and type of entity to minimize adverse impacts to small entities.[1230] It stated that a categorical ban was inappropriate given the range of industries and nature of economic impacts.[1231] One business requested an exception for highly paid workers at small businesses, to create a predictable bright-line rule while leveling the playing field for small businesses. An industry association asked for an exception for newly formed businesses to encourage capital formation among start-up entities.

b. Responses to Comments

First and foremost, the Commission finds, based on its expertise, the empirical evidence, and the record before it, that non-competes tend to negatively affect competitive conditions in both labor and product and service markets, including by inhibiting new business formation.[1232] The Commission is not aware of any empirical research on existing firm closures—including small business closures—being correlated with decreased non-compete enforceability. The Commission is also not aware of empirical research on specific business closure patterns. Rather, the empirical evidence shows that non-competes overall increase new business formation and decrease concentration, indicating that the final rule will likely increase the overall number of small businesses. The Commission is focused on the aggregate effects of non-competes on competitive conditions and here considers the overall effect on small businesses. While an individual small business may benefit from prohibiting one of its workers from joining a competitor or from keeping a competitor from entering the market, non-competes have a substantial net negative aggregate impact on competitive conditions in both labor markets and product and services markets, including negative spillover effects on other small businesses that do not use non-competes.[1233]

The Commission has assessed the evidence on protection of trade secrets and proprietary information in Part IV.D and finds that businesses have sufficient, less restrictive alternatives to protect such information. These options, such as NDAs, protection under trade secrets law, and importantly, competing

[1227] Sections 7(j)(10) and 8(a) of the Small Business Act (15 U.S.C. 636(j)(10) and 637(a)) authorize the SBA to establish a business development program, which is known as the 8(a) Business Development program. The 8(a) program is a robust nine-year program created to help firms owned and controlled by socially and economically disadvantaged individuals. SBA, *8(a) Business Development Program* (last updated Jan. 25, 2024), *https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program.*

[1228] SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1229] NPRM, proposed § 910.1(e).

[1230] SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1231] *Id.*

[1232] *See* Parts IV.B and IV.C.

[1233] *See id.*

on the merits to retain workers, are also accessible to small businesses. On the latter, small businesses have potentially distinct options from larger firms because of their greater ability to be flexible and responsive to their workers' preferences. Moreover, the Commission notes that no evidence exists to support the hypothesis that trade secret litigation will increase after the final rule takes effect. Recent evidence suggests trade secret litigation does not increase following bans on non-competes.[1234] With a bright-line rule banning non-competes, small businesses, like other business, will not face or have to undertake litigation related to non-competes, which may partially offset other litigation costs if firms do substitute other litigation. In fact, the purported dynamic where small firms are outspent and outmatched by large firms that drive up the cost of trade secrets litigation, is the exact dynamic many small businesses face when sued over a non-compete, which can also force small businesses to close.[1235] While the Commission does not have data on the frequency of each type of litigation or how often it forces small businesses to close, these comments indicate that this alleged legal threat is already present in a different form. Moreover, the overbreadth of non-competes that employers cite as the source of their benefits for reducing litigation costs is also the source of the negative effects of non-competes on competitive conditions, and pecuniary benefits to a firm engaged in an anticompetitive practice are not a cognizable justification for an anticompetitive practice.[1236]

Additionally, the Commission is unaware of any evidence that small businesses in States where non-competes are less enforceable are more likely to experience trade secret misappropriation, or evidence that small businesses are at a distinct disadvantage in these States. Finally, the Commission notes that despite claims that using non-competes to protect trade secrets supports innovation, the empirical evidence shows increased enforceability of non-competes on net in the aggregate harms innovation. Again, the Commission considers the overall effect on all business, including small businesses, and finds that the final rule will not reduce innovation by small business.

In response to the comments that businesses would limit sharing confidential information with their workers or that a small business's inability to protect confidential information would cause new businesses to fail, the Commission notes that use of less restrictive alternatives, including, for example, NDAs, fixed term contracts, and worker retention policies, would allow small businesses to maintain the same or near same level of protection for the confidential information they might share and want to protect. Accordingly, to the extent it is productive for a small business to protect such information or share it with a worker, the firm would adopt these alternatives and be able to continue to operate with the same or similar use of confidential information. Moreover, the Commission is not aware of any empirical evidence supporting the conclusion that firms would share less confidential information or be less able to protect it. In fact, the evidence shows that both within-industry and non-within industry spinouts are better quality, on average, when non-competes are less enforceable, which reinforces the conclusion that small businesses do not rely on non-competes to thrive.[1237] Indeed, no empirical evidence shows new businesses fail at a higher rate when (or because) non-competes are less enforceable. To the extent some businesses may choose to limit information sharing (as some individual comments suggest), the Commission concludes that the benefits of the final rule with respect to earnings, new business formation, and innovation justify any limited resulting negative effect.

In Parts IV.D.1 and X.F.7.a, the Commission examines the evidence on human capital investment and other investment and finds uncertainty regarding whether the effects on training and other investment will be benefits or costs under the final rule. The Commission distinguishes between core training and advanced training, finding that businesses may be able to spend less on core training under the final rule to the extent businesses are able to better match workers with their needs. The Commission similarly finds that new business formation under the final rule could result in an increase in overall capital investment or serve to offset any decreased capital investment in incumbent firms. As noted in comments from small businesses, non-competes limit their ability to hire experienced, productive workers. While it may be true in some cases that large businesses will be able to ''poach'' workers from smaller business, smaller businesses would also be better able to hire talent from large (or other) businesses under the final rule. In fact, theoretically, the final rule would be more beneficial to smaller businesses because they would no longer be hamstrung by the threat of non-compete litigation by large firms when hiring experienced workers from those firms. To the extent large firms can afford to pay out a worker non-compete or to litigate or threaten litigation to secure talent they want from a small firm, a ban on non-competes will better level the playing field between small and large firms competing for talent. While as stated by one commenter, some small businesses may be successful if they are able to use non-competes, the empirical evidence supports the conclusion that new business formation will increase overall under the final rule, and the Commission is not aware of any evidence of small business closure patterns. Businesses also have other alternatives to retain workers.[1238] Finally, the empirical evidence demonstrates ways in which non-competes advantage large businesses against smaller ones.[1239]

In response to comments that argued non-competes were needed to promote stability and worker retention, the Commission notes there is no evidence that stability and worker retention are economically productive in and of themselves. The overall evidence on the harms from non-competes demonstrates that retention of workers through non-competes has considerable costs to both labor markets and product and service markets. Importantly, businesses also have other, less restrictive alternatives—that do not tend to negatively affect competitive conditions—to retain workers as discussed in this Part and in Part IV.D.2. In response to the comment that small businesses will be less likely to afford retaining workers than large businesses that can pay more, the Commission notes that increases in innovation are likely to make small businesses more productive and successful, allowing them to better compete with their larger competitors. Moreover, the Commission notes that, in addition to those retention alternatives, many workers commented that their non-competes prevented them from seeking jobs with better working

[1234] Greenwood, Kobayashi, & Starr, *supra* note 757. The Commission notes that this study supplements—but is not necessary to support—its finding that no evidence supports the conclusion that litigation costs will increase under the final rule. That finding is based on the Commission's expertise and the rulemaking record, including relevant comments. This study was published after the close of the comment period.

[1235] *See* Parts IV.D and X.F.7.c.

[1236] *See* Part II.F.

[1237] *See* Part X.F.9.a.

[1238] *See* Part IV.D.2.

[1239] *See* Part IV.B.3.b.

conditions, shorter commutes, more flexible hours, or more career advancement opportunities, among others.[1240] Small businesses have ways to compete for workers beyond wages alone.

Many of the comments from small businesses, as well as from other commenters, appear to confuse non-competes with other types of agreements, such as non-solicitation agreements or NDAs, and argue that non-competes are needed to prevent former workers from taking the employer's customers or clients or disclosing confidential information. The final rule does not ban non-solicitation clauses unless they meet the definition of non-compete clause.[1241] While one commenter argued that non-solicitation clauses may be more difficult to enforce than non-competes, the Commission weighs the cost of this potential increased difficulty against the harms from non-competes and finds that any marginal benefit compared to a non-solicitation clause does not justify the costs of non-competes. And as explained previously, pecuniary benefits to a firm from an anticompetitive practice are not a cognizable defense.[1242]

In response to comments that small businesses are more reliant on independent contractors and without non-competes independent contractors might have access to confidential information for multiple competitors, the Commission first notes that the final rule does not prohibit agreements preventing a worker from working for two firms simultaneously.[1243] Many alternatives to non-competes allow businesses working with independent contracts to protect their confidential information, including maintaining security of confidential information as well as NDAs and other such agreements, as described in Part IV.D. There is no evidence that independent contractors are more likely to use or share confidential business information and, in fact, they are likely to be working under an agreement detailing their responsibilities and to be more familiar with ways to assure clients that any confidential business information shared with them will remain confidential.

In response to comments that banks might decrease lending without non-competes, the Commission notes that there is no indication that small businesses in States that have banned or limited non-competes have been unable to obtain financing and commenters provide no related evidence. Again, small businesses will have less restrictive alternatives as a means of protecting confidential information. Moreover, with respect to new business formation, workers seeking to start their own businesses will be able to reassure banks that their business will not face the threat of litigation or a court enjoining them from continuing with their business because of a non-compete.

In response to SBA Advocacy's comment on compensation for non-competes, the Commission considered this issue in Part IV.C. and decided to allow existing non-competes with senior executives, which the Commission finds are most likely to have involved consideration, to remain in force.

In response to the comment on the 8(a) business development program, the Commission notes that there are likely program participants in States where non-competes are banned or partially banned and, thus, are not able to use non-competes. Moreover, the program aims to help firms owned and controlled by socially and economically disadvantaged individuals with various supports and assistance to improve their success in securing government contracts. There is no basis to believe such assistance hinges on these small businesses being able to use non-competes with their workers. Like other firms, program participants have viable, less restrictive alternatives that do not tend to negatively affect competitive conditions. The evidence presented in this Part shows that on the whole, small businesses—including 8(a) participants—are expected to benefit from the ban on non-competes by, for example, having a larger pool of talent from which to hire workers.

In response to the comment that large businesses may use borderline *de facto* non-competes, the Commission notes that it provides greater clarity on the definition of non-compete clause in Part III.D, which the Commission believes will reduce both confusion and evasion. To the extent the commenter is raising the possibility that such other restrictive employment terms may tend to negatively affect competitive conditions, the Commission notes that section 5 and the other antitrust laws apply to those terms and govern whether such terms might be unlawful.

In response to comments on the proposed sale of business threshold, as explained in Part V.A, the Commission is eliminating the 25% threshold, meaning more small businesses will be able to utilize non-competes for more owners when they are selling their business. While individual businesses might see decreased value in a sale from being unable to use non-competes for workers, any decrease is justified by the net aggregate benefits of freeing labor markets and product and service markets from non-competes. Again, pecuniary benefits to a firm engaged in an anticompetitive practice is not a cognizable defense.[1244]

In response to the proposed definitions of "small business," first, as explained in Part X.H, the Commission declines to create an exception for small businesses. Second, the SBA already defines "small business" based on size standards set forth in 13 CFR 121.201, and agencies are prohibited from deviating from this definition without following the procedures set out in 13 CFR 121.903.[1245]

In response to the comments arguing that the Commission's jurisdiction does not extend to tax-exempt nonprofit hospitals and healthcare organizations and that the final rule would, thus, give large nonprofits an unfair advantage over small practices, the Commission addresses this question in Parts II.E.2 and V.D.4. In response to the comment on difficulties in using TRAPs under the proposed rule, the Commission notes the final rule does not ban TRAPs, but covers terms and conditions of employment that meet the definition of non-compete clause as delineated in § 910.1 and described in Part III.D.

The commenter asserting that the final rule would exacerbate a labor shortage for small businesses did not provide evidence to support this claim. The Commission, however, finds that a ban on non-competes will increase labor mobility and enable skilled workers who are currently trapped by non-competes to work for others in the industry.

Finally, the Commission notes that numerous workers at small businesses have shared how non-competes have harmed them.

The Commission has carefully considered all of SBA Advocacy's and other stakeholders' comments, including those requesting a small business exception. The Commission has made the following changes, which the Commission believes will benefit small entities: adding an exception for existing senior executive non-competes; amending the notice requirement to ease compliance; and eliminating the sale of

[1240] *See* Part IV.B.3.a.iii.

[1241] *See* Part III.D.

[1242] *See* Part II.F.

[1243] *See* Part III.D.

[1244] *See* Part II.F.

[1245] RFA Compliance Guide, *supra* note 1207 at 14. One business suggested that the SBA definition is prone to confusion and litigation but did not provide any additional information to explain why or how.

business ownership threshold. The Commission believes that the final rule will benefit small businesses overall. The Commission notes that no State has exempted small businesses from any State statutes regulating non-competes.[1246] There is no empirical evidence that a small business exception is necessary or appropriate. Further, the evidence indicating that a ban on non-competes will benefit the economy accounts for non-competes used by both large and small businesses. In sum, the evidence indicates the final rule will, in the aggregate, benefit both small businesses and workers who work for small businesses—not to mention the consumers who in turn benefit. More small businesses are expected to enter the market, and the final rule will remove barriers to their growth.

D. Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The Commission received and carefully reviewed the comment from the SBA.[1247] The issues raised by the SBA and the Commission's responses are included in Parts XI.C and XI.F.

E. Description and Estimated Number of Small Entities to Which the Rule Will Apply

The final rule will impact all small businesses, across all industry classes, that use non-competes. It may also impact some small businesses that do not use non-competes but are impacted by other businesses' use of non-competes. The Commission does not expect that there are classes of businesses which will face disproportionate impacts from the final rule.

For the vast majority of industries, there is no nationwide granular data regarding the percentage of firms that use non-competes, which would facilitate calculating the number of small entities in a given industry using non-competes. Because of this data limitation and given the relatively stable percentage of firms using non-competes across the size distribution,[1248] the Commission estimates the total number of small firms across all industries in the U.S. economy. The Commission then calculates the number of firms estimated to use non-competes by applying an estimate of the percentage of firms using non-competes to that total. Using the size standards set by the SBA,[1249] the Commission calculates that there are 5.25 million small firms and 5.48 million small establishments in the U.S.[1250] Assuming that 49.4% of firms or establishments use non-competes,[1251] an estimated 2.59 million small firms, comprising 2.71 million small establishments, would be affected by the final rule. These calculations—the counts of businesses and the percentage of businesses that use non-competes—are based on small businesses with employees, since sole proprietorships are unlikely to use non-competes. Since the estimate cannot account for differential use of non-competes across industries, these firms span all industries and various sizes below the standards set in the SBA's size standards.

The Commission sought comments on all aspects of the IRFA, including the description and estimated number of small entities to which the rule would apply. A business association claimed the IRFA estimated the number of small businesses solely based on one incomplete study, the Colvin and Shierholz study, which it argued counted only firms with no union members who said all employees signed non-competes, risking significantly undercounting the number of impacted businesses. This comment misreads the study. The cited statement explained that when tabulating the share of businesses where all employees sign non-competes, the study counted only firms with no union members as it did not have information on whether union members signed non-competes.[1252] That does not mean that only firms with no union members where all employees signed non-competes were included in the study. In fact, the study divided its results between the share of workplaces where all employees and only some employees were subject to non-competes.[1253] The comment cites to only one component of the study results. Moreover, the study states that anecdotal evidence indicates it is rare for unions to agree to non-competes,[1254] and comments the Commission received align with that anecdotal evidence.

F. Projected Reporting, Recordkeeping, and Other Compliance Requirements

To comply with the final rule, small entities must do three things. First, to comply with §§ 910.2(a)(1)(i) and 910.2(a)(2)(i), which state it is an unfair method of competition to enter into a non-compete with a worker, small entities can no longer enter into new non-competes with incoming workers, including senior executives. This may include revising human resources materials and manuals and template or form contracts to ensure they are not misused on a forward-going basis, and making strategic decisions regarding workers' employment terms. Second, to comply with § 910.2(a)(1)(ii) and (iii), small entities cannot enforce (or make misrepresentations about) existing non-competes for workers other than senior executives after the effective date. That is, businesses must refrain from suing or threatening to sue workers other than senior executives regarding a non-compete after the effective date; but formal contract rescission is not required. Third, businesses must provide notice to workers other than senior executives that the worker's non-compete will not be enforced against the worker. The Commission provides a safe harbor notice that must be provided only to workers with known contact information. These foregoing steps entail some potential legal and administrative costs.

As calculated in Parts X.D.1.a and X.D.2.a, the Commission estimates the legal and administrative costs would

[1246] *See generally* Beck Reed Riden Chart, *supra* note 1052. In 2023, Maryland increased its non-compete compensation threshold to $19.88 per hour and set a slightly lower threshold for small employers at $19.20 per hour. Md. Lab. & Empl. Code sec. 3–716.

[1247] SBA Off. of Advocacy, FTC–2023–0007–21110.

[1248] *See* Colvin & Shierholz, *supra* note 65 at 5. The Commission emphasizes that, since smaller firms generally use non-competes at a lower rate, based on the numbers reported in Table 1, the estimate of the number of affected small entities is likely larger than is true in practice.

[1249] *See* Small Bus. Admin., *Table of Size Standards, https://www.sba.gov/document/support-table-size-standards.*

[1250] The Commission uses the latest data available from the Census Bureau's Statistics of U.S. Businesses database, available based on firm revenue and firm size. Census Bureau, *Statistics of U.S. Businesses (SUSB)* (last revised Nov. 17, 2023), *https://www.census.gov/programs-surveys/susb.html.* Values are deflated to current dollars using *https://www.bls.gov/data/inflation_calculator.htm.* As used in this analysis, per the Census Bureau, "a firm is a business organization consisting of one or more domestic establishments in the same geographic area and industry that were specified under common ownership or control." On the other hand, "an establishment is a single physical location at which business is conducted or services or industrial operations are performed." *See* Census Bureau, *Glossary, https://www.census.gov/programs-surveys/susb/about/glossary.html.* The number of small firms calculated here has decreased compared to the IRFA based on the updated Census Bureau data and SBA size standards.

[1251] *See* Colvin & Shierholz, *supra* note 65. The Commission notes that the estimated percentage of firms which use non-competes is based on a survey of businesses with employees. In addition, the Small Business Majority's recent survey of small businesses finds that 48% of respondents use non-competes. Sm. Bus. Majority Opinion Poll, supra note 1214. The Commission does not find that this survey has a sufficiently representative sample size to be considered definitive but notes that it aligns with the Colvin & Shierholz estimate.

[1252] *See* Colvin & Shierholz, *supra* note 65.

[1253] *See generally id.*

[1254] *Id.*

total $538.48 to $1,076.96 for each small firm, plus an additional $155.85 for each establishment owned by that firm, plus an additional $1.81 per worker. A single-establishment firm with 10 workers, for example, would bear estimated costs of $712.45 to $1,250.93.[1255] Only a small portion of the average cost estimated for each small firm—$155.85 per establishment, plus $1.81 per worker—is required under the rule. The remainder of the estimated cost is attributable to legal costs which firms may (but are not required to) undertake to revise their contractual practices. The FRFA assumes that the value of human resource professionals' times and legal professionals' time is equal to twice their average wages, which results in updated estimates.[1256] In an abundance of caution, the Commission has erred on the side of overestimating costs.

As described in greater detail in Part X.F.7.a, the Commission also finds that firm investment in human capital may increase or decrease under the final rule, depending on the type of training affected. Given the evidence available, the Commission is unable to fully monetize the estimates of firm investment in human capital. It concludes, however, that even in the absence of a full monetization of all costs and benefits of the final rule, the final rule has substantial benefits that clearly justify the costs.

1. Legal Costs

To ensure that incoming workers' contracts do not include non-competes and that they fully comply with the final rule, firms may employ in-house counsel, outside counsel, or human resource specialists (depending on the complexity of the relevant non-compete). For many firms, this process would likely be straightforward (*i.e.,* simply not using non-competes or removing one section from a boilerplate contract). Other firms may have more complex agreements or choose to use more time. The Commission assumes that, on average, ensuring that contracts for incoming workers do not have non-competes would take the equivalent of one hour of a lawyer's time (valued at $134.62),[1257] resulting in a total cost of $134.62*2.71 million = $364.8 million. There may be substantial heterogeneity in the costs for individual firms; however, the Commission believes this number is conservative. For firms whose costs of removing non-competes for incoming workers is greater, the work of ensuring that contracts comply with the law would overlap substantially with the costs of updating contractual practices, described in Part X.F.7.b.

For each establishment of each firm, estimated direct compliance costs total $21.23 + $134.62 = $155.85, plus $1.81 per worker with a non-compete.

Some business commenters have indicated that they may add or expand the scope of NDAs or other contractual provisions. This legal work is not mandated or required by the rule; it would be undertaken only by the subset of firms and workers for whom firms conclude that such alternatives would be desirable. Additionally, such adjustments are likely unnecessary for senior executives whose non-competes continue to be enforceable under the final rule. Therefore, this component additionally involves identifying senior executives whose existing non-competes are unaffected. For any such legal work, firms may use in-house counsel or outside counsel. To do so, firms may use in-house counsel or outside counsel to revise current contracts or enter into new, different contracts with workers.

The Commission is not aware of empirical evidence on how much it costs firms to revise their contractual practices when they can no longer use non-competes, and commenters did not provide evidence on costs. However, there is evidence indicating that firms that use non-competes are already using other types of restrictive employment provisions. Balasubramanian et al. find that 95.6% of workers with non-competes are also subject to an NDA, 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and that 74.7% of workers with non-competes are also subject to all three other types of provisions.[1258] Firms that are already using multiple restrictive covenants may not need to expand the scope of existing restrictive employment provisions or enter into new ones.

Among the approximately one half of firms that use non-competes,[1259] the Commission assumes that the average firm employs the equivalent of four to eight hours of a lawyer's time to revise its contractual practices.[1260] The Commission emphasizes that this is an average to underline the fact that there would likely be large differences in the extent to which firms update their contractual practices. Many firms, including those that use non-competes only with workers who do not have access to sensitive information, or those that are already using other types of restrictive employment provisions to protect sensitive information, may opt to make no changes. Other firms may employ several hours or multiple days of lawyers' time to arrive at a new contract.[1261] The estimated range of four to eight hours represents an average taken across these different possibilities. For example, if two-thirds of firms that currently use non-competes opt to make no changes to their contractual practices (for example, because their workers are among the 97.5% of workers that already have other post-employment restrictions, or because they will rely on trade secret law in the future, or because they are using non-competes with workers who do not have access to sensitive information), and one-third of such firms spend (on average) the equivalent of 1.5 to 3 working days of an attorney's time, this would result in the estimate of 4–8 hours on average.

The Commission further emphasizes this estimate is an average across all employers that would be covered by the final rule. There is likely substantial heterogeneity in the amount of time firms would use to revise contractual practices; very large firms that use non-competes extensively would likely incur greater costs.

Under the assumption that the average firm that uses a non-compete employs the equivalent of four to eight hours of a lawyer's time, this analysis calculates the total expenditure on updating contractual practices to range from $134.62*4*2.59 million = $1.4 billion to $134.62*8*2.59 million = $2.8 billion. Note that this assumes decisions regarding protection of sensitive information and contract updating are

[1255] "Ten workers" is chosen as an illustrative example.

[1256] See Part X.F.7.b for a detailed description of the calculation and assumptions. The Commission notes that a typographical error in the IRFA resulted in the Commission reporting preliminary figures that were substantially larger than the comparable calculations in the preliminary section 22 analysis, which accounts for some of the differential between the preliminarily reported figures in the IRFA and the final estimates here.

[1257] BLS, *Occupational Outlook Handbook, Lawyers* (last modified Sept. 6, 2023), *https://www.bls.gov/ooh/legal/lawyers.htm* (updated for inflation to 2023 dollars and based on updated BLS data). Assumed lost productivity is twice the median wage.

[1258] Balasubramanian, Starr, & Yamaguchi, *supra* note 74. The value 97.5% is calculated as (1–0.6%/24.2%), where 0.6% represents the proportion of workers with only a non-compete, and no other post-employment restriction, and 24.2% represents the proportion of workers with a non-compete, regardless of what other post-employment restrictions they have.

[1259] Colvin & Shierholz, *supra* note 65 at 1.

[1260] Part X.F.7.b.i.

[1261] These estimates are derived from outreach to employment attorneys active in assisting firms in writing their non-competes. Commenters did not provide additional information or data that could be used to update these estimates.

made at the firm, rather than establishment, level, since sensitive information is likely shared across business establishments of a firm.

For each affected small business, the estimated cost of updating contractual practices is $134.62*4 = $538.48 to $134.62*8 = $1,076.96.

2. Administrative Costs for Notification Requirements

To reduce compliance costs and increase compliance certainty, § 910.2(b)(5) provides that an employer complies with the notice requirement in § 910.2(b)(1) where it provides notice to a worker pursuant to § 910.2(b)(4). Furthermore, § 910.2(b)(4) includes model language that constitutes notice to the worker that the worker's non-compete is no longer in effect. The Commission estimates that composing and sending this message in a digital format to all of a firm's workers and applicable former workers for whom digital contact information is available would take 20 minutes of a human resources specialist's time.[1262] According to BLS, the median wage for a human resources specialist was $31.85 per hour in 2023.[1263] The cost of compliance for currently employed workers with digital contact information available is therefore ($31.85*2)/3 = $21.23 per establishment. As estimated in Part XI.E, there are 2.59 million small firms, comprising 2.71 million small establishments, in the U.S. that use non-competes.[1264] Conservatively assuming that each establishment must engage in its own communication (*i.e.,* that a firm's headquarters does not have the ability to send a company-wide email, for example), this means that the total direct compliance cost for workers who are already employed and for whom digital contact information is available is $21.23*2.71 million = $57.5 million.

Each small firm must additionally mail notice to workers with non-competes for whom a physical address is available, but digital contact information is not. The cost per notice is estimated as 5 cents for one printed page plus mailing cost of 70 cents plus one minute of an HR professional's time, at $63.70 per hour, for a total of $1.81 per notice. Given an estimated count of affected workers with non-competes at small businesses of 584,843,[1265] the overall cost of mailed notice provision is therefore estimated to be $1.1 million.

G. Comments and Responses to Comments on the IRFA

The IRFA explained the Commission's preliminary assessment of the direct compliance costs for employers, both for rescinding non-competes for workers who are already employed as well as the costs of an attorney to ensure contracts for incoming workers do not have non-competes.[1266] The IRFA also explained the Commission's assessment of the costs of updating contractual practices, if the employer seeks to do so, by expanding the scope of other contractual provisions to protect trade secrets and other valuable investments.[1267] The Commission sought comment on all aspects of the IRFA.[1268]

In support of the proposed rule, one employment law firm said there are no significant recurring compliance costs to the final rule that would create an undue burden for small employers compared to larger employers. The Commission agrees. The final rule is designed to require only a one-time action and no recurring compliance requirements in order to minimize compliance costs for employers. A technology startup organization said the rule would save small businesses significant legal costs from the complex legal analysis currently necessary when trying to hire a worker subject to a non-compete, particularly when trying to assess the patchwork of State laws, ''reasonableness'' tests, and choice-of-law issues, which startups have few resources to pay.

Some commenters raised concerns about the preliminary assessment of direct compliance costs, primarily concerning unsubstantiated costs of consulting with counsel. Some commenters said small businesses would need to consult with outside counsel to ensure they properly comply with the final rule, though they did not explain why. Another business association said most small businesses do not have the organizational development required to issue the notice and would need to hire outside counsel. A group of industry associations said the estimated costs of $317.68 to $563.84 were not realistic and did not reflect the cost of discussions with outside counsel on its existing agreements and contracts and its contract negotiation practices, but the comment did not provide information to support a different estimate. Some commenters argued that small businesses lacking internal counsel or employment lawyers on retainer would face substantial unplanned expenses when seeking outside counsel on whether other restrictive covenants violated the proposed *de facto* non-compete provision. These commenters did not provide cost estimates.

First, in response to the proposed rule's Preliminary Regulatory Impact Analysis, commenters discussed that the estimated compliance costs and costs of contractual updating may underestimate true costs for the broader business community and provided alternative estimates of the time employers might spend complying with the rule and updating contractual practices, as well as the charged rates of outside counsel. These comments are addressed in the sensitivity analyses presented in Part X.F.7. The Commission has also updated the estimated legal costs in this Part. Commenters also argued that small businesses would face greater costs associated with the use of outside counsel but did not quantify those costs for small businesses. Again, the Commission provides a sensitivity analysis reflecting the cost of experienced outside counsel for all firms in Part X.F.7.b.i. Moreover, as the Commission notes, the estimate reflects significant heterogeneity, so that it is likely that some firms will simply be able to remove the paper or electronic copy of the non-compete from their website or workplace manual—requiring no attorney time—while others, like the commenter, may spend more time consulting with counsel.

Second, in response to these and other comments and as explained in Part III.D, the definition of non-compete clause has been revised to reduce confusion and give employers and workers a clearer understanding of what is prohibited, which will in turn reduce compliance costs. Third, the FRFA includes updated compliance costs to reflect any remaining need to assess contracts under § 910.2(a). Fourth, the Commission has made the notice

[1262] *See* Part X.F.7.

[1263] *See* BLS, *Occupational Outlook Handbook, Human Resources Specialists, https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm* (last modified Sept. 6, 2023) (updated for inflation to 2023 dollars).

[1264] The dataset is available at Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry,* Industry (Feb. 2022) (last revised Sept. 15, 2023), *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.*

[1265] Estimated as 80% * 18.1% * 66% * (33,271,644–27,151,987), where 80% is the percentage of covered workers (see Part X.F.4.a), 18.1% is the estimated percentage of workers with non-competes (see Starr, Prescott, & Bishara, *supra* note 68), 67% is the assumed percent of workers without digital contact information, and 6,119,657 = 33,271,644–27,151,987 is the count of workers at small businesses (see *https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-US.pdf*).

[1266] *See* NPRM at 3532.

[1267] *See id.* at 3532–33.

[1268] *See id.* at 3531.

requirement as simple as possible by providing model language for the notice in § 910.2(b)(4) and a safe harbor allowing employers to use a last known address and an exception for employers who do not have a workers' contact information. Employers can provide the notice by hand or through the mail, email, or a text message,[1269] and employers are not required to provide notice if they have no method of contacting a worker by paper or digital format.[1270] An employer is required only to notify workers that existing non-competes are no longer in effect and refrain from including non-competes in future contracts. This process is designed to be as easy as possible for employers. Employers should rarely need to seek outside legal assistance for complying with the notice requirement, and commenters do not provide an explanation of why legal assistance would be a necessary part of this process, though the cost of any such legal assistance (to identify senior executives for whom notice is not required) is accounted for in Part XI.F.1. Finally, the Commission will provide guidance materials for small entities to explain how to comply with the final rule.

The estimated compliance costs do not directly include any costs or savings from the senior executive exception, because the number of workers the exception might apply to is such a small portion of workers overall that any effect is *de minimis.* At an individual firm level, small businesses might not be impacted by the exception (if no workers earn above the total compensation threshold). Others might face increased compliance costs if they choose to use the exception and need to evaluate whether a worker meets the definition of senior executive (as accounted for in Part XI.F.1). However, the total compensation threshold included in the final rule's definition of ''senior executive'' is designed to ensure that employers and workers do not need to conduct a job duties assessment for every worker, only workers making above the threshold. In addition, in many cases it may be clear that a worker does or does not meet the test for whether a worker is a ''senior executive'' without a detailed assessment. For example, CEOs and Presidents are presumed to be in a policy-making position under § 910.1 and will not be otherwise subject to a job duties test, while highly paid workers in a non-executive role such as many physicians will not. Other small businesses might see decreased or eliminated direct and indirect compliance costs if they can maintain existing senior executive non-competes.

Many commenters also stated there are other indirect costs. SBA Advocacy suggested that the IRFA did not account for additional potential costs, including the costs of services, including higher legal fees to protect information, potential increased training, hiring and retention costs, and process changes.[1271] Similarly, a business association argued small businesses could face additional costs for finding alternatives to protect assets and to alter hiring, training, and retention processes. Some business associations argued that the cost of updating contractual practices would be higher because businesses would need to consult counsel, and many small businesses may be unable to afford to do so. A business organization stated that the Commission should consider the costs from a small business diminishing in value to potential buyers because it cannot record the value of its non-competes.

Another business organization said costs to small businesses are not limited to updating contractual agreements, mentioning the use of non-competes to protect assets and investments. A law firm suggested that trade secrets litigation often costs unspecified millions in attorney and expert fees and investigations costs. A business association commented that the rule would likely trigger additional litigation costs for trade secret protection and satisfying standards for injunctive relief, as well as unspecified additional costs related to lost business relationships and ideas. The business association cited an article from the biotech industry as saying a ban will force biotech companies to find other ways to protect themselves, likely through increased trade secret litigation, and recognizing that non-competes are critical to startups in the industry.

Two comments requested that the Commission publish a supplemental IRFA to account for the rule's potential impact.

The Commission notes that agencies are generally not required to consider indirect costs, though it is considered a best practice.[1272] While commenters raised categories of indirect costs that may be implicated (and it is not clear exactly what potential costs may fit into those categories), commenters did not provide any data or information that could enable the Commission to estimate any indirect costs. Some of these costs are also attenuated and speculative. Many of these concerns are also addressed in Parts IV.D and XI.C. The commenters also misunderstand the calculations in the IRFA and RIA; the estimates are an average across employers using non-competes, and there is likely to be substantial heterogeneity. The calculations account for the assumption that some firms may spend more than this amount. In response to comments on hiring costs, some firms may save on hiring costs from easier hiring, while others might have increased turnover costs.[1273] Businesses also have other options to compete on the merits besides raising wages, as many commenters indicated they sought jobs with better hours, more flexible schedules, shorter commutes, career opportunities, and other benefits.[1274] Businesses will be better able to hire workers experienced in their field who require less training than workers new to an industry.[1275]

Even if commenters' unsupported assertions that trade secret litigation and NDA enforcement may be more costly for businesses, including small businesses, are correct, such costs are justified by the benefits of the rule and in any event pecuniary benefits to a firm from an anticompetitive practice are not a cognizable justification.[1276] The Commission estimates that the final rule may increase or decrease overall litigation costs, and there is no evidence in the literature to allow the Commission to quantify those costs or benefits.[1277]

The comment citing an article on the biotech industry overstates the article's statements. The article said the existing increase in trade secrets litigation was likely to continue if the rule were adopted, did not cite any evidence for this prediction other than that non-competes are often used to protect trade secrets, and noted that companies may also use NDAs or restrict access to sensitive information.[1278] The article

[1269] § 910.2(b)(2).

[1270] § 910.2(b)(3).

[1271] SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1272] *Mid-Tex Elec. Co-op., Inc.* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities[,]'' and the court inferred that ''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.''); *see also* RFA Compliance Guide, *supra* note 1207 at 22–23, 64–68.

[1273] *See* Part X.F.9.

[1274] *See* Part XI.C.2.b.

[1275] *See* Part X.F.7.a.

[1276] *See* Parts IV.D.3, X.F.5–6, II.F.

[1277] *See* Part X.F.7.c.

[1278] Rosemary Scott, *FTC's Non-Compete Law Could Propel Rise in Trade Secrets Lawsuits,* Continued

did not say that non-competes are critical to biotech startups.[1279]

The commenter asking the Commission to consider small business valuation changes did not provide any potential estimates of such a cost, nor did the commenter demonstrate that such costs exist. It is unclear whether this commenter was referring to the value of non-competes for owners or for workers, but some such non-competes may fall within the exceptions for existing senior executive non-competes or for owners in a sale of business.[1280] To the extent there are any remaining non-competes that increase the value of a business in a sale, the Commission finds that any marginal decrease is justified by the substantial overall benefits of the rule.

In response to the requests for a supplemental IRFA, one is not required by law, and this FRFA responds to all comments on the IRFA. A supplemental IRFA would not provide the public with additional relevant information that the IRFA did not.

H. Discussion of Significant Alternatives

The RFA requires that agencies include a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, 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.[1281] Statutory examples of ‘‘significant alternatives’’ include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the rule, or any part thereof, for small entities.[1282]

In Part IX, the Commission discusses significant alternatives to the final rule. Part IX also includes an assessment determining that each of the significant alternatives would not accomplish the objectives of the final rule. The Commission did incorporate some of the alternatives proposed in the NPRM and in comments into the final rule, namely the exception for existing senior executive non-competes, simplifying notice requirements, eliminating rescission requirements, and eliminating the 25% threshold for the sale of business exception. In addition, the Commission's analysis of benefits and costs in Part X includes an assessment of the benefits and costs of excluding senior executives. The Commission notes that it has designed the final rule to minimize compliance costs for all businesses and that the final rule does not include any reporting requirements. As stated in Part X.F.7.b, the Commission estimates that direct compliance costs and the costs of updating contractual practices would result in costs of $538.48 to $1,076.96 for each firm. As previously noted, the Commission does not believe the final rule imposes a significant economic impact on a substantial number of small entities. The Commission has also described how the final rule will benefit and increase the number of small businesses.

After careful consideration, the Commission is not creating an exception for small entities or different regulatory requirements for small entities. The final rule provides that for workers other than senior executives, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete, enforce or attempt to enforce a non-compete, or represent that the worker is subject to a non-compete.[1283] For senior executives, the final rule provides that it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete, enforce or attempt to enforce a non-compete entered into after the effective date, or represent that the worker is subject to a non-compete, where the non-compete was entered into after the effective date.[1284] Based on the available evidence, the Commission does not believe that the analysis in Parts IV.B and IV.C is fundamentally different for non-competes that are imposed by small entities. For this reason, the Commission is not creating an exception for small entities or different regulatory requirements for small entities.

The Commission is not delaying the effective date of the final for small entities. Under § 910.6, the final rule is effective 120 days after publication in the **Federal Register** on September 4, 2024. One small business asked that the final rule's effective date be delayed for two years to give the business time to silo its intellectual property and implement safeguards to protect its information. In the Commission's view, the rule's effective date of September 4, 2024 will afford small entities a sufficient period of time to comply with the final rule, and commenters have not provided evidence that more time is necessary.[1285]

XII. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (‘‘PRA’’),[1286] Federal agencies must obtain approval from the Office of Management and Budget (‘‘OMB’’) for each collection of information they conduct or sponsor. The term ‘‘collection of information’’ includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.[1287] Under the PRA, the Commission may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.[1288]

A. The Proposed Rule

In the NPRM, the Commission stated that it believed the proposed rule would contain a disclosure requirement that would constitute a collection of information requiring OMB approval under the PRA. The Commission stated that this disclosure requirement was proposed § 910.2(b)(2), which would have required employers to provide notice to a worker with an existing non-compete—*i.e.,* a non-compete that was entered into prior to the effective date—that the non-compete is no longer in effect and may not be enforced against the worker.[1289] Conservatively assuming that each establishment must engage in its own communication—*i.e.,* a firm's headquarters does not have the ability to send a company-wide email, for example—the Commission estimated that covered employers would incur an estimated labor cost burden of 1,310,747 hours to comply with this requirement (3,932,240 establishments × 20 minutes). The Commission estimated the associated labor cost for notifying affected workers who are already employed is $9.98 × 7.96 million × 0.494 = $39,243,755.[1290]

The Commission stated that the proposed rule would impose only *de minimis* capital and non-labor costs.

BioSpace (Feb. 8, 2023), *https://www.biospace.com/article/ftc-s-non-compete-law-could-propel-rise-in-trade-secrets-lawsuits-/.*

[1279] *Id.*

[1280] *See* § 910.3.

[1281] 5 U.S.C. 604(a)(6).

[1282] *See* 5 U.S.C. 603(c)(1)–(4).

[1283] *See* § 910.2(a)(1).

[1284] *See* § 910.2(a)(2).

[1285] *See* Part VIII.

[1286] 44 U.S.C. 3501 *et seq.*

[1287] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[1288] 44 U.S.C. 3506(c)(1)(B); 5 CFR 1320.5(a)(3).

[1289] NPRM at 3533.

[1290] *Id.* at 3534.

The Commission anticipated that covered employers would already have in place existing systems to communicate with and provide employment-related disclosures to workers. While the proposed rule would require a one-time disclosure to some workers subject to a rescinded non-compete, the Commission anticipated that this one-time disclosure would not require substantial investments in new systems or other non-labor costs. The Commission noted that, moreover, many establishments are likely to provide the disclosure electronically, further reducing total costs.[1291]

The Commission sought comment on all aspects of its PRA analysis, including (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of these information collections on respondents.

B. Comments Received

No commenters specifically addressed the PRA analysis in the NPRM. However, the Commission received extensive comments on its Preliminary Regulatory Impact Analysis and Initial Regulatory Flexibility Act Analysis, and many of these commenters addressed the Commission's estimates related to the cost of compliance. These comments are summarized in Parts X (the Commission's Final Regulatory Analysis) and XI (the Commission's Final Regulatory Flexibility Act Analysis). The Commission also received comments on the proposed notice requirement itself. These comments are summarized in Part IV.E.

C. Final PRA Analysis

The Commission finalizes the proposed rule's notice requirement largely as proposed, with some adjustments to even further ease compliance. In the final rule, § 910.2(a)(1)(ii) prohibits employers from enforcing existing non-competes—*i.e.,* non-competes entered into prior to the effective date—with respect to workers other than senior executives. Section 910.2(b)(1) as finalized states further that for each existing non-compete that it is an unfair method of competition to enforce or attempt to enforce under § 910.2(a)(1)(ii)—*i.e.,* non-competes entered into with workers other than senior executives—the person who entered into the non-compete with the worker must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete will not be, and cannot legally be, enforced against the worker.

Pursuant to § 910.2(b)(2), the notice must (i) identify the person who entered into the non-compete with the worker and (ii) be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.

Section 910.2(b)(3) provides an exception to the notice requirement in § 910.2(b)(1) where the person that would otherwise be required to provide the notice has no record of a street address, email address, or mobile telephone number.

Section 910.2(b)(4) provides model language that employers may use to comply with the notice requirement. Section 910.2(b)(5) states that an employer presumptively complies with the notice requirement in § 910.2(b)(1) where the employer provides a notice to the worker pursuant to § 910.2(b)(4). And § 910.2(b)(6) allows but does not require employers, in addition to providing the required notice in English, to provide the notice in another language (or languages). Section 910.2(b)(6) also permits employers to use any Commission-provided translation of the model language in § 910.2(b)(4).

The notice requirement has changed in two important respects from the proposed rule. First, employers are no longer required to provide the notice to senior executives with existing non-competes. Second, as long as employers provide the notice in English, they are permitted to provide the notice in a language other than English. However, neither of these changes significantly affects the burden of complying with the notice. Senior executives are only 0.75% of workers, so the cost savings to employers of not needing to provide the notice to senior executives are minimal. No employer is required to provide the notice in a different language, so the rule does not require employers to incur any compliance costs for doing so.

The Commission estimates that composing and sending the notice in a digital format to workers for whom digital contact information is available would take 20 minutes of a human resources specialist's time. According to BLS, the median wage for a human resources specialist in 2022 was $31.85 per hour in 2023 dollars.[1292] The cost of compliance for currently employed workers is therefore ($31.85*2)/3=$21.23 per establishment.[1293] According to the Census Bureau's Statistics of U.S. Businesses database, in 2021 (the most recent year for which data are available), there were 5.91 million firms and 6.88 million establishments in the U.S.[1294] The Commission estimates the percentage of firms using non-competes in the U.S. at 49.4%.[1295] The Commission conservatively assumes that each establishment must engage in its own communication—*i.e.,* that a firm's headquarters does not have the ability to send a company-wide email, for example. This yields an estimated 3,397,545 covered establishments which would incur an estimated labor cost burden of 1,132,515 hours to comply with this requirement (3,397,545 establishments × 20 minutes). The Commission estimates the associated labor cost for notifying affected workers who are already employed and for whom digital contact information is available is $21.23 × 6.88 million × 0.494 = $72,141,201.

Businesses may not have digital contact information for workers. The number of workers with non-competes who must therefore receive physical notice is the total number of covered workers (101.1 million; see Part X.F.7.a.i) times the percentage of workers who have non-competes (18.1%) times the percentage of workers who require mailed notice (assumed to be 66% of workers[1296]), for a total of 12.1 million workers. The Commission notes that the percentage of workers who require mailed notice is likely a substantial overestimate, since it is estimated based on the percentage of individuals who receive health information digitally. The Commission believes that employers are more likely to have digital means of providing the notice to their current workers

[1291] *Id.*

[1292] BLS, *Occupational Outlook Handbook: Human Resources Specialists, https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm.* The value in 2022 was $30.88, which was updated to 2023 dollars.

[1293] The lost productivity of workers is assumed to be twice the median wage. *See* Part X.F.7.b.ii.

[1294] Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry* (December 2023), *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.*

[1295] *See* Colvin & Shierholz, *supra* note 65 at 4.

[1296] *See supra* note 1165 (CMS Supporting Statement assumes 66% of workers require mailed notice from their health insurance companies).

especially, but also to their former workers. The Commission conservatively adopts this estimate as an upper bound. The cost of mailed notice provision includes some capital costs (the cost of postage and mailing materials) and the cost of a human resource professional's time. The cost per worker is estimated as 5 cents for one printed page plus mailing cost of 70 cents plus the cost of one minute of an HR professional's time, at $63.70 per hour, for a total of $1.81 per notice. The overall cost of mailed notice provision is therefore estimated to be $22 million.

As the Commission stated in the proposed rule, the Commission anticipates that covered employers already have in place existing systems to communicate with and provide employment-related disclosures to workers. While the final rule requires a one-time disclosure to some workers, the Commission anticipates this one-time disclosure will not require substantial investments in new systems or other non-labor costs. Moreover, many establishments are likely to provide the disclosure electronically, further reducing total costs.

XIII. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this final rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 910

Antitrust.

■ For the reasons set forth above, and under the authority of Sections 5 and 6(g) of the Federal Trade Commission Act, the Federal Trade Commission adds subchapter J, consisting of parts 910 and 912, to chapter I in title 16 of the Code of Federal Regulations to read as follows:

Subchapter J—Rules Concerning Unfair Methods of Competition

PART 910—NON-COMPETE CLAUSES

PART 912—[RESERVED]

PART 910—NON-COMPETE CLAUSES

Sec.
910.1. Definitions.
910.2. Unfair methods of competition.
910.3. Exceptions.
910.4. Relation to State laws and preservation of State authority and private rights of action.
910.5. Severability.
910.6. Effective date.

Authority: 15 U.S.C. 45 and 46(g).

PART 910—NON-COMPETE CLAUSES

§ 910.1 Definitions.

As used in this part:

Business entity means a partnership, corporation, association, limited liability company, or other legal entity, or a division or subsidiary thereof.

Employment means work for a person.

Non-compete clause means:

(1) A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:

(i) Seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or

(ii) Operating a business in the United States after the conclusion of the employment that includes the term or condition.

(2) For the purposes of this part, term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

Officer means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any natural person routinely performing corresponding functions with respect to any business entity whether incorporated or unincorporated.

Person means any natural person, partnership, corporation, association, or other legal entity within the Commission's jurisdiction, including any person acting under color or authority of State law.

Policy-making authority means final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.

Policy-making position means a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. An officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for purposes of this paragraph. A natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise.

Preceding year means a person's choice among the following time periods: the most recent 52-week year, the most recent calendar year, the most recent fiscal year, or the most recent anniversary of hire year.

Senior executive means a worker who:

(1) Was in a policy-making position; and

(2) Received from a person for the employment:

(i) Total annual compensation of at least $151,164 in the preceding year; or

(ii) Total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year; or

(iii) Total compensation of at least $151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause.

Total annual compensation is based on the worker's earnings over the preceding year. Total annual compensation may include salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during that 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in 29 CFR 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other similar fringe benefits.

Worker means a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.

§ 910.2 Unfair methods of competition.

(a) *Unfair methods of competition*—(1) *Workers other than senior executives.* With respect to a worker other than a senior executive, it is an unfair method of competition for a person:

(i) To enter into or attempt to enter into a non-compete clause;

(ii) To enforce or attempt to enforce a non-compete clause; or

(iii) To represent that the worker is subject to a non-compete clause.

(2) *Senior executives.* With respect to a senior executive, it is an unfair method of competition for a person:

(i) To enter into or attempt to enter into a non-compete clause;

(ii) To enforce or attempt to enforce a non-compete clause entered into after the effective date; or

(iii) To represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.

(b) *Notice requirement for existing non-compete clauses*—(1) *Notice required.* For each existing non-compete clause that it is an unfair method of competition to enforce or attempt to enforce under paragraph (a)(1)(ii) of this section, the person who entered into the non-compete clause with the worker must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker.

(2) *Form of notice.* The notice to the worker required by paragraph (b)(1) of this section must:

(i) Identify the person who entered into the non-compete clause with the worker;

(ii) Be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.

(3) *Exception.* If a person that is required to provide notice under paragraph (b)(1) of this section has no record of a street address, email address, or mobile telephone number, such person is exempt from the notice requirement in paragraph (b)(1) of this section with respect to such worker.

(4) *Model language.* For purposes of paragraph (b)(1) of this section, the following model language constitutes notice to the worker that the worker's non-compete clause cannot legally be enforced and will not be enforced against the worker.

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Figure 1 to Paragraph (b)(4)—Model Language

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit [*link to final rule landing page*]. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at [URL on FTC's website].

BILLING CODE 6750–01–C

(5) *Safe harbor.* A person complies with the requirement in paragraph (b)(1) of this section if the person provides notice to a worker pursuant to paragraph (b)(4) of this section.

(6) *Optional notice in additional languages.* In addition to providing the notice required in paragraph (b)(1) of this section in English, a person is permitted to provide such notice in a language (or in languages) other than English or to include internet links to translations in additional languages. If providing optional notice under this paragraph (b)(6), a person may use any Commission-provided translation of the model language in paragraph (b)(4) of this section.

§ 910.3 Exceptions.

(a) *Bona fide sales of business.* The requirements of this part shall not apply to a non-compete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets.

(b) *Existing causes of action.* The requirements of this part do not apply where a cause of action related to a non-compete clause accrued prior to the effective date.

(c) *Good faith.* It is not an unfair method of competition to enforce or attempt to enforce a non-compete clause or to make representations about a non-compete clause where a person has a good-faith basis to believe that this part is inapplicable.

§ 910.4 Relation to State laws and preservation of State authority and private rights of action.

(a) This part will not be construed to annul, or exempt any person from complying with any State statute,

regulation, order, or interpretation applicable to a non-compete clause, including, but not limited to, State antitrust and consumer protection laws and State common law, except that this part supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b).

(b) Except with respect to laws superseded under paragraph (a) of this section, no provision of this part shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement agency or entity or the rights of a person to bring a claim or regulatory action arising under any State statute, regulation, order, or interpretation, including, but not limited to, State antitrust and consumer protection laws and State common law.

§ 910.5 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 shall be construed so as to continue to give the maximum effect to the provision permitted by law and such invalidity shall not affect the application of the provision to other persons or circumstances or the validity or application of other provisions. If any provision or application of this part is held to be invalid or unenforceable, the provision or application shall be severable from this part and shall not affect the remainder thereof.

§ 910.6 Effective date.

This part is effective September 4, 2024.

PART 912—[RESERVED]

By direction of the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

APPENDIX A—TABLE A.1

State	Estimated number of covered workers	Estimated increase in total annual worker earnings	Estimated increase in average annual worker earnings
Alabama	1,620,882	$822,829,396	$508
Alaska	251,167	145,317,588	579
Arizona	2,460,342	1,410,771,964	573
Arkansas	999,178	478,239,544	479
California			
Colorado	2,251,980	1,484,772,427	659
Connecticut	1,314,029	945,571,637	720
Delaware	367,291	220,637,013	601
District of Columbia	598,990	604,415,889	1,009
Florida	7,486,582	4,229,047,004	565
Georgia	3,764,270	2,188,893,667	581
Hawaii	495,988	270,123,206	545
Idaho	656,688	315,487,683	480
Illinois	4,735,066	3,051,620,266	644
Indiana	2,490,735	1,280,797,352	514
Iowa	1,229,598	624,937,405	508
Kansas	1,112,654	553,683,941	498
Kentucky	1,536,365	759,416,081	494
Louisiana	1,492,474	747,953,455	501
Maine	501,216	258,101,666	515
Maryland	2,112,817	1,378,702,305	653
Massachusetts	2,876,506	2,288,111,777	795
Michigan	3,440,754	1,946,978,052	566
Minnesota			
Mississippi	916,362	384,971,511	420
Missouri	2,256,955	1,184,012,673	525
Montana	396,982	191,696,465	483
Nebraska	787,174	399,373,568	507
Nevada	1,177,510	646,371,090	549
New Hampshire	536,516	343,360,391	640
New Jersey	3,307,696	2,301,979,408	696
New Mexico	666,290	326,156,344	490
New York	7,411,689	5,879,334,118	793
North Carolina	3,759,643	2,105,343,963	560
North Dakota			
Ohio	4,314,090	2,330,837,261	540
Oklahoma			
Oregon	1,560,619	916,694,759	587
Pennsylvania	4,690,586	2,795,472,689	596
Rhode Island	385,074	220,004,925	571
South Carolina	1,745,274	858,798,497	492
South Dakota	354,502	169,742,169	479
Tennessee	2,526,310	1,389,744,066	550
Texas	10,599,295	6,535,957,999	617
Utah	1,320,994	715,807,809	542
Vermont	241,017	127,248,043	528
Virginia	3,166,902	1,995,480,948	630

APPENDIX A—TABLE A.1—Continued

State	Estimated number of covered workers	Estimated increase in total annual worker earnings	Estimated increase in average annual worker earnings
Washington	2,809,814	2,090,953,114	744
West Virginia	539,026	253,817,680	471
Wisconsin	2,301,874	1,207,149,373	524
Wyoming	217,787	108,650,236	499
Full US, excluding CA, ND, OK, MN	101,785,552	53,291,058,349	524

Note: The estimated number of covered workers is calculated as 80% * (total employed population in the state); the estimated increase in total earnings is calculated as 0.86% * (estimated total covered earnings), where estimated total covered earnings is calculated as (estimated number of covered workers) * (average annual earnings); and the estimated increase in average earnings is calculated as 0.86% * (average annual earnings). Total employed population and average annual earnings are taken from the U.S. Census Bureau Quarterly Census of Employment and Wages for 2022 (see *https://www.bls.gov/cew/data.htm*). National totals may not equal the sum of state-specific estimates due to rounding.

[FR Doc. 2024–09171 Filed 4–30–24; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL REGISTER

Vol. 89 Tuesday,

No. 89 May 7, 2024

Part IV

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2018–0794; FRL–6716.3–02–OAR]

RIN 2060–AV53

National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes amendments to the national emission standards for hazardous air pollutants (NESHAP) for the Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) source category. These final amendments are the result of the EPA's review of the 2020 Residual Risk and Technology Review (RTR). The changes, which were proposed under the technology review in April 2023, include amending the filterable particulate matter (fPM) surrogate emission standard for non-mercury metal hazardous air pollutants (HAP) for existing coal-fired EGUs, the fPM emission standard compliance demonstration requirements, and the mercury (Hg) emission standard for lignite-fired EGUs. Additionally, the EPA is finalizing a change to the definition of ''startup.'' The EPA did not propose, and is not finalizing, any changes to the 2020 Residual Risk Review.

DATES: This final rule is effective on July 8, 2024. The incorporation by reference of certain material listed in the rule was approved by the Director of the Federal Register as of April 16, 2012.

ADDRESSES: The U.S. Environmental Protection Agency (EPA) has established a docket for this action under Docket ID No. EPA–HQ–OAR–2018–0794. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information 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 either electronically through *https://www.regulations.gov,* or in hard copy at the EPA Docket Center, WJC West Building, Room Number 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions about this final action contact Sarah Benish, Sector Policies and Programs Division (D243–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, P.O. Box 12055, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5620; and email address: *benish.sarah@epa.gov.*

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

APH air preheater
Btu British Thermal Units
CAA Clean Air Act
CEMS continuous emission monitoring system
EGU electric utility steam generating unit
EIA Energy Information Administration
ESP electrostatic precipitator
FF fabric filter
FGD flue gas desulfurization
fPM filterable particulate matter
GWh gigawatt-hour
HAP hazardous air pollutant(s)
HCl hydrogen chloride
HF hydrogen fluoride
Hg mercury
Hg^0 elemental Hg vapor
Hg^{2+} divalent Hg
$HgCl_2$ mercuric chloride
Hg_p particulate bound Hg
HQ hazard quotient
ICR Information Collection Request
IGCC integrated gasification combined cycle
IPM Integrated Planning Model
IRA Inflation Reduction Act
lb pounds
LEE low emitting EGU
MACT maximum achievable control technology
MATS Mercury and Air Toxics Standards
MMacf million actual cubic feet
MMBtu million British thermal units of heat input
MW megawatt
NAICS North American Industry Classification System
NESHAP national emission standards for hazardous air pollutants
NO_X nitrogen oxides
NRECA National Rural Electric Cooperative Association
OMB Office of Management and Budget
PM particulate matter
$PM_{2.5}$ fine particulate matter
PM CEMS particulate matter continuous emission monitoring systems
REL reference exposure level
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RIN Regulatory Information Number
RTR residual risk and technology review
SC–CO_2 social cost of carbon
SO_2 sulfur dioxide
TBtu trillion British thermal units of heat input
tpy tons per year
UMRA Unfunded Mandates Reform Act
WebFIRE Web Factor Information Retrieval System

Background information. On April 24, 2023, the EPA proposed revisions to the Coal- and Oil-Fired EGU NESHAP based on our review of the 2020 RTR. In this action, we are finalizing revisions to the rule, commonly known as the Mercury and Air Toxics Standards (MATS). We summarize some of the more significant comments regarding the proposed rule that were received during the public comment period and provide our responses in this preamble. A summary of all other public comments on the proposal and the EPA's responses to those comments is available in *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review Proposed Rule Response to Comments,* Docket ID No. EPA–HQ–OAR–2018–0794. A ''track changes'' version of the regulatory language that incorporates the changes in this action is available in the docket.

Organization of this document. The information in this preamble is organized as follows:

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I. General Information

A. Executive Summary

1. Background and Purpose of the Regulatory Action

Exposure to hazardous air pollutants (''HAP,'' sometimes known as toxic air pollution, including Hg, chromium, arsenic, and lead) can cause a range of adverse health effects including harming people's central nervous system; damage to their kidneys; and cancer. These adverse effects can be particularly acute for communities living near sources of HAP. Recognizing the dangers posed by HAP, Congress enacted Clean Air Act (CAA) section 112. Under CAA section 112, the EPA is required to set standards based on maximum achievable control technology (known as ''MACT'' standards) for major sources [1] of HAP that ''require the maximum degree of reduction in emissions of the hazardous air pollutants . . . (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impacts and energy requirements, determines is achievable.'' 42 U.S.C. 7412(d)(2). The EPA is further required to ''review, and revise'' those standards every 8 years ''as necessary (taking into account developments in practices, processes, and control technologies).'' *Id.* 7412(d)(6).

On January 20, 2021, President Biden signed Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis'' (86 FR 7037; January 25, 2021). The executive order, among other things, instructed the EPA to review the 2020 final rule titled *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil- Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review* (85 FR 31286; May 22, 2020) (2020 Final Action) and to consider publishing a notice of proposed rulemaking suspending, revising, or rescinding that action. The 2020 Final Action included two parts: (1) a finding that it is not appropriate and necessary to regulate coal- and oil-fired EGUs under CAA section 112; and (2) the RTR for the 2012 MATS Final Rule.

The EPA reviewed both parts of the 2020 Final Action. The results of the EPA's review of the first part, finding it is appropriate and necessary to regulate EGUs under CAA section 112, were proposed on February 9, 2022 (87 FR 7624) (2022 Proposal) and finalized on March 6, 2023 (88 FR 13956). In the 2022 Proposal, the EPA also solicited information on the performance and cost of new or improved technologies that control HAP emissions, improved methods of operation, and risk-related information to further inform the EPA's review of the second part, the 2020 MATS RTR. The EPA proposed amendments to the RTR on April 24, 2023 (88 FR 24854) (2023 Proposal) and this action finalizes those amendments and presents the final results of the EPA's review of the MATS RTR.

2. Summary of Major Provisions of the Regulatory Action

Coal- and oil-fired EGUs remain one of the largest domestic emitters of Hg and many other HAP, including many of the non-Hg HAP metals—including lead, arsenic, chromium, nickel, and cadmium—and hydrogen chloride (HCl). Exposure to these HAP, at certain levels and duration, is associated with a variety of adverse health effects. In the 2012 MATS Final Rule, the EPA established numerical standards for Hg, non-Hg HAP metals, and acid gas HAP emissions from coal- and oil-fired EGUs. The EPA also established work practice standards for emissions of organic HAP. To address emissions of non-Hg HAP

[1] The term ''major source'' means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. 42 U.S.C. 7412(a)(1).

metals, the EPA established individual emission limits for each of the 10 non-Hg HAP metals[2] emitted from coal- and oil- fired EGUs. Alternatively, affected sources could meet an emission standard for ''total non-Hg HAP metals'' by summing the emission rates of each of the non-Hg HAP metals or meet a fPM emission standard as a surrogate for the non-Hg HAP metals. For existing coal-fired EGUs, almost every unit has chosen to demonstrate compliance with the non-Hg HAP metals surrogate fPM emission standard of 0.030 pounds (lb) of fPM per million British thermal units of heat input (lb/MMBtu).

Pursuant to CAA section 112(d)(6), the EPA reviewed developments in the costs of control technologies, and the effectiveness of those technologies, as well as the costs of meeting a fPM emission standard that is more stringent than 0.030 lb/MMBtu and the other statutory factors. Based on that review, the EPA is finalizing, as proposed, a revised non-Hg HAP metal surrogate fPM emission standard for all existing coal-fired EGUs of 0.010 lb/MMBtu. This strengthened standard will ensure that the entire fleet of coal-fired EGUs is performing at the fPM pollution control levels currently achieved by the vast majority of regulated units. The EPA further concludes that it is the lowest level currently compatible with the use of PM CEMS for demonstrating compliance.

Relatedly, the EPA is also finalizing a revision to the requirements for demonstrating compliance with the revised fPM emission standard. Currently, affected EGUs that do not qualify for the low emitting EGU (LEE) program for fPM[3] can demonstrate compliance with the fPM standard either by conducting quarterly performance testing (*i.e.,* quarterly stack testing) or by using particulate matter (PM) continuous emission monitoring systems (PM CEMS). PM CEMS confer significant benefits, including increased transparency regarding emissions performance for sources, regulators, and the surrounding communities; and real-time identification of when control technologies are not performing as expected, allowing for quicker repairs. After considering updated information on the costs for quarterly performance testing compared to the costs of PM CEMS and the measurement capabilities of PM CEMS, as well as the many benefits of using PM CEMS, the EPA is finalizing, as proposed, a requirement that all coal- and oil-fired EGUs demonstrate compliance with the revised fPM emission standard by using PM CEMS. As the EPA explained in the 2023 Proposal, by requiring facilities to use PM CEMS, the current compliance method for the LEE program becomes superfluous since LEE is an optional program in which stack testing occurs infrequently, and the revised fPM limit is below the current fPM LEE program limit. Therefore, the EPA is finalizing, as proposed, the removal of the fPM LEE program.

Based on comments received during the public comment period, the EPA is not removing, but instead revising the alternative emission limits for the individual non-Hg HAP metals such as lead, arsenic, chromium, nickel, and cadmium and for the total non-Hg HAP metals proportional to the finalized fPM emission limit of 0.010 lb/MMBtu.[4] Owners and operators of EGUs seeking to use these alternative standards must request and receive approval to use a HAP metal continuous monitoring system (CMS) as an alternative test method under 40 CFR 63.7(f).

The EPA is also finalizing, as proposed, a more protective Hg emission standard for existing lignite-fired EGUs, requiring that such lignite-fired EGUs meet the same Hg emission standard as EGUs firing other types of coal (*i.e.,* bituminous and subbituminous), which is 1.2 lb of Hg per trillion British thermal units of heat input (lb/TBtu) or an alternative output-based standard of 0.013 lb per gigawatt-hour (lb/GWh). Finally, the EPA is finalizing, as proposed, the removal of the second option for defining the startup period for MATS-affected EGUs.

The EPA did not propose and is not finalizing modifications to the HCl emission standard (nor the alternative sulfur dioxide (SO_2) emission standard), which serves as a surrogate for all acid gas HAP (HCl, hydrogen fluoride (HF), selenium dioxide (SeO_2)) for existing coal-fired EGUs. The EPA proposed to require PM CEMS for existing integrated gasification combined cycle (IGCC) EGUs but is not finalizing this requirement due to technical issues calibrating CEMS on these types of EGUs and the related fact that fPM emissions from IGCCs are very low.

In establishing the final standards, as discussed in detail in sections IV., V., VI., and VII. of this preamble, the EPA considered the statutory direction and factors laid out by Congress in CAA section 112. Separately, pursuant to Executive Order 12866 and Executive Order 14904, the EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, *Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review* (Ref. EPA–452/R–24–005), is available in the docket, and is briefly summarized in sections I.A.3. and IX. of this preamble.

3. Costs and Benefits

In accordance with Executive Order 12866 and 14094, the EPA prepared a Regulatory Impact Analysis (RIA). The RIA presents estimates of the emission, cost, and benefit impacts of this final rulemaking for the 2028 to 2037 period; those estimates are summarized in this section.

The power industry's compliance costs are represented in the RIA as the projected change in electric power generation costs between the baseline and final rule scenarios. The quantified emission estimates presented in the RIA include changes in pollutants directly covered by this rule, such as Hg and non-Hg HAP metals, and changes in other pollutants emitted from the power sector due to the compliance actions projected under this final rule. The cumulative projected national-level emissions reductions over the 2028 to 2037 period under the finalized requirements are presented in table 1. The supporting details for these estimates can be found in the RIA.

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[2] The ten non-Hg HAP metals are antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium.

[3] In order to qualify for fPM LEE status, an EGU must demonstrate that its fPM emission rate is below 50 percent of standard (or 0.015 lb/MMBtu) from quarterly stack tests for 3 consecutive years. Once a source achieves LEE status for fPM, the source must conduct stack testing every 3 years to demonstrate that its emission rate remains below 50 percent of the standard.

[4] The emission limits for the individual non-Hg HAP metals and the total non-Hg HAP metals have been reduced by two-thirds, consistent with the revision of the fPM emission limit from 0.030 lb/MMBtu to 0.010 lb/MMBtu.

Table 1. Cumulative Projected Emissions Reductions under the Final Rule, 2028 to 2037[a]

Pollutant	Emissions Reductions
Hg (pounds)	9,500
$PM_{2.5}$ (tons)	5,400
SO_2 (tons)	770
NO_x (tons)	220
CO_2 (thousand tons)	650
non-Hg HAP metals (tons)[b]	49

[a] Values rounded to two significant figures.

[b] The non-Hg HAP metals are antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium.

The EPA expects that emission reductions under the final rulemaking will result in reduced exposure to Hg and non-Hg HAP metals. The EPA also projects health benefits due to improvements in particulate matter with a diameter of 2.5 micrometers or less ($PM_{2.5}$) and ozone and climate benefits from reductions in carbon dioxide (CO_2) emissions. The EPA also anticipates benefits from the increased transparency to the public, the assurance that standards are being met continuously, and the accelerated identification of anomalous emissions due to requiring PM CEMS in this final rule.

The EPA estimates negative net monetized benefits of this rule (see table 2 below). However, the benefit estimates informing this result represent only a partial accounting of the potential benefits of this final rule. Several categories of human welfare and climate benefits are unmonetized and are thus not directly reflected in the quantified net benefit estimates (see section IX.B. in this preamble and section 4 of the RIA for more details). In particular, estimating the economic benefits of reduced exposure to HAP generally has proven difficult for a number of reasons: it is difficult to undertake epidemiologic studies that have sufficient power to quantify the risks associated with HAP exposures experienced by U.S. populations on a daily basis; data used to estimate exposures in critical microenvironments are limited; and there remains insufficient economic research to support valuation of HAP benefits made even more challenging by the wide array of HAP and possible HAP effects.[5] In addition, due to data limitations, the EPA is also unable to quantify potential emissions impacts or monetize potential benefits from continuous monitoring requirements.

The present value (PV) and equivalent annual value (EAV) of costs, benefits, and net benefits of this rulemaking over the 2028 to 2037 period in 2019 dollars are shown in table 2. In this table, results are presented using a 2 percent discount rate. Results under other discount rates and supporting details for the estimates can be found in the RIA.

[5] See section II.B.2. for discussion of the public health and environmental hazards associated with HAP emissions from coal- and oil-fired EGUs and discussion on the limitations to monetizing and quantifying benefits from HAP reductions. See also *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding,* 88 FR 13956, 13970–73 (March 6, 2023).

Table 2. Projected Benefits, Costs, and Net Benefits under the Final Rule, 2028 to 2037 (millions of 2019 dollars, discounted to 2023)[a]

	2% Discount Rate	
	PV	EAV
Ozone- and $PM_{2.5}$-related Health Benefits	300	33
Climate Benefits[b]	130	14
Compliance Costs	860	96
Net Benefits[c]	-440	-49
Non-Monetized Benefits	Benefits from reductions of about 900 to 1000 pounds of Hg annually	
	Benefits from reductions of about 4 to 7 tons of non-Hg HAP metals annually	
	Benefits from the increased transparency, compliance assurance, and accelerated identification of anomalous emission anticipated from requiring PM CEMS	

[a] Values rounded to two significant figures. Totals may not appear to add correctly due to rounding.

[b] Climate benefits are based on reductions in CO_2 emissions and are calculated using three different estimates of the SC-CO_2 (under 1.5 percent, 2.0 percent, and 2.5 percent near-term Ramsey discount rates). For the presentational purposes of this table, we show the climate benefits associated with the SC-CO_2 at the 2 percent near-term Ramsey discount rate.

[c] Several categories of benefits remain unmonetized and are thus not reflected in the table.

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The EPA notes that analysis of such impacts is distinct from the determinations finalized in this action under CAA section 112, which are based on the statutory factors the EPA discusses in section II.A. and sections IV. through VII. below.

B. Does this action apply to me?

Regulated entities. The source category that is the subject of this action is coal- and oil-fired EGUs regulated by NESHAP under 40 CFR part 63, subpart UUUUU, commonly known as MATS. The North American Industry Classification System (NAICS) codes for the coal- and oil-fired EGU source category are 221112, 221122, and 921150. This list of NAICS codes is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by the final action for the source category listed. To determine whether your facility is affected, you should examine the applicability criteria in the appropriate NESHAP. If you have any questions regarding the applicability of any aspect of this NESHAP, please contact the appropriate person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section of this preamble.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action will also be available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at: *https://www.epa.gov/stationary-sources-air-pollution/mercury-and-air-toxics-standards.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version and key technical documents at this same website.

Additional information is available on the RTR website at *https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous.* This information includes an overview of the RTR program and links to project websites for the RTR source categories.

D. Judicial Review and Administrative Reconsideration

Under CAA section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (the Court) by July 8, 2024. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that only an objection to a rule or procedure that was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. This section also provides a mechanism for the EPA to reconsider the rule if the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within the period for public comment or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule. Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, WJC South Building, 1200 Pennsylvania Ave., NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate

General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Background

A. What is the statutory authority for this action?

1. Statutory Language

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a multi-stage regulatory process to develop standards for emissions of HAP from stationary sources. Generally, during the first stage, Congress directed the EPA to establish technology-based standards to ensure that all major sources control HAP emissions at the level achieved by the best-performing sources, referred to as the MACT. After the first stage, Congress directed the EPA to review those standards periodically to determine whether they should be strengthened. Within 8 years after promulgation of the standards, the EPA must evaluate the MACT standards to determine whether the emission standards should be revised to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition, the CAA also requires the EPA to review standards set under CAA section 112 on an ongoing basis no less than every 8 years and revise the standards as necessary taking into account any ''developments in practices, processes, and control technologies.'' This review is commonly referred to as the ''technology review,'' and is the primary subject of this final rule. The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements.

In the first stage of the CAA section 112 standard-setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are ''area sources.'' For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect ''*the maximum degree of reduction* in emissions of the [HAP] subject to this section (*including a prohibition on such emissions, where achievable*) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impacts and energy requirements, determines is achievable.'' (emphasis added). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) establishes a minimum control level for MACT standards, known as the MACT ''floor.'' [6] In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as ''beyond-the-floor'' standards. For area sources, CAA section 112(d)(5) allows the EPA to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.[7]

For categories of major sources and any area source categories subject to MACT standards, the next stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk pursuant to CAA section 112(f)(2). The residual risk review requires the EPA to update standards if needed to provide an ample margin of safety to protect public health.

Concurrent with that review, and then at least every 8 years thereafter, CAA section 112(d)(6) requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies).'' *See Portland Cement Ass'n* v. *EPA,* 665 F.3d 177, 189 (D.C. Cir. 2011) (''Though EPA must review and revise standards 'no less often than every eight years,' 42 U.S.C. 7412(d)(6), nothing prohibits EPA from reassessing its standards more often.''). In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floors that were established in earlier rulemakings. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008); *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6). *See e.g., Nat'l Ass'n for Surface Finishing,* v. *EPA,* 795 F.3d 1, 11 (D.C. Cir. 2015). The EPA is required to address regulatory gaps, such as missing MACT standards for listed air toxics known to be emitted from the source category. *Louisiana Environmental Action Network (LEAN)* v. *EPA,* 955 F.3d 1088 (D.C. Cir. 2020). The residual risk review and the technology review are distinct requirements and are both mandatory.

In this action, the EPA is finalizing amendments to the MACT standards based on two independent sources of authority: (1) its review of the 2020 Final Action's risk and technology review pursuant to the EPA's statutory authority under CAA section 112, and (2) the EPA's inherent authority to reconsider previous decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *see also Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 42 (1983).

2. Statutory Structure and Legislative History

In addition to the text of the specific subsections of CAA section 112 discussed above, the statutory structure and legislative history of CAA section 112 further support the EPA's authority to take this action. Throughout CAA section 112 and its legislative history, Congress made clear its intent to quickly secure large reductions in the volume of HAP emissions from stationary sources based on technological developments in control technologies because of its recognition of the hazards to public health and the environment that result from exposure to such emissions. CAA section 112 and its legislative history also reveal Congress's understanding that fully characterizing the risks posed by HAP emissions was exceedingly difficult. Thus, Congress purposefully replaced a regime that required the EPA to make an assessment of risk in the first instance, with one in which Congress determined risk existed and directed the EPA to make swift and substantial reductions based upon the most stringent standards technology could achieve.

Specifically, in 1990, Congress radically transformed section 112 of the CAA and its treatment of HAP through the Clean Air Act Amendments, by

[6] Specifically, for existing sources, the MACT ''floor'' shall not be less stringent than the average emission reduction achieved by the best performing 12 percent of existing sources. 42 U.S.C. 7412(d)(3). For new sources MACT shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source. *Id.*

[7] For categories of area sources subject to GACT standards, there is no requirement to address residual risk, but, similar to the major source categories, the technology review is required.

amending CAA section 112 to be a technology-driven standard setting provision as opposed to the risk-based one that Congress initially promulgated in the 1970 CAA. The legislative history of the 1990 Amendments indicates Congress's dissatisfaction with the EPA's slow pace addressing HAP under the 1970 CAA: ''In theory, [hazardous air pollutants] were to be stringently controlled under the existing Clean Air Act section 112. However, . . . only 7 of the hundreds of potentially hazardous air pollutants have been regulated by EPA since section 112 was enacted in 1970.'' H.R. Rep. No. 101–490, at 315 (1990); see also *id.* at 151 (noting that in 20 years, the EPA's establishment of standards for only seven HAP covered ''a small fraction of the many substances associated . . . with cancer, birth defects, neurological damage, or other serious health impacts.'').

In enacting the 1990 Amendments with respect to the control of HAP, Congress noted that ''[p]ollutants controlled under [section 112] tend to be less widespread than those regulated [under other sections of the CAA], but are often associated with more serious health impacts, such as cancer, neurological disorders, and reproductive dysfunctions.'' *Id.* at 315. In its substantial 1990 Amendments, Congress itself listed 189 HAP (CAA section 112(b)) and set forth a statutory structure that would ensure swift regulation of a significant majority of these HAP emissions from stationary sources. Specifically, after defining major and area sources and requiring the EPA to list all major sources and many area sources of the listed pollutants (CAA section 112(c)), the new CAA section 112 required the EPA to establish technology-based emission standards for listed source categories on a prompt schedule and to revisit those technology-based standards every 8 years on an ongoing basis (CAA section 112(d) (emission standards); CAA section 112(e) (schedule for standards and review)). The 1990 Amendments also obligated the EPA to conduct a one-time evaluation of the residual risk within 8 years of promulgation of technology-based standards. CAA section 112(f)(2).

In setting the standards, CAA section 112(d) requires the EPA to establish technology-based standards that achieve the ''maximum degree of reduction,'' ''including a prohibition on such emissions where achievable.'' CAA section 112(d)(2). Congress specified that the maximum degree of reduction must be at least as stringent as the average level of control achieved in practice by the best performing sources in the category or subcategory based on emissions data available to the EPA at the time of promulgation. This technology-based approach enabled the EPA to swiftly set standards for source categories without determining the risk or cost in each specific case, as the EPA had done prior to the 1990 Amendments. In other words, this approach to regulation quickly required that all major sources and many area sources of HAP meet an emission standard consistent with the top performers in each category, which had the effect of obtaining immediate reductions in the volume of HAP emissions from stationary sources. The statutory requirement that sources obtain levels of emission limitation that have actually been achieved by existing sources, instead of levels that could theoretically be achieved, inherently reflects a built-in cost consideration.[8]

Further, after determining the minimum stringency level of control, or MACT floor, CAA section 112(d)(2) directs the EPA to ''require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)'' that the EPA determines are achievable after considering the cost of achieving such standards and any non-air-quality health and environmental impacts and energy requirements of additional control. In doing so, the statute further specifies in CAA section 112(d)(2) that the EPA should consider requiring sources to apply measures that, among other things, ''reduce the volume of, or eliminate emissions of, such pollutants . . . '' (CAA section 112(d)(2)(A)), ''enclose systems or processes to eliminate emissions'' (CAA section 112(d)(2)(B)), and ''collect, capture, or treat such pollutants when released . . . '' (CAA section 112(d)(2)(C)). The 1990 Amendments also built in a regular review of new technologies and a one-time review of risks that remain after imposition of MACT standards. CAA section 112(d)(6) requires the EPA to evaluate every NESHAP no less often than every 8 years to determine whether additional control is necessary after taking into consideration ''developments in practices, processes, and control technologies,'' separate from its obligation to review residual risk. CAA section 112(f) requires the EPA to ensure within 8 years of promulgating a NESHAP that the risks are acceptable and that the MACT standards provide an ample margin of safety.

The statutory requirement to establish technology-based standards under CAA section 112 eliminated the requirement for the EPA to identify hazards to public health and the environment in order to justify regulation of HAP emissions from stationary sources, reflecting Congress's judgment that such emissions are inherently dangerous. See S. Rep. No. 101–228, at 148 (''The MACT standards are based on the performance of technology, and not on the health and environmental effects of the [HAP].''). The technology review required in CAA section 112(d)(6) further mandates that the EPA continually reassess standards to determine if additional reductions can be obtained, without evaluating the specific risk associated with the HAP emissions that would be reduced. Notably, Congress required the EPA to conduct the CAA section 112(d)(6) review of what additional reductions may be obtained based on new technology even after the EPA has conducted the one-time CAA section 112(f)(2) risk review and determined that the existing standard will protect the public with an ample margin of safety. The two requirements are distinct, and both are mandatory.

B. What is the Coal- and Oil-Fired EGU source category and how does the NESHAP regulate HAP emissions from the source category?

1. Summary of Coal- and Oil-Fired EGU Source Category and NESHAP Regulations

The EPA promulgated the Coal- and Oil-Fired EGU NESHAP (commonly referred to as MATS) on February 16, 2012 (77 FR 9304) (2012 MATS Final Rule). The standards are codified at 40 CFR part 63, subpart UUUUU. The coal- and oil-fired electric utility industry consists of facilities that burn coal or oil located at both major and area sources of HAP emissions. An existing affected source is the collection of coal- or oil-fired EGUs in a subcategory within a single contiguous area and under common control. A new affected source is each coal- or oil-fired EGU for which construction or reconstruction began

[8] Congress recognized as much: ''The Administrator may take the cost of achieving the maximum emission reduction and any non-air quality health and environmental impacts and energy requirements into account when determining the emissions limitation which is achievable for the sources in the category or subcategory. Cost considerations are reflected in the selection of emissions limitations which have been achieved in practice (rather than those which are merely theoretical) by sources of a similar type or character.'' A Legislative History of the Clean Air Act Amendments of 1990 (CAA Legislative History), Vol 5, pp. 8508–8509 (CAA Amendments of 1989; p. 168–169; Report of the Committee on Environment and Public Works S. 1630).

after May 3, 2011. An EGU is a fossil fuel-fired combustion unit of more than 25 megawatts (MW) that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 MW electric output to any utility power distribution system for sale is also considered an EGU. The 2012 MATS Final Rule defines additional terms for determining rule applicability, including, but not limited to, definitions for ''coal-fired electric utility steam generating unit,'' ''oil-fired electric utility steam generating unit,'' and ''fossil fuel-fired.'' In 2028, the EPA expects the source category covered by this MACT standard to include 314 coal-fired steam generating units (140 GW at 157 facilities), 58 oil-fired steam generating units (23 GW at 35 facilities), and 5 IGCC units (0.8 GW at 2 facilities).

For coal-fired EGUs, the 2012 MATS Final Rule established standards to limit emissions of Hg, acid gas HAP (*e.g.,* HCl, HF), non-Hg HAP metals (*e.g.,* nickel, lead, chromium), and organic HAP (*e.g.,* formaldehyde, dioxin/furan). Emission standards for HCl serve as a surrogate for the acid gas HAP, with an alternate standard for SO_2 that may be used as a surrogate for acid gas HAP for those coal-fired EGUs with flue gas desulfurization (FGD) systems and SO_2 CEMS installed and operational. Standards for fPM serve as a surrogate for the non-Hg HAP metals. Work practice standards limit formation and emissions of organic HAP.

For oil-fired EGUs, the 2012 MATS Final Rule established standards to limit emissions of HCl and HF, total HAP metals (*e.g.,* Hg, nickel, lead), and organic HAP (*e.g.,* formaldehyde, dioxin/furan). Standards for fPM also serve as a surrogate for total HAP metals, with standards for total and individual HAP metals provided as alternative equivalent standards. Work practice standards limit formation and emissions of organic HAP.

MATS includes standards for existing and new EGUs for eight subcategories: three for coal-fired EGUs, one for IGCC EGUs, one for solid oil-derived fuel-fired EGUs (*i.e.,* petroleum coke-fired), and three for liquid oil-fired EGUs. EGUs in seven of the subcategories are subject to numeric emission limits for all the pollutants described above except for organic HAP (limited-use liquid oil-fired EGUs are not subject to numeric emission limits). Emissions of organic HAP are regulated by a work practice standard that requires periodic combustion process tune-ups. EGUs in the subcategory of limited-use liquid oil-fired EGUs with an annual capacity factor of less than 8 percent of its maximum or nameplate heat input are also subject to a work practice standard consisting of periodic combustion process tune-ups but are not subject to any numeric emission limits. Emission limits for existing EGUs and additional information of the history and other requirements of the 2012 MATS Final Rule are available in the 2023 Proposal preamble (88 FR 24854).

2. Public Health and Environmental Hazards Associated With Emissions From Coal- and Oil-Fired EGUs

Coal- and oil-fired EGUs are a significant source of numerous HAP that are associated with adverse effects to human health and the environment, including Hg, HF, HCl, selenium, arsenic, chromium, cobalt, nickel, hydrogen cyanide, beryllium, and cadmium emissions. Hg is a persistent and bioaccumulative toxic metal that, once released from power plants into the ambient air, can be readily transported and deposited to soil and aquatic environments where it is transformed by microbial action into methylmercury.[9] Methylmercury bioaccumulates in the aquatic food web eventually resulting in highly concentrated levels of methylmercury within the larger and longer-living fish (*e.g.,* carp, catfish, trout, and perch), which can then be consumed by humans.

Of particular concern is chronic prenatal exposure via maternal consumption of foods containing methylmercury. Elevated exposure has been associated with developmental neurotoxicity and manifests as poor performance on neurobehavioral tests, particularly on tests of attention, fine motor function, language, verbal memory, and visual-spatial ability. Evidence also suggests potential for adverse effects on the cardiovascular system, adult nervous system, and immune system, as well as potential for causing cancer. Because the impacts of the neurodevelopmental effects of methylmercury are greatest during periods of rapid brain development, developing fetuses, infants, and young children are particularly vulnerable. Children born to populations with high fish consumption (*e.g.,* people consuming fish as a dietary staple) or impaired nutritional status may be especially susceptible to adverse neurodevelopmental outcomes. These dietary and nutritional risk factors are often particularly pronounced in vulnerable communities with people of color and low-income populations that have historically faced economic and environmental injustice and are overburdened by cumulative levels of pollution. In addition to adverse neurodevelopmental effects, there is evidence that exposure to methylmercury in humans and animals can have adverse effects on both the developing and adult cardiovascular system.

Along with the human health hazards associated with methylmercury, it is well-established that birds and mammals are also exposed to methylmercury through fish consumption (Mercury Study). At higher levels of exposure, the harmful effects of methylmercury include slower growth and development, reduced reproduction, and premature mortality. The effects of methylmercury on wildlife are variable across species but have been observed in the environment for numerous avian species and mammals including polar bears, river otters, and panthers.

EGUs are also the largest source of HCl, HF, and selenium emissions, and are a major source of metallic HAP emissions including arsenic, chromium, nickel, cobalt, and others. Exposure to these HAP, depending on exposure duration and levels of exposures, is associated with a variety of adverse health effects. These adverse health effects may include chronic health disorders (*e.g.,* pneumonitis, decreased pulmonary function, pneumonia, or lung damage; detrimental effects on the central nervous system; damage to the kidneys) and alimentary effects (such as nausea and vomiting). As of 2021, three of the key metal HAP emitted by EGUs (arsenic, chromium, and nickel) have been classified as human carcinogens, while three others (cadmium, selenium, and lead) are classified as probable human carcinogens. Overall (metal and nonmetal), the EPA has classified four of the HAP emitted by EGUs as human carcinogens and five as probable human carcinogens.

While exposure to HAP is associated with a variety of adverse effects, quantifying the economic value of these impacts remains challenging. Epidemiologic studies, which report a central estimate of population-level risk, are generally used in an air pollution benefits assessment to estimate the number of attributable cases of events. Exposure to HAP is typically more uneven and more highly concentrated among a smaller number of individuals than exposure to criteria pollutants.

[9] U.S. EPA. 1997, Mercury Study Report to Congress, EPA–452/R–97–003 (December 1997); *see also* 76 FR 24976 (May 3, 2011); 80 FR 75029 (December 1, 2015).

Hence, conducting an epidemiologic study for HAP is inherently more challenging; for starters, the small population size means such studies often lack sufficient statistical power to detect effects (particularly outcomes like cancer, for which there can exist a multi-year time lag between exposure and the onset of the disease). By contrast, sufficient power generally exists to detect effects for criteria pollutants because exposures are ubiquitous and a variety of methods exist to characterize this exposure over space and time.

For the reasons noted above, epidemiologic studies do not generally exist for HAP. Instead, the EPA tends to rely on experimental animal studies to identify the range of effects which may be associated with a particular HAP exposure. Human controlled clinical studies are often limited due to ethical barriers (*e.g.,* knowingly exposing someone to a carcinogen). Generally, robust data are needed to quantify the magnitude of expected adverse impacts from varying exposures to a HAP. These data are necessary to provide a foundation for quantitative benefits analyses but are often lacking for HAP, made even more challenging by the wide array of HAP and possible noncancer HAP effects.

Finally, estimating the economic value of HAP is made challenging by the human health endpoints affected. For example, though EPA can quantify the number and economic value of HAP-attributable deaths resulting from cancer, it is difficult to monetize the value of reducing an individual's potential cancer risk attributable to a lifetime of HAP exposure. An alternative approach of conducting willingness to pay studies specifically on risk reduction may be possible, but such studies have not yet been pursued.

C. Summary of the 2020 Residual Risk Review

As required by CAA section 112(f)(2), the EPA conducted the residual risk review (2020 Residual Risk Review) in 2020, 8 years after promulgating the 2012 MATS Final Rule, and presented the results of the review, along with our decisions regarding risk acceptability, ample margin of safety, and adverse environmental effects, in the 2020 Final Action. The results of the risk assessment are presented briefly in table 3 of this document, and in more detail in the document titled *Residual Risk Assessment for the Coal- and Oil-Fired EGU Source Category in Support of the 2020 Risk and Technology Review Final Rule* (risk document for the final rule), available in the docket (Document ID No. EPA–HQ–OAR–2018–0794–4553). The EPA summarized the results and findings of the 2020 Residual Risk Review in the preamble of the 2023 Proposal (88 FR 24854), and additional information concerning the residual risk review can be found in our *National-Scale Mercury Risk Estimates for Cardiovascular and Neurodevelopmental Outcomes for the National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Finding; Notice of Proposed Rulemaking* memorandum (Document ID No. EPA–HQ–OAR–2018–0794–4605).

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Table 3. Coal- and Oil-Fired EGU Inhalation Risk Assessment Results in the 2020 Final Action (85 FR 31286; May 22, 2020)

Number of Facilities[1]	Maximum Individual Cancer Risk (in 1 million)[2]		Population at Increased Risk of Cancer ≥ 1-in-1 million		Annual Cancer Incidence (cases per year)		Maximum Chronic Noncancer TOSHI[3]		Maximum Screening Acute Noncancer HQ[4]
	Based on . . .		Based on . . .		Based on . . .		Based on . . .		Based on Actual Emissions Level
322	Actual Emissions Level	Allowable Emissions Level	Actual Emissions Level	Allowable Emissions Level	Actual Emissions Level	Allowable Emissions Level	Actual Emissions Level	Allowable Emissions Level	
	9	10	193,000	636,000	0.04	0.1	0.2	0.4	HQ_{REL} = 0.09 (arsenic)

[1] Number of facilities evaluated in the risk analysis. At the time of the risk analysis there were an estimated 323 facilities in the Coal- and Oil-Fired EGU source category; however, one facility is located in Guam, which was beyond the geographic range of the model used to estimate risks. Therefore, the Guam facility was not modeled and the emissions for that facility were not included in the assessment.

[2] Maximum individual excess lifetime cancer risk due to HAP emissions from the source category.

[3] Maximum target organ-specific hazard index (TOSHI). The target organ systems with the highest TOSHI for the source category are respiratory and immunological.

[4] The maximum estimated acute exposure concentration was divided by available short-term threshold values to develop an array of hazard quotient (HQ) values. HQ values shown use the lowest available acute threshold value, which in most cases is the reference exposure level (REL). When an HQ exceeds 1, we also show the HQ using the next lowest available acute dose-response value.

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D. Summary of the 2020 Technology Review

Pursuant to CAA section 112(d)(6), the EPA conducted a technology review (2020 Technology Review) in the 2020 Final Action, which focused on identifying and evaluating developments in practices, processes, and control technologies for the emission sources in the source category that occurred since the 2012 MATS Final Rule was promulgated. Control technologies typically used to minimize emissions of pollutants that have numeric emission limits under the 2012 MATS Final Rule include electrostatic precipitators (ESPs) and fabric filters (FFs) for control of fPM as a surrogate for non-Hg HAP metals; wet scrubbers, dry scrubbers, and dry sorbent injection for control of acid gases (SO_2, HCl, and HF); and activated carbon injection (ACI) and other Hg-specific technologies for control of Hg. The EPA determined that the existing air pollution control technologies that were in use were well-established and provided the capture efficiencies necessary for compliance with the MATS emission limits. Based on the effectiveness and proven reliability of these control technologies, and the relatively short period of time since the promulgation of the 2012 MATS Final Rule, the EPA did not identify any developments in practices, processes, or control technologies, nor any new technologies or practices, for the control of non-Hg HAP metals, acid gas HAP, or Hg. However, in the 2020 Technology Review, the EPA did not consider developments in the cost and effectiveness of these proven technologies, nor did the EPA evaluate the current performance of emission reduction control equipment and strategies at existing MATS-affected EGUs, to determine whether revising the standards was warranted. Organic HAP, including emissions of dioxins and furans, are regulated by a work practice standard that requires periodic burner tune-ups to ensure good combustion. The EPA found that this work practice continued to be a practical approach to ensuring that combustion equipment was maintained and optimized to run to reduce emissions of organic HAP and continued to be more effective than establishing a numeric standard that cannot reliably be measured or monitored. Based on the effectiveness and proven reliability of the work practice standard, and the relatively short amount of time since the promulgation of the 2012 MATS Final Rule, the EPA did not identify any developments in work practices nor any new work practices or operational procedures for this source category regarding the additional control of organic HAP.

After conducting the 2020 Technology Review, the EPA did not identify developments in practices, processes, or

control technologies and, thus, did not propose changes to any emission standards or other requirements. More information concerning that technology review is in the memorandum titled Technology Review for the Coal- and Oil-Fired EGU Source Category, available in the docket (Document ID No. EPA–HQ–OAR–2018–0794–0015), and in the February 7, 2019, proposed rule. 84 FR 2700. On May 20, 2020, the EPA finalized the first technology review required by CAA section 112(d)(6) for the coal- and oil-fired EGU source category regulated under MATS. Based on the results of that technology review, the EPA found that no revisions to MATS were warranted. See 85 FR 31314 (May 22, 2020).

E. Summary of the EPA's Review of the 2020 RTR and the 2023 Proposed Revisions to the NESHAP

Pursuant to CAA section 112(d)(6), the EPA conducted a review of the 2020 Technology Review and presented the results of this review, along with our proposed decisions, in the 2023 Proposal. The results of the technology review are presented briefly below in this preamble. More detail on the proposed technology review is in the memorandum *2023 Technology Review for the Coal- and Oil-Fired EGU Source Category* (''2023 Technical Memo'') (Document ID No. EPA–HQ–OAR–2018–0794–5789).

Based on the results of the technology review, the EPA proposed to lower the fPM standard, the surrogate for non-Hg HAP metals, for coal-fired EGUs from 0.030 lb/MMBtu to 0.010 lb/MMBtu. The Agency solicited comment on the control technology effectiveness and cost assumptions used in the proposed rule, as well as on a more stringent fPM limit of 0.006 lb/MMBtu or lower. Additionally, the Agency proposed to require the use of PM CEMS for all coal-fired, oil-fired, and IGCC EGUs for demonstrating compliance with the fPM standard. As the Agency proposed to require PM CEMS for compliance demonstration, we also proposed to remove the LEE option, a program based on infrequent stack testing, for fPM and non-Hg HAP metals. As EGUs would be required to demonstrate compliance with PM CEMS, the Agency also proposed to remove the alternate emission standards for non-Hg HAP metals and total HAP metals, because almost all regulated sources have chosen to demonstrate compliance with the non-Hg HAP metal standards by demonstrating compliance with the surrogate fPM standard, and solicited comment on prorated metal limits (adjusted proportionally according to the level of the final fPM standard), should the Agency not finalize the removal of the non-Hg HAP metals limits.

The Agency also proposed to lower the Hg emission standard for lignite-fired EGUs from 4.0 lb/TBtu to 1.2 lb/TBtu and solicited comment on the performance of Hg controls and on cost and effectiveness of control strategies to meet more stringent Hg standards. Lastly, the EPA did not identify new developments in control technologies or improved methods of operation that would warrant revisions to the Hg emission standards for non-lignite EGUs, for the organic HAP work practice standards, for the acid gas standards, or for standards for oil-fired EGUs. Therefore, the Agency did not propose changes to these standards in the 2023 Proposal but did solicit comment on the EPA's proposed findings that no revisions were warranted and on the appropriateness of the existing standards.

Additionally, the EPA proposed to remove one of the two options for defining the startup period for MATS-affected EGUs.

In the 2023 Proposal, the EPA determined not to reopen the 2020 Residual Risk Review, and accordingly did not propose any revisions to that review. As the EPA explained in the proposal, the EPA found in the 2020 RTR that risks from the Coal- and Oil-Fired EGU source category due to emissions of air toxics are acceptable and that the existing NESHAP provides an ample margin of safety to protect public health. As noted in the proposal, the EPA also acknowledges that it received a petition for reconsideration from environmental organizations that, in relevant part, sought the EPA's reconsideration of certain aspects of the 2020 Residual Risk Review. The EPA granted in part the environmental organizations' petition which sought the EPA's review of startup and shutdown provisions in the 2023 Proposal, 88 FR 24885, and the EPA continues to review and will respond to other aspects of the petition in a separate action.[10]

III. What is included in this final rule?

This action finalizes the EPA's determinations pursuant to the RTR provisions of CAA section 112 for the Coal- and Oil-Fired EGU source category and amends the Coal- and Oil-Fired EGU NESHAP based on those determinations. This action also finalizes changes to the definition of startup for this rule. This final rule includes changes to the 2023 Proposal after consideration of comments received during the public comment period described in sections IV., V., VI., and VII. of this preamble.

A. What are the final rule amendments based on the technology review for the Coal- and Oil-Fired EGU source category?

We determined that there are developments in practices, processes, and control technologies that warrant revisions to the MACT standards for this source category. Therefore, to satisfy the requirements of CAA section 112(d)(6), we are revising the MACT standards by revising the fPM limit for existing coal-fired EGUs from 0.030 lb/MMBtu to 0.010 lb/MMBtu and requiring the use of PM CEMS for coal and oil-fired EGUs to demonstrate compliance with the revised fPM standard, as proposed. We are also finalizing, as proposed, a Hg limit for lignite-fired EGUs of 1.2 lb/TBtu, which aligns with the existing Hg limit that has been in effect for other coal-fired EGUs since 2012. This revised Hg limit for lignite-fired EGUs is more stringent than the limit of 4.0 lb/TBtu that was finalized for such units in the 2012 MATS Final Rule. The rationale for these changes is discussed in more detail in sections IV. and V. below.

Based on comments received during the public comment period, the EPA is not finalizing the proposed removal of the non-Hg HAP metals limits for existing coal-fired EGUs (see section V.). Additionally, this final rule is requiring the use of PM CEMS for compliance demonstration for coal- and oil-fired EGUs (excluding EGUs in the limited-use liquid oil-fired subcategory), but not for IGCC EGUs (see section VI.).

Because this final rule includes revisions to the emissions standards for fPM as a surrogate for non-Hg HAP metals for existing coal-fired EGUs, the fPM emission standard compliance demonstration requirements, the Hg emission standard for lignite-fired EGUs, and the definition of ''startup,'' the EPA intends each portion of this rule to be severable from each other as it is multifaceted and addresses several distinct aspects of MATS for independent reasons. This includes the revised emission standard for fPM as a surrogate for non-Hg HAP metals and the fPM compliance demonstration requirement to utilize PM CEMS. While the EPA considered the technical feasibility of PM CEMS in establishing the revised fPM standard, the EPA finds there are independent reasons for adopting each revision to the standards, and that each would continue to be workable without the other in the place.

[10] See Document ID No. EPA–HQ–OAR–2018–0794–4565 at *https://www.regulations.gov*.

The EPA intends that the various pieces of this package be considered independent of each other. For example, the EPA notes that our judgments regarding developments in fPM control technology for the revised fPM standard as a surrogate for non-Hg HAP metals largely reflect that the fleet was reporting fPM emission rates well below the current standard and with lower costs than estimated during promulgation of the 2012 MATS Final Rule; while our judgments regarding the ability for lignite-fired EGUs to meet the same standard for Hg emissions as other coal- and oil-fired EGUs rest on a separate analysis specific to lignite-fired units. Thus, the revised fPM surrogate emissions standard is feasible and appropriate even absent the revised Hg standard for lignite-fired units, and vice versa. Similarly, the EPA is finalizing changes to the fPM compliance demonstration requirement based on the technology's ability to provide increased transparency for owners and operators, regulators, and the public; and the EPA is finalizing changes to the startup definition based on considerations raised by environmental groups in petitions for reconsideration. Both of these actions are independent from the EPA's revisions to the fPM surrogate standard, and the Hg standard for lignite-fired units. Accordingly, the EPA finds that each set of standards is severable from each other set of standards.

Finally, the EPA finds that implementation of each set of standards, compliance demonstration requirements, and revisions to the startup definition are independent. That is, a source can abide by any one of these individual requirements without abiding by any others. Thus, the EPA's overall approach to this source category continues to be fully implementable even in the absence of any one or more of the elements included in this final rule.

Thus, the EPA has independently considered and adopted each portion of this final rule (including the revised fPM emission standard as a surrogate for non-Hg HAP metals, the fPM compliance demonstration requirement, the revised Hg emission standard for lignite-fired units, and the revised startup definition) and each is severable should there be judicial review. If a court were to invalidate any one of these elements of the final rule, the EPA intends the remainder of this action to remain effective. Importantly, the EPA designed the different elements of this final rule to function sensibly and independently. Further, the supporting bases for each element of the final rule reflect the Agency's judgment that the element is independently justified and appropriate, and that each element can function independently even if one or more other parts of the rule has been set aside.

B. What other changes have been made to the NESHAP?

The EPA is finalizing, as proposed, the removal of the work practice standards of paragraph (2) of the definition of ''startup'' in 40 CFR 63.10042. Under the first option, startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on-site use). Under the second option, startup ends 4 hours after the EGU generates electricity that is sold or used for any other purpose (including on-site use), or 4 hours after the EGU makes useful thermal energy (such as heat or steam) for industrial, commercial, heating, or cooling purposes, whichever is earlier. The final rule requires that all EGUs use the work practice standards in paragraph (1) of the definition of ''startup,'' which is already being used by the majority of EGUs.

C. What are the effective and compliance dates of the standards?

The revisions to the MACT standards being promulgated in this action are effective on July 8, 2024. The compliance date for affected coal-fired sources to comply with the revised fPM limit of 0.010 lb/MMBtu and for lignite-fired sources to meet the lower Hg limit of 1.2 lb/TBtu is 3 years after the effective date of the final rule. The Agency believes this timeline is as expeditious as practicable considering the potential need for some sources to upgrade or replace pollution controls. As discussed elsewhere in this preamble, we are adding a requirement that compliance with the fPM limit be demonstrated using PM CEMS. Based on comments received during the comment period and our understanding of suppliers of PM CEMS, the EPA is finalizing the requirement that affected sources use PM CEMS for compliance demonstration by 3 years after the effective date of the final rule. The compliance date for existing affected sources to comply with amendments pertaining to the startup definition is 180 days after the effective date of the final rule, as few EGUs are affected, and changes needed to comply with paragraph (1) of startup are achievable by all EGUs at little to no additional expenditures. All affected facilities remain subject to the current requirements of 40 CFR part 63, subpart UUUUU, until the applicable compliance date of the amended rule.

The EPA has considered the concerns raised by commenters that these compliance deadlines could affect electric reliability and concluded that given the flexibilities detailed further in this section, the requirements of the final rule for existing sources can be met without adversely impacting electric reliability. In particular, the EPA notes the flexibility of permitting authorities to allow, if warranted, a fourth year for compliance under CAA section 112(i)(3)(B). This flexibility, if needed, would address many of the concerns that commenters raised. Furthermore, in the event that an isolated, localized concern were to emerge that could not be addressed solely through the 1-year extension under CAA section 112(i)(3), the CAA provides additional flexibilities to bring sources into compliance while maintaining reliability.

The EPA notes that similar concerns regarding reliability were raised about the 2012 MATS Final Rule—a rule that projected the need for significantly greater installation of controls and other capital investments than this current revision. In the 2012 MATS Final Rule, the EPA emphasized that most units should be able to comply with the requirements of the final rule within 3 years. However, the EPA also made it clear that permitting authorities have the authority to grant a 1-year compliance extension where necessary, in a range of situations described in the 2012 MATS Final Rule preamble.[11] The EPA's Office of Enforcement and Compliance Assurance (OECA) also issued the MATS Enforcement Response policy (Dec. 16, 2011)[12] which described the approach regarding the issue of CAA section 113(a) administrative orders with respect to the sources that must operate in noncompliance with the MATS rule for up to 1 year to address specific documented reliability concerns. While several affected EGUs requested and were granted a 1-year CAA section 112(i)(3)(B) compliance extension by their permitting authority, OECA only issued five administrative orders in connection with the Enforcement Response policy. The 2012 MATS Final Rule was ultimately implemented over the 2015—2016 timeframe without challenges to grid reliability.

[11] 77 FR 9406.

[12] *https://www.epa.gov/enforcement/enforcement-response-policy-mercury-and-air-toxics-standard-mats.*

IV. What is the rationale for our final decisions and amendments to the filterable PM (as a surrogate for non-Hg HAP metals) standard and compliance options from the 2020 Technology Review?

In this section, the EPA provides descriptions of what we proposed, what we are finalizing, our rationale for the final decisions and amendments, and a summary of key comments and responses related to the emission standard for fPM, non-Hg HAP metals, and the compliance demonstration options. For all comments not discussed in this preamble, comment summaries and the EPA's responses can be found in the comment summary and response document *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review Proposed Rule Response to Comments,* available in the docket.

Based on its review, the EPA is finalizing a revised non-Hg HAP metal surrogate fPM emission standard for all existing coal-fired EGUs of 0.010 lb/MMBtu and is requiring that all coal- and oil-fired EGUs demonstrate compliance with the revised fPM emission standard by using PM CEMS. The revised fPM standard will ensure that the entire fleet of coal-fired EGUs achieves performance levels that are consistent with those of the vast majority of regulated units operating today—*i.e.,* that the small minority of units that currently emit significantly higher levels of HAP than their peers use proven technologies to reduce their HAP to the levels achieved by the rest of the fleet. Further, the EPA finds that a 0.010 lb/MMBtu fPM emission standard is the lowest level currently compatible with PM CEMS for demonstrating compliance, which the EPA finds provides significant benefits including increased transparency regarding emissions performance for sources, regulators, and the surrounding communities; and real-time identification of when control technologies are not performing as expected, allowing for quicker repairs. In addition, the rule's current requirement to shift electronic reporting of PM CEMS data to the Emissions Collection and Monitoring Plan System (ECMPS) will enable regulatory authorities, nearby citizens, and others, including members of the public and media, to quickly and easily locate, review, and download fPM emissions using simple, user-directed inquiries. An enhanced, web-based version of ECMPS (ECMPS 2.0) is currently being prepared that will ease data editing, importing, and exporting and is expected to be available prior to the date by which EGUs are required to use PM CEMS.

A. What did we propose pursuant to CAA section 112(d)(6) for the Coal- and Oil-Fired EGU source category?

1. Proposed Changes to the Filterable PM Standard

The EPA proposed to lower the fPM limit, a surrogate for total non-Hg HAP metals, for coal-fired EGUs from 0.030 lb/MMBtu to 0.010 lb/MMBtu. The EPA further solicited comment on an emission standard of 0.006 lb/MMBtu or lower. The EPA did not propose any changes to the fPM emission standard for oil-fired EGUs or for IGCC units. The EPA also proposed to remove the total and individual non-Hg HAP metals emission limits. The EPA also solicited comment on adjusting the total and individual non-Hg HAP metals emission limits proportionally to the revised fPM limit rather than eliminating the limits altogether.

2. Proposed Changes to the Requirements for Compliance Demonstration

The EPA proposed to require that all coal- and oil-fired EGUs (IGCC units are discussed in section VI.) use PM CEMS to demonstrate compliance with the fPM emission limit. The EPA also proposed to remove the option of demonstrating compliance using infrequent stack testing and the LEE program (where stack testing occurs quarterly for 3 years, then every third year thereafter) for both PM and non-Hg HAP metals.

B. How did the technology review change for the Coal- and Oil-Fired EGU source category?

1. Filterable PM Emission Standard

Commenters provided both supportive and opposing arguments for issues regarding the fPM limit that were presented in the proposed review of the 2020 Technology Review. Comments received on the proposed fPM limit for coal-fired EGUs, along with additional analyses, did not change the Agency's conclusions that were presented in the 2023 Proposal, and, therefore, the Agency is finalizing the 0.010 lb/MMBtu fPM emission limit for existing coal-fired EGUs, as proposed.

Additionally, commenters urged the Agency to retain the option of complying with individual non-Hg HAP metal (*e.g.,* lead, arsenic, chromium, nickel, and cadmium) emission rates or with a total non-Hg HAP metal emission rate. After consideration of public comments, the Agency is finalizing updated limits for non-Hg HAP metals and total non-Hg HAP metals that have been reduced proportional to the reduction of the fPM emission limit from 0.030 lb/MMBtu to the new final fPM emission limit of 0.010 lb/MMBtu. EGU owners or operators who would choose to comply with the non-Hg HAP metals emission limits instead of the fPM limit must request and receive approval of a non-Hg HAP metal CMS as an alternative test method (*e.g.,* multi-metal CMS) under the provisions of 40 CFR 63.7(f).

2. Compliance Demonstration Options

Comments received on the compliance demonstration options for coal- and oil-fired EGUs also did not change the results of the technology review, therefore the Agency is finalizing the use of PM CEMS for compliance demonstration purposes and removing the fPM and non-Hg HAP metals LEE options for all coal-fired EGUs and for oil-fired EGUs (except those in the limited use liquid oil-fired EGU subcategory). The Agency received comments that some PM CEMS that are currently correlated for the 0.030 lb/MMBtu fPM emission limit may experience some difficulties should re-correlation be necessary at a lower fPM standard. Based on these comments and on additional review of PM CEMS test reports, as mentioned in sections IV.C.2. and IV.D.2., the Agency has made minor technical revisions to shift the basis of correlation testing from sampling a minimum volume per run to collecting a minimum mass or minimum sample volume per run and has adjusted the quality assurance (QA) criterion otherwise associated with the new emission limit. These changes will enable PM CEMS to be properly certified for use in demonstrating compliance with the lower fPM standard with a high degree of accuracy and reliability.

C. What key comments did we receive on the filterable PM and compliance options, and what are our responses?

1. Comments on the Filterable PM Emission Standard

Comment: Some commenters supported the proposed fPM limit of 0.010 lb/MMBtu as reasonable and achievable, noting that this limit is slightly greater than the fPM emission limit required for new and reconstructed units. Additionally, commenters stated CAA section 112 was intended to improve the performance of lagging industrial sources and that a

standard that falls far behind what the vast majority of sources have already achieved, as the current standard does, is inadequate. Other commenters opposed the proposed fPM limit of 0.010 lb/MMBtu as too stringent. For instance, some commenters stated that the EPA did not provide adequate support for the proposed limit. Other commenters stated that the fact that the vast majority of units are achieving emission rates below the current limit does not constitute ''developments in practices, processes, and control technologies.''

Response: The EPA disagrees that the Agency has not adequately supported the proposed fPM limit. As described in the proposal preamble, the Agency conducted a review of the 2020 Technology Review pursuant to CAA section 112(d)(6), which focused on identifying and evaluating developments in practices, processes, and control technologies for the emission sources in the source category that occurred since promulgation of the 2012 MATS Final Rule. Based on that review, the EPA found that a majority of sources were not only reporting fPM emissions significantly below the current emission limit, but also that the fleet achieved lower fPM rates at lower costs than the EPA estimated when it promulgated the 2012 MATS Final Rule. The EPA explains these findings in more detail in section IV.D.1. of this preamble and elsewhere in the record. Further, the EPA finds that there are technological developments and improvements in PM control technology, which also controls non-Hg HAP metals, since the 2012 MATS Final Rule that informed the 2023 Proposal and this action, as discussed further in section IV.D.1. below. For example, industry has implemented ''best practices'' for monitoring ESP operation more carefully, and more durable materials have been adopted for FFs since the 2012 MATS Final Rule. The EPA also finds that these are cognizable developments for purposes of CAA section 112(d)(6). As other commenters noted, in *National Association for Surface Finishing* v. *EPA,* 795 F.3d 1, 11 (D.C. Cir. 2015), the D.C. Circuit found that the EPA ''permissibly identified and took into account cognizable developments'' based on the EPA's interpretation of the term as ''not only wholly new methods, but also technological improvements.'' Similarly, here the EPA identified a clear trend in control efficiency, costs, and technological improvements, which the EPA is accounting for in this action. Further, as discussed elsewhere in this section and in section IV.D.1. of this preamble, the EPA finds case law and substantial administrative precedent support the EPA's decision to update the fPM limit based upon these developments.

Comment: Many commenters recommended that the EPA add a compliance margin in its achievability assumptions. These commenters conveyed that most EGUs typically operate well below the limit to allow for a compliance margin in the event of an equipment malfunction or failure, which they encouraged the EPA to consider when setting new limits. These commenters claimed that with a proposed fPM limit of 0.010 lb/MMBtu, an appropriate design margin of 20 percent necessitates that control technologies must be able to achieve a limit of 0.008 lb/MMBtu or lower in practice. They also expressed concerns that the EPA did not take design margin into consideration in the cost analysis. They stated that by not including the need for a design margin, which the EPA has acknowledged the need for in at least two of the Agency's publications (*NESHAP Analysis of Control Technology Needs for Revised Proposed Emission Standards for New Source Coal-fired EGUs,* Document ID No. EPA–HQ–OAR–2009–0234–20223 and *PM CEMS Capabilities Summary for Performance Specification 11, NSPS, and MACT Rules,* Document ID No. EPA–HQ–OAR–2018–0794–5828), the EPA underpredicted the number of units that would require retrofits. These commenters stated that the combination of a very low fPM limit and having to account for the measurement uncertainty and correlation methodology of PM CEMS would likely necessitate an ''operational target limit'' of 50 percent of the applicable limit. Some commenters referenced the National Rural Electric Cooperative Association (NRECA) technical evaluation for the 2023 Proposal titled *Technical Comments on National Emissions Standard for Hazardous Air Pollutants: Coal- and Oil-fired Electric Utility Steam Generating Units Review of Residual Risk and Technology.*[13] They said that, even using the EPA's unrealistic ''baseline fPM rates'' and the lowest possible compliance margin of 20 percent, the NRECA technical evaluation estimated that 37 units—almost twice as many as the EPA's estimate—would be required to take substantial action to comply with the proposed limit.

Response: The EPA agrees that most facility operators normally target an emission level below the emission limit by incorporating a compliance margin or margin of error in case of equipment malfunctions or failures. As the commenters noted, the Agency has previously recognized that some operators target an emission level 20 to 50 percent below the limit. However, no commenters provided data to suggest that ESPs or FF are unable to achieve a lower fPM limit. Furthermore, the Agency does not prescribe specifically how an EGU controls its emissions or how the unit operates. The choice to target a lower-level emission rate for a compliance margin is the sole decision of owners and operators. For facilities with more than one EGU in the same subcategory, owners or operators may find emissions averaging (40 CFR 63.10009), coupled with or without a compliance margin, could help the facility attain and maintain emission limits as an effective, low-cost approach. Additionally, no commenters provided data to indicate that every owner or operator aims to comply with the fPM limit with the same compliance margin. Because some operators might aim for a larger compliance margin than others, it would be difficult to select a particular assumption about compliance margin for the cost analysis. Every operator plans for compliance differently and the EPA cannot know every operator's plans for a compliance margin. Even if the EPA were to assume a 20 percent compliance margin in its evaluation of PM controls, the results of the analysis would not change the EPA's decision to adopt a lower fPM limit. Specifically, a 20 percent compliance margin assumption to a fPM limit of 0.010 lb/MMBtu would increase the number of affected EGUs from 33 to 53 (14.1 to 23.9 GW affected capacity) and the annual compliance costs from $87.2M to $147.7M. The number of EGUs that demonstrated an ability to meet the lower fPM limit, but do not do so on average and therefore would require O&M, would increase from 17 to 27 (including the compliance margin). Similarly, the number of ESP upgrades (previously 11) and bag upgrades (previously 3) would also increase (to 20 and 4, respectively). There would be no change in the number of new FF installs. Therefore, cost-effectiveness values for fPM and individual and total non-Hg HAP metals would only increase slightly. Moreover, the 30-boiler operating day averaging period using PM CEMS for compliance

[13] *Technical Comments on National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-fired Electric Utility Steam Generating Units Review of Residual Risk and Technology.* Cichanowicz, *et al.* June 19, 2023. Attachment A to Document ID No. EPA–HQ–OAR–2018–0794–5994.

demonstration provides flexibility for owners and operators to account for equipment malfunctions, operational variability, and other issues. Lastly, as described in the 2023 Proposal, and updated here, the vast majority of coal-fired EGUs are reporting fPM emissions well below the revised fPM limit. For instance, the median fPM rate of the 296 coal-fired EGUs assessed in the 2024 Technical Memo is 0.004 lb/MMBtu,[14] or 60 percent below the revised fPM limit of 0.010 lb/MMBtu. The median fPM rate of a quarter of the best performing sources (N=74) is 0.002 lb/MMBtu, about 80 percent below the revised fPM limit of 0.010 lb/MMBtu. Therefore, for these reasons, the EPA disagrees with commenters that a compliance margin needs to be considered in the cost analysis.

The updated PM analysis, detailed in the memorandum *2024 Update to the 2023 Proposed Technology Review for the Coal- and Oil-Fired EGU Source Category* (''2024 Technical Memo'') available in the docket, estimates that the number of EGUs that will need to improve their fPM emission rate to achieve a 0.010 lb/MMBtu limit has increased from the 20 EGUs assumed in the 2023 Proposal to 33 EGUs, which is more consistent with the NRECA technical evaluation estimate of 37 EGUs. This increase is a result of updated methodology that utilizes both the lowest achieved fPM rate (*i.e.,* the lowest quarter's 99th percentile) and the average fPM rate across all quarterly data when assessing PM upgrade and costs assumptions for the evaluated limits. The Agency disagrees with the commenters, however, that the 37 EGUs in the NRECA technical evaluation would require ''substantial action to comply with the proposed standard.'' In the Agency's revised analysis, only 13 EGUs would require capital investments to meet a fPM limit of 0.010 lb/MMBtu. Of these, only two EGUs at one facility (Colstrip) currently without the most effective PM controls are projected to require installation of a FF, the costliest PM control upgrade option, to meet 0.010 lb/MMBtu. The remaining nine EGUs projected by the EPA to require capital investments are estimated to require various levels of ESP upgrades. The EPA estimates that more than half (20 EGUs) would be able to comply without any capital investments and would instead require improvements to their existing FF or ESP as they have already demonstrated the ability to meet the limit, but do not do so on average.

Comment: Some commenters stated that cost effectiveness is an important consideration in technology reviews under CAA section 112(d)(6) and acknowledged that the EPA undertook cost-effectiveness analyses for the three fPM standards on which the Agency sought comment. However, the commenters stated, the NRECA technical evaluation found meaningful errors in the EPA's cost analysis, including unreasonably low capital cost estimates for ESP rebuilds and a failure to consider the variability of fPM due to changes in operation or facility design, by not utilizing a compliance margin. They asserted that these errors resulted in sizeable cost-effectiveness underestimates that eroded the EPA's overall determination that the proposed fPM limit is cost-effective. These commenters also asserted that the EPA's rationale was arbitrary on its face because it reversed, without explanation, the EPA's prior acknowledgements that a cost-effectiveness analysis should account for the cost effectiveness of controls at each affected facility and not simply on an aggregate nationwide basis. They stated that facility-specific costs should factor into the EPA's assessment of what is ''necessary'' pursuant to the provisions of CAA section 112(d)(6) and CAA section 112(f)(2).

Some commenters asserted that, even using the EPA's cost-effectiveness figures, the proposed 0.010 lb/MMBtu limit is not cost-effective. These commenters stated that the EPA's proposal to revise the fPM standard to 0.010 lb/MMBtu based on a cost-effectiveness estimate of up to $14.7 million per ton of total non-Hg HAP metals removed (equivalent to $44,900 per ton of fPM removed) is inconsistent with the EPA's prior actions because the cost-effectiveness estimate is substantially higher than estimates the Agency has previously found to be not cost-effective. They further said that, in the past, the EPA has decided against revising fPM standards based on cost-effectiveness estimates substantially lower than the cost-effectiveness estimates here. They said that the EPA should follow these precedents and acknowledge that $12.2 to $14.7 million per ton of non-Hg HAP metals reduced is not cost-effective. They argued that the Agency should not finalize the proposed standard of 0.010 lb/MMBtu for that reason. Further, these commenters argued that the alternative, more stringent limit of 0.006 lb/MMBtu is even less cost-effective at $25.6 million per ton of non-Hg HAP metals reduced, so it should not be considered either.

The commenters provided the following examples of previous rulemakings where EPA found controls to not be cost-effective:

• In the Petroleum Refinery Sector technology review,[15] the EPA declined to revise the fPM emission limit for existing fluid catalytic cracking units after finding that it would cost $10 million per ton of total non-Hg HAP metals reduced (in that case, equivalent to $23,000 per ton of fPM reduced), which was not cost-effective.

• In the Iron Ore Processing technology review,[16] the EPA declined to revise the non-Hg HAP metals limit after finding that installing wet scrubbers would cost $16 million per ton of non-Hg HAP metals reduced, which was not cost-effective.

• In the Integrated Iron and Steel Manufacturing Facilities technology review,[17] the EPA declined to revise the non-Hg HAP metals limit after finding that upgrading all fume/flame suppressants at blast furnaces to baghouses would cost $7 million per ton of non-Hg HAP metals reduced, which was not cost-effective. The Agency made a similar finding for a proposed limit that would have cost $14,000 per ton of volatile HAP reduced.

• In the Portland Cement Manufacturing beyond-the-floor analysis,[18] the EPA declined to impose a more stringent non-Hg HAP metals limit because it resulted in ''significantly higher cost effectiveness for PM than EPA has accepted in other NESHAP.'' The EPA noted in that rulemaking that it had previously ''reject[ed] $48,501 per ton of PM as not cost-effective for PM,'' and noted prior EPA statements in a subsequent rulemaking providing that $268,000 per ton of HAP removed was a higher cost-effectiveness estimate than the EPA had accepted in other NESHAP rulemakings.

In contrast, other commenters focused on the EPA's estimated cost-effective estimates for fPM (which is a surrogate for non-Hg HAP metals) and argued that

[14] For the revised fPM analysis, the EPA uses two methods to assess the performance of the fleet: average and the 99th percentile of the lowest quarter of data. Values reported here use the average fPM rate for each EGU.

[15] *Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards,* 80 FR 75178, 75201 (December 1, 2015).

[16] *National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing Residual Risk and Technology Review,* 85 FR 45476, 45483 (July 28, 2020).

[17] *National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Residual Risk and Technology Review,* 85 FR 42074, 42088 (July 13, 2020).

[18] *National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants,* 78 FR 10006, 10021 (February 12, 2013).

those estimates were substantially lower than estimates that the EPA has considered to be cost-effective in other technology reviews. Therefore, these commenters concluded that the EPA should strengthen the limit to at least 0.010 lb/MMBtu. These commenters also pointed to a 2023 report by Andover Technology Partners [19] that found that the cost to comply with an emission limit of 0.006 lb/MMBtu on a fleetwide basis was significantly less than the costs estimated by the EPA. Andover Technology Partners attributed this difference ''to the assumptions EPA made regarding the potential emission reductions from ESP upgrades, which result in a much higher estimate of baghouse retrofits in EPA's analysis for an emission rate of 0.006 lb/MMBtu.'' These commenters stated that meeting the lower emission limit of 0.006 lb/MMBtu is technologically feasible using currently available controls, and they urged the EPA to adopt this limit. They stated that although cost effectiveness is less relevant in the CAA section 112 context than for other CAA provisions, the $103,000 per ton of fPM and $209,000 per ton of filterable fine $PM_{2.5}$ estimates that the EPA calculated for the 0.006 lb/MMBtu limit were reasonable and comparable to past practice in technology reviews under CAA section 112(d)(6). They noted that the EPA has previously found a control measure that resulted in an inflation-adjusted cost of $185,000 per ton of $PM_{2.5}$ reduced to be cost-effective for the ferroalloys production source category [20] and proposed a limit for secondary lead smelting sources that cost an inflation-adjusted $114,000 per ton of fPM reduced.[21] They argued that, using the Andover Technology Partners cost estimates, the 0.006 lb/MMBtu limit has even better cost-effectiveness estimates at about $72,000 per ton of fPM reduced and $146,000 per ton of filterable $PM_{2.5}$ reduced. These commenters noted that the EPA also calculated cost effectiveness based on allowable emissions (*i.e.,* assuming emission reductions achieved if all evaluated EGUs emit at the maximum allowable amount of fPM, or 0.030 lb/MMBtu) at $1,610,000 per ton, showing that a limit of 0.006 lb/MMBtu allows far less pollution at low cost to the power sector. They concluded that all these metrics and approaches to considering costs show that a fPM limit of 0.006 lb/MMBtu would require cost-effective reductions and can be achieved at a reasonable cost that would not jeopardize the power sector's function.

Additionally, some commenters cited *Sierra Club* v. *Costle,* 657 F.2d 298, 330 (D.C. Cir. 1981), and said the case supports the EPA's discretion to weigh cost, energy, and environmental impacts, recognizing the Agency's authority to take these factors into account ''in the broadest sense at the national and regional levels and over time as opposed to simply at the plant level in the immediate present.'' These commenters said that the EPA has the authority to require costs that are reasonable for the industry even if they are not reasonable for every facility. These commenters acknowledged that the EPA has discretion to consider cost effectiveness under CAA section 112(d)(2), citing *NRDC* v. *EPA,* 749 F.3d 1055, 1060–61 (D.C. Cir. 2014), but argued that the dollar-per-ton cost-effectiveness metric is less relevant under CAA section 112 than under other CAA provisions because the Agency is not charged with equitably distributing the costs of emission reductions through a uniform compliance strategy, as the EPA has done in its transport rules. The commenters concluded that the Agency should require maximum reductions of HAP emissions from each regulated source category and has no authority to balance cost effectiveness across industries.

Response: In this action, the EPA is acting under its authority in CAA section 112(d)(6) to ''review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards'' promulgated under CAA section 112. As the EPA explained in the 2023 Proposal, this technology review is separate and distinct from other standard-setting provisions under CAA section 112, such as establishing MACT floors, conducting the beyond-the-floor analysis, and reviewing residual risk.

Regarding the comments that the EPA underestimated costs to an extent that undermines the EPA's overall cost-effectiveness assumptions, the EPA disagrees that the Agency underestimated the typical costs of ESP rebuilds. The commenters provided cost examples from only two facilities to support their assertions regarding the costs of ESP rebuilds. The costs provided for one of those facilities, Labadie, were not the costs associated with an ESP rebuild, but instead were the costs associated with the full replacement of an ESP. The commenter stated that, ''Ameren retrofitted the entire ESP trains on two units in 2014/2015. On each of these units two of the three original existing ESPs had to be abandoned and one of the existing ESPs was retrofitted with new power supplies and flue gas flow modifications. A new state-of-the-art ESP was added to each unit to supplement the retrofitted ESPs.'' An ESP replacement is different from an ESP rebuild, and therefore the costs of an ESP replacement do not inform the costs of an ESP rebuild. The ESP rebuild cost provided for the other facility, Petersburg, was less than the EPA's final assumption regarding the typical cost of an ESP rebuild on a capacity-weighted average basis. Neither of these examples provided by the commenter demonstrate that the EPA underestimated costs. For these reasons, the EPA disagrees with these commenters. Additionally, the EPA disagrees with these commenters that the Agency must add a compliance margin in its cost assumptions. As described above, the Agency does not prescribe specifically how an EGU must be controlled or how it must be operated, and the choice of overcompliance is at the sole discretion of the owners and operators.

Generally, the EPA agrees with commenters that cost effectiveness, *i.e.,* the costs per unit of emissions reduction, is a metric that the EPA consistently considers, often alongside other cost metrics, in CAA section 112 rulemakings where it can consider costs, *e.g.,* beyond-the-floor analyses and technology reviews, and agrees with commenters who recognize that the Agency has discretion in how it considers statutory factors under CAA section 112(d)(6), including costs. *See e.g., Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667, 673–74 (D.C. Cir. 2013) (allowing that the EPA may consider costs in conducting technology reviews under CAA section 112(d)(6)); *see also Nat'l Ass'n for Surface Finishing* v. *EPA,* 795 F.3d 1, 11 (D.C. Cir. 2015). The EPA acknowledges that the cost-effectiveness values for these standards are higher than cost-effectiveness values that the EPA concluded were not cost-effective and weighed against implementing more stringent standards for some prior rules. The EPA disagrees, however, that there is any particular threshold that renders

[19] Assessment of Potential Revisions to the Mercury and Air Toxics Standards. Andover Technology Partners. June 15, 2023. Docket ID No. EPA–HQ–OAR–2018–0794. Also available at *https://www.andovertechnology.com/wp-content/uploads/2023/06/C_23_CAELP_Final.pdf.*

[20] *National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production,* 80 FR 37381 (June 30, 2015).

[21] *National Emission Standards for Hazardous Air Pollutants: Secondary Lead Smelting,* 76 FR 29032 (May 19, 2011).

a rule cost-effective or not.[22] The EPA's prior findings about cost effectiveness in other rules were specific to those rulemakings and the industries at issue in those rules. As commenters have pointed out, in considering cost effectiveness, the EPA will often consider what estimates it has deemed cost-effective in prior rulemakings. However, the EPA routinely views cost effectiveness in light of other factors, such as other relevant costs metrics (*e.g.,* total costs, annual costs, and costs compared to revenues), impacts to the regulated industry, and industry-specific dynamics to determine whether there are ''developments in practices, processes, and control technologies'' that warrant updates to emissions standards pursuant to CAA section 112(d)(6). Some commenters, pointing to prior CAA section 112 rulemakings where the EPA chose not to adopt more stringent controls, mischaracterized cost effectiveness as the sole criterion in those decisions. These commenters omitted any discussion of other relevant factors from those rulemakings that, in addition to cost effectiveness, counseled the EPA against adopting more stringent standards. For example, in the 2014 Ferroalloys rulemaking that commenters cited to, the EPA rejected a potential control option due to questions about technical feasibility and significant economic impacts the option would create for the industry, including potential facility closures that would impact significant portions of industry production.[23] In contrast here, the controls at issue are technically feasible (they are used at facilities throughout the country) and will not have significant effects on the industry. Indeed, the EPA does not project that the final revisions to MATS will result in incremental changes in operational coal-fired capacity.

Similarly, in the other rulemakings these commenters pointed to, where the EPA found similar cost-effectiveness values to those that the EPA identified for the revised fPM standard here, there are distinct aspects of those rulemakings and industries that distinguish those prior actions from this rulemaking. In the 2015 Petroleum Refineries rulemaking, the EPA considered the cost effectiveness of developments at only two facilities to decide whether to deploy a standard across the much wider industry.[24] Here in contrast, the EPA is basing updates to fPM standards for coal-fired EGUs on developments across the majority of the industry and the performance of the fleet as a whole, which has demonstrated the achievability of a more stringent standard. Additionally, there are inherent differences between the power sector and other industries that similarly distinguish prior actions from this rulemaking. For example, because of the size of the power sector (314 coal-fired EGUs at 157 facilities), and because this source category is one of the largest stationary source emitters of Hg, arsenic, and HCl and is one of the largest regulated stationary source emitters of total HAP,[25] even considering that this rule affects only a fraction of the sector, the estimated HAP reductions in this final rule (8.3 tpy) are higher than those in the prior rulemakings cited by the commenters (as are the estimated PM reductions (2,537 tpy) used as a surrogate for non-Hg HAP metals). In contrast, in the 2020 Integrated Iron and Steel Manufacturing rulemaking, the source category covered included only 11 facilities, and the estimated reductions the EPA considered would have removed 3 tpy of HAP and 120 tpy of PM.[26] Likewise, in the 2013 Portland Cement rulemaking, the EPA determined not to pursue more stringent controls for the sector after finding the standard would only result in 138 tpy of nationwide PM reductions and that there was a high cost for such modest reductions.[27] Here, the EPA estimates significantly greater HAP emission reductions, and fPM emission reductions that are orders of magnitude greater than both prior rulemakings.[28]

There are also unique attributes of the power sector that the EPA finds support the finalization of revised standards for fPM and non-Hg HAP metals despite the relatively high cost-effectiveness values of this rulemaking as compared to other CAA section 112 rulemakings. As the EPA has demonstrated throughout this record, there are hundreds of EGUs regulated under MATS with well-performing control equipment that are already reporting emission rates below the revised standards, whereas only a handful of facilities with largely outdated or underperforming controls are emitting significantly more than their peers. That means that the communities located near these handful of facilities may experience exposure to higher levels of toxic metal emissions than communities located near similarly sized well-controlled plants. This is what the revised standards seek to remedy, and as discussed throughout this record, this goal is consistent with the EPA's authority under CAA section 112(d)(6) and the purpose of CAA section 112 more generally.

U.S. EGUs are a major source of HAP metals emissions including arsenic, beryllium, cadmium, chromium, cobalt, lead, nickel, manganese, and selenium. Some HAP metals emitted by U.S. EGUs are known to be persistent and bioaccumulative and others have the potential to cause cancer. Exposure to these HAP metals, depending on exposure duration and levels of exposures, is associated with a variety of adverse health effects. These adverse health effects may include chronic health disorders (*e.g.,* irritation of the lung, skin, and mucus membranes; decreased pulmonary function, pneumonia, or lung damage; detrimental effects on the central nervous system; damage to the kidneys; and alimentary effects such as nausea and vomiting). The emissions reductions projected under this final rule from the use of PM controls are expected to reduce exposure of individuals residing near these facilities to non-Hg HAP metals, including carcinogenic HAP.

EGUs projected to be impacted by the revised fPM standards represent a small fraction of the total number of the coal-fired EGUs (11 percent for the 0.010 lb/MMBtu fPM limit). In addition, many regulated facilities are electing to retire

[22] See *e.g., National Emissions Standards for Hazardous Air Pollutants: Ferroalloys Production,* 80 FR 37366, 37381 (June 30, 2015) (''[I]t is important to note that there is no bright line for determining acceptable cost effectiveness for HAP metals. Each rulemaking is different and various factors must be considered.'').

[23] *National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production,* 79 FR 60238, 60273 (October 6, 2014).

[24] *Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards,* 80 FR 75178, 75201 (December 1, 2015).

[25] 2020 National Emissions Inventory (NEI) Data; *https://www.epa.gov/air-emissions-inventories/2020-national-emissions-inventory-nei-data.*

[26] *National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Residual Risk and Technology Review,* 85 FR 42074, 42088 (July 13, 2020).

[27] *National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants,* 78 FR 10006, 10020–10021 (February 12, 2013).

[28] In addition, while commenters are correct that the EPA determined not to adopt more stringent controls under the iron ore processing technology review, the aspects of the rulemaking that the commenters cite to concerned whether additional controls were necessary to provide an ample margin of safety under a residual risk review. In that instance, the EPA determined not to implement more stringent standards under the risk review based on the installation of wet ESPs in addition to wet scrubbers, based on the EPA's determination that such improvements were not necessary to provide an ample margin of safety to protect public health. See *National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing Residual Risk and Technology Review,* 84 FR 45476, 45483 (July 28, 2020).

due to factors independent of the EPA's regulations, and the EPA typically has more information on plant retirements for this sector than other sectors regulated under CAA section 112. Both of these factors contribute to relatively higher cost-effectiveness estimates in this rulemaking as compared to other sectors where the EPA is not able to account for facility retirements and factor in shorter amortization periods for the price of controls.

While some commenters stated that meeting an even lower emission limit of 0.006 lb/MMBtu is technologically feasible using currently available controls, the Agency declines to finalize this limit primarily due to the technological limitations of PM CEMS at this lower emission limit (as discussed in more detail in sections IV.C.2. and IV.D.2. below). Additionally, the EPA considered the higher costs associated with a more stringent standard as compared to the final standard presented in section IV.D.1.

Finally, as mentioned in the Response to Comments document, the EPA finds that use of PM CEMS, which provide continuous feedback with respect to fPM variability, in lieu of quarterly fPM emissions testing, will render moot the commenter's suggestion that margin of compliance has not been taken into account.

Comment: Some commenters argued that the low residual risks the EPA found in its review of the 2020 Residual Risk Review obviate the need for the EPA to revise the standards under the separate technology review, and that residual risk should be a relevant aspect of the EPA's technology review of coal- and oil-fired EGUs. These commenters argued that it is arbitrary and capricious for the EPA to impose high costs on facilities, which they claimed will only result in marginal emission reductions, when the EPA determined there is not an unreasonable risk to the environment or public health.

Other commenters agreed with the EPA's ''two-pronged'' interpretation that CAA section 112(d)(6) provides authorities to the EPA that are distinct from the EPA's risk-based authorities under CAA section 112(f)(2). These commenters said that if the criteria under CAA section 112(d)(6) are met, the EPA must update the standards to reflect new developments independent of the risk assessment process under CAA section 112(f)(2). They said the technology-based review conducted under CAA section 112(d)(6) need not account for any information learned during the residual risk review under CAA section 112(f)(2) unless that information pertains to statutory factors under CAA section 112(d)(6), such as costs. They concluded that CAA section 112(d)(6) requires the EPA to promulgate the maximum HAP reductions possible where achievable at reasonable cost and is separate from the EPA's residual risk analysis.

Response: The EPA has an independent statutory authority and obligation to conduct the technology review separate from the EPA's authority to conduct a residual risk review, and the Agency agrees with commenters that recognized that the EPA is not required to account for information obtained during a residual risk review in conducting a technology review. The EPA's finding that there is an ample margin of safety under the residual risk review in no way interferes with the EPA's obligation to require more stringent standards under the technology review where developments warrant such standards. The D.C. Circuit has recognized the CAA section 112(d)(6) technology review and 112(f)(2) residual review are ''distinct, parallel analyses'' that the EPA undertakes ''[s]eparately.'' *Nat'l Ass'n for Surface Finishing* v. *EPA,* 795 F.3d 1, 5 (D.C. Cir. 2015). In other recent residual risk and technology reviews, the EPA determined additional controls were warranted under technology reviews pursuant to CAA section 112(d)(6) although the Agency determined additional standards were not necessary to maintain an ample margin of safety under CAA section 112(f)(2).[29] The EPA has also made clear that the Agency ''disagree[s] with the view that a determination under CAA section 112(f) of an ample margin of safety and no adverse environmental effects alone will, in all cases, cause us to determine that a revision is not necessary under CAA section 112(d)(6).''[30] While the EPA has considered risks as a factor in some previous technology reviews,[31] that does not compel the Agency to do so in this rulemaking. Indeed, in other instances, the EPA has adopted the same standards under both CAA sections 112(f)(2) and 112(d)(6) based on independent rationales where necessary to provide an ample margin of safety and because it is technically appropriate and necessary to do so, emphasizing the independent authority of the two statutory provisions.[32]

The language and structure of CAA section 112, along with its legislative history, further underscores the independent nature of these two provisions.[33] While the EPA is only required to undertake the risk review once (8 years after promulgation of the original MACT standards), it is required to undertake the technology review multiple times (at least every 8 years after promulgation of the original MACT standard). That Congress charged the EPA to ensure an ample margin of safety through the risk review, yet still required the technology review to be conducted on a periodic basis, demonstrates that Congress anticipated that the EPA would strengthen standards based on technological developments even after it had concluded there was an ample margin of safety. CAA section 112's overarching charge to the EPA to ''require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions)'' further demonstrates that Congress sought to minimize the emission of hazardous air pollution wherever feasible independent of a finding of risk. Moreover, as discussed *supra,* in enacting the 1990 CAA Amendments, Congress purposefully replaced the previous risk-based approach to establishing standards for HAP with a technology-driven approach. This technology-driven

[29] See, *e.g., National Emission Standards for Hazardous Air Pollutants: Refractory Products Manufacturing Residual Risk and Technology Review,* 86 FR 66045 (November 19, 2021); *National Emission Standards for Hazardous Air Pollutants: Site Remediation Residual Risk and Technology Review,* 85 FR 41680 (July 10, 2020); *National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline) Residual Risk and Technology Review,* 85 FR 40740, 40745 (July 7, 2020); *National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards Residual Risk and Technology Review for Ethylene Production,* 85 FR 40386, 40389 (July 6, 2020); *National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills,* 82 FR 47328 (October 11, 2017); *National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards; and Manufacture of Amino/Phenolic Resins,* 79 FR 60898, 60901 (October 8, 2014).

[30] *National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins; Marine Tank Vessel Loading Operations; Pharmaceuticals Production; and the Printing and Publishing Industry,* 76 FR 22566, 22577 (April 21, 2011).

[31] See, *e.g., National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry,* 71 FR 76603, 76606 (December 21, 2006); *see also Proposed Rules: National Emission Standards for Halogenated Solvent Cleaning,* 73 FR 62384, 62404 (October 20, 2008).

[32] *National Emissions Standards for Hazardous Air Pollutants: Secondary Lead Smelting,* 77 FR 556, 564 (January 5, 2012).

[33] See section II.A.2. above for further discussion of the statutory structure and legislative history of CAA section 112.

approach recognizes the ability for the EPA to achieve substantial reductions in HAP based on technological improvements without the inherent difficulty in quantifying risk associated with HAP emission exposure given the complexities of the pathways through which HAP cause harm and insufficient availability of data to quantify their effects discussed in section II.B.2. Independent of risks, it would be inconsistent with the text, structure, and legislative history for the EPA to conclude that Congress intended the statute's technology-based approach to be sidelined after the EPA had concluded the risk review.

Comment: Some commenters expressed concern that some portion of affected units could simply retire instead of coming into compliance with new requirements, potentially occurring before new generation could be built to replace the lost generation. During this period, a lack of dispatchable generation could significantly increase the likelihood of outages, particularly during periods of severe weather. In addition, some commenters argued that revising the fPM limit was unnecessary as there is a continuing downward trend in HAP emissions from early retirements of coal-fired EGUs, whereas accelerating this trend could have potential adverse effects on reliability. Some commenters also stated that as more capacity and generation is shifted away from coal-fired EGUs due to the Inflation Reduction Act (IRA) and other regulatory and economic factors, the total annual fPM and HAP emissions from industry will decline, regardless of whether the fPM limit is made more stringent.

Response: The EPA disagrees that this rule would threaten resource adequacy or otherwise degrade electric system reliability. Commenters provided no credible information supporting the argument that this final rule would result in a significant number of retirements or a larger amount of capacity needing controls. The Agency estimates that this rule will require additional fPM control at less than 12 GW of operable capacity in 2028, which is about 11 percent of the total coal-fired EGU capacity projected to operate in that year. The units requiring additional fPM controls are projected to generate less than 1.5 percent of total generation in 2028. Moreover, the EPA does not project that any EGUs will retire in response to the standards promulgated in this final rule. Because the EPA projects no incremental changes in existing operational capacity to occur in response to the final rule, the EPA does not anticipate this rule will have any implications for resource adequacy.

Nevertheless, it is possible that some EGU owners may conclude that retiring a particular EGU and replacing it with new capacity is a more economic option from the perspective of the unit's customers and/or owners than making investments in new emissions controls at the unit. The EPA understands that before implementing such a retirement decision, the unit's owner will follow the processes put in place by the relevant regional transmission organization (RTO), balancing authority, or state regulator to protect electric system reliability. These processes typically include analysis of the potential impacts of the proposed EGU retirement on electrical system reliability, identification of options for mitigating any identified adverse impacts, and, in some cases, temporary provision of additional revenues to support the EGU's continued operation until longer-term mitigation measures can be put in place. No commenter stated that this rule would somehow authorize any EGU owner to unilaterally retire a unit without following these processes, yet some commenters nevertheless assume without any rationale that is how multiple EGU owners would proceed, in violation of their obligations to RTOs, balancing authorities, or state regulators relating to the provision of reliable electric service.

In addition, the Agency has granted the maximum time allowed for compliance under CAA section 112(i)(3) of 3 years, and individual facilities may seek, if warranted, an additional 1-year extension of the compliance date from their permitting authority pursuant to CAA section 112(i)(3)(B). The construction of any additional pollution control technology that EGUs might install for compliance with this rule can be completed within this time and will not require significant outages beyond what is regularly scheduled for typical maintenance. Facilities may also obtain, if warranted, an emergency order from the Department of Energy pursuant to section 202(c) of the Federal Power Act (16 U.S.C. 824a(c)) that would allow the facility to temporarily operate notwithstanding environmental limits when the Secretary of Energy determines doing so is necessary to address a shortage of electric energy or other electric reliability emergency.

Further, despite the comments asserting concerns over electric system reliability, no commenter cited a single instance where implementation of an EPA program caused an adverse reliability impact. Indeed, similar claims made in the context of the EPA's prior CAA rulemakings have not been borne out in reality. For example, in the stay litigation over the Cross-State Air Pollution Rule (CSAPR), claims were made that allowing the rule to go into effect would compromise reliability. Yet in the 2012 ozone season starting just over 4 months after the rule was stayed, EGUs covered by CSAPR collectively emitted below the overall program budgets that the rule would have imposed in that year if the rule had been allowed to take effect, with most individual states emitting below their respective state budgets. Similarly, in the litigation over the 2015 Clean Power Plan, assertions that the rule would threaten electric system reliability were made by some utilities or their representatives, yet even though the Supreme Court stayed the rule in 2016, the industry achieved the rule's emission reduction targets years ahead of schedule without the rule ever going into effect. *See West Virginia* v. *EPA,* 142 S. Ct. 2587, 2638 (2022) (Kagan, J., dissenting) (''[T]he industry didn't fall short of the [Clean Power] Plan's goal; rather, the industry exceeded that target, all on its own . . . . At the time of the repeal . . . 'there [was] likely to be no difference between a world where the [Clean Power Plan was] implemented and one where it [was] not.' '') (quoting 84 FR 32561). In other words, the claims that these rules would have had adverse reliability impacts proved to be groundless.

The EPA notes that similar concerns regarding reliability were raised about the 2012 MATS Final Rule—a rule that projected the need for significantly greater installation of controls and other capital investments than this current revision.[34] As with the current rule, the flexibility of permitting authorities to allow a fourth year for compliance was available in a broad range of situations, and in the event that an isolated, localized concern were to emerge that could not be addressed solely through the 1-year extension under CAA section 112(i)(3), the CAA provides flexibilities to bring sources into compliance while maintaining reliability. We have seen no evidence in the last decade to suggest

[34] The EPA projected that the 2012 MATS Final Rule would drive the installation of an additional 20 GW of dry FGD (dry scrubbers), 44 GW of DSI, 99 GW of additional ACI, 102 GW of additional FFs, 63 GW of scrubber upgrades, and 34 GW of ESP upgrades. While a subsequent analysis found that the industry ultimately installed fewer controls than was projected, the control installations that occurred following the promulgation of the 2012 MATS Final Rule were still significantly greater than the installations that are estimated to occur as a result of this final rule (where, for example, the EPA estimates that less than 2 GW of capacity would install FF technology for compliance).

that the implementation of MATS caused power sector adequacy and reliability problems, and only a handful of sources obtained administrative orders under the enforcement policy issued with MATS to provide relief to reliability critical units that could not comply with the rule by 2016.

Comment: Commenters suggested that the EPA use its authority to create subcategories of affected facilities that elect to permanently retire by the compliance date as the Agency has taken in similar proposed rulemakings affecting coal- and oil-fired EGUs. Commenters stated the EPA should subcategorize those sources that have adopted enforceable retirement dates and not subject those sources to any final rule requirements. They indicated that the EPA is fully authorized to subcategorize these units under CAA section 112(d)(1). Commenters asked that the EPA consider other simultaneous rulemakings, such as the proposed Greenhouse Gas Standards and Guidelines for Fossil Fuel Power Plants,[35] where the EPA proposed that EGUs that elect to shut down by January 1, 2032, must maintain their recent historical carbon dioxide (CO_2) emission rate via routine maintenance and operating procedures (*i.e.,* no degradation of performance). Commenters also referenced the retirement date of December 31, 2032, in the EPA Office of Water's proposed Effluent Limitation Guidelines.[36]

Commenters claimed that creating a subcategory for units facing near-term retirements that harmonizes the retirement dates with other rulemakings would greatly assist companies with moving forward on retirement plans without running the risk of being forced to retire early, which could create reliability concerns or, in the alternative, forced to deliberate whether to install controls and delaying retirement to recoup investments in the controls. Commenters also suggested that EGUs with limited continued operation be allowed to continue to perform quarterly stack testing to demonstrate compliance with the fPM limitations (rather than having to install PM CEMS). Commenters suggested that imposing different standards on these subcategories should continue the status quo for these units until retirement. Commenters claimed that it would make no sense for the EPA to require an EGU slated to retire in the near term to expend substantial resources on controls in the interim since these sources are very unlikely to find it viable to construct significant control upgrades for a revised standard that would become effective in mid-2027, only 5 years before the unit's permanent retirement. Commenters further noted if the EPA does not establish such a subcategory or take other action to ensure these units are not negatively impacted by the rulemaking, the retirement of some units could be accelerated due to the costs of installing a PM CEMS and the need to rebuild or upgrade an existing ESP or install a FF to supplement an existing ESP. Commenters stated that the EPA cannot ignore the need for a coordinated retirement of thermal generating capacity while new generation sources come online to avoid detrimental impacts to grid reliability.

Commenters suggested that if the EPA decides to proceed with finalizing the revised standards in the 2023 Proposal, the Agency should create a subcategory for coal-fired EGUs that elect by the compliance date of the revised standards (*i.e.,* mid-2027) to retire the units by December 31, 2032, or January 1, 2032, if the EPA prefers to tie the 2023 Proposal to the proposed Emission Guidelines instead of the Effluent Limitation Guidelines, and maintain the current MATS standards for this subcategory of units. Commenters requested that the EPA coordinate the required retirement date for the 2023 Proposal with other rules so that all retirement dates align. Commenters reiterated that the EPA has multiple authorities with overlapping statutory timelines that affect commenters' plans regarding the orderly retirement of coal-fired EGUs and their ability to continue the industry's clean energy transformation while providing the reliability and affordability that their customers demand. Commenters suggested that EGUs that plan to retire by 2032 should have the opportunity to seek a waiver from PM CEMS installation altogether and continue quarterly stack testing during the remaining life of the unit. They also suggested that if a unit does not retire by the specified date, it should be required to immediately cease operation or meet the standards of the rule. Commenters stated that under this recommendation an EGU's failure to comply would then be a violation of the 2023 Proposal's final rule subject to enforcement.

Response: In response to commenters' concerns, the EPA evaluated the feasibility of creating a subcategory for facilities with near-term retirements but disagrees with commenters that such a subcategory is appropriate for this rulemaking. In particular, the EPA found that, based on its own assessment and that of commenters, only a few facilities would likely be eligible for a near-term retirement subcategory and that it would not significantly reduce the costs of the revised standards. According to the EPA's assessment, 67 of the 296 EGUs assessed[37] have announced retirements between 2029 and 2032—less than one-quarter of the fleet—and all but three of those EGUs (at two facilities) have already demonstrated the ability to comply with the 0.010 lb/MMBtu fPM standard on average. Additionally, these three EGUs already use PM CEMS to demonstrate compliance, therefore the comment requesting a waiver of PM CEMS installations for EGUs with near-term retirements is not relevant. Because the EPA's analysis led the Agency to conclude that there would be little utility to a near-term retirement subcategory and it would not change the costs of the rule in a meaningful way, the EPA determined not to create a retirement subcategory for the fPM standard. In addition, the EPA notes that allowing units to operate without the best performing controls for an additional number of years would lead to higher levels of non-Hg HAP metals emissions and continued exposure to those emissions in the communities around these units during that timeframe. Regarding a fPM compliance requirement subcategory for EGUs with near-term retirements, the Agency estimates 26 of 67 EGUs are already using PM CEMS for compliance demonstration and finds that the costs to install PM CEMS for facilities with near-term retirements are reasonable. The Agency finds that the transparency provided by PM CEMS and the increased ability to quickly detect and correct potential control or operational problems using PM CEMS furthers Congress's goal to ensure that emission reductions are consistently maintained and makes PM CEMS the best choice for this rule's compliance monitoring for all EGUs.

2. Comments on the Proposed Changes to the Compliance Demonstration Options

Comment: The Agency received both supportive and opposing comments requiring the use of PM CEMS for compliance demonstration. Supportive commenters stated the EPA must require the use of PM CEMS to monitor their emissions of non-Hg HAP metals

[35] 88 FR 33245 (May 23, 2023).

[36] 88 FR 18824, 18837 (March 29, 2023).

[37] In this final rule, the EPA reviewed fPM compliance data for 296 coal-fired EGUs expected to be operational on January 1, 2029. This review is explained in detail in the 2024 Technical Memo.

as PM CEMS are now more widely deployed than when MATS was first promulgated, and experience with PM CEMS has enabled operators to more promptly detect and correct problems with pollution controls as compared to other monitoring and testing options allowed under MATS (*i.e.,* periodic stack testing and parametric monitoring for PM), thereby lowering HAP emissions. They said that the fact that PM CEMS have been used to demonstrate compliance in a majority of units in the eight best performing deciles [38] provides strong evidence that PM CEMS can be used effectively to measure low levels of PM emissions.

Opposing commenters urged the EPA to retain all current options for demonstrating compliance with non-Hg HAP metal standards, including quarterly PM and metals testing, LEE, and PM CPMS. These commenters said removing these compliance flexibility options goes beyond the scope of the RTR and does not address why the reasons these options were originally included in MATS are no longer valid. Commenters said they have previously raised concerns about PM CEMS that the EPA has avoided by stating that CEMS are not the only compliance method for PM. They stated that previously, the EPA has determined these compliance methods were both adequate and frequent enough to demonstrate compliance.

Response: The Agency disagrees with commenters who suggests that the rule should retain all previous options for demonstrating compliance with either the individual metals, total metals, or fPM limits. Congress intended for CAA section 112 to achieve significant reductions of HAP, and the EPA agrees with other commenters that the use of CEMS in general and PM CEMS in particular enables owners or operators to detect and quickly correct control device or process issues in many cases before the issues become compliance problems. Consistent with the discussion contained in the 2023 Proposal (88 FR 24872), the Agency finds the transparency and ability to quickly detect and correct potential control or operational problems furthers Congress's goal to ensure that emission reductions are consistently maintained and makes PM CEMS the best choice for this rule's compliance monitoring.

Comment: Some commenters objected to the EPA's proposal to require the use of PM CEMS for purposes of demonstrating compliance with the revised fPM standard, stating that the requirements of Performance Specification 11 of 40 CFR part 60, appendix B (PS–11) will become extremely hard to satisfy at the low emission limits proposed. For PS–11, relative correlation audit (RCA), and relative response audit (RRA), the tolerance interval and confidence interval requirements are expressed in terms of the emission standard that applies to the source. The commenters reviewed test data from operating units and found significantly higher PS–11 failure (>80 percent), RCA failure (>80 percent), and RRA failure (60 percent) rates at the more stringent proposed emission limits. They stated that the cost, complexity, and failure rate of equipment calibration remains one of the biggest challenges with the use of PM CEMS and therefore other compliance demonstration methods should be retained. Commenters also noted that repeated tests due to failure could result in higher total emissions from the units.

Response: The Agency is aware of concerns by some commenters that PM CEMS currently correlated for the 0.030 lb/MMBtu fPM emission limit may experience difficulties should re-correlation be necessary; and those concerns are also ascribed to yet-to-be installed PM CEMS. In response to those concerns, the Agency has shifted the basis of correlation testing from requiring only the collection of a minimum volume per run to also allowing the collection of a minimum mass per run and has adjusted the QA criterion otherwise associated with the new emission limit. These changes will ease the transition for coal- and oil-fired EGUs using only PM CEMS for compliance demonstration purposes. The first change, allowing the facility to choose either the collection of a minimum mass per run or a minimum volume per run, should reduce high-level correlation testing duration, addressing other concerns about extended runtimes with degraded emissions control or increased emissions, and should reduce correlation testing costs. The second change, adjusting the QA criteria, is consistent with other approaches the Agency has used when lower ranges of instrumentation or methods are employed. For example, in section 13.2 of Performance Specification 2 (40 CFR part 60, appendix B) the QA criteria for the relative accuracy test audit for SO_2 and Nitrogen Oxide CEMS are relaxed as the emission limit decreases. This is accomplished at lower emissions by allowing a larger criterion or by modifying the calculation and allowing a less stringent number in the denominator. With these changes to the QA criteria and correlation procedures, the EPA believes EGUs will be able to use PM CEMS to demonstrate compliance at the revised level of the fPM standard.

Comment: Some commenters asserted that if the EPA finalizes the requirement to demonstrate compliance using PM CEMS, EGUs will not be able to comply with a lower fPM limit on a continuous basis and that accompanying a lower limit with more restrictive monitoring requirements adds to the regulatory burden of affected sources and permitting authorities.

Response: The EPA disagrees with commenters' claim that that EGUs will not be able to demonstrate compliance continuously with a fPM limit of 0.010 lb/MMBtu. The EPA believes that CEMS in general and PM CEMS in particular enable owners and operators to detect and quickly correct control device or process issues in many cases before the issues become compliance problems. Contrary to the commenter's assertion that EGUs will not be able to comply with a lower fPM limit on a continuous basis, as mentioned in the June 2023 Andover Technology Partners analysis,[39] over 80 percent of EGUs using PM CEMS for compliance purposes have already been able to achieve and are reporting and certifying consistent achievement of fPM rates below 0.010 lb/MMBtu.[40] The EPA is unaware of any additional burden experienced by those EGU owners or operators or their regulatory authorities with regard to PM CEMS use at these lower emission levels, and does not expect additional burden to be placed on EGU owners or operators with regard to PM CEMS from application of the revised emission limit. However, this final rule incorporates approaches, such as switching from a minimum sample volume per run to collection of a

[38] Analysis of PM and Hg Emissions and Controls from Coal-Fired Power Plants. Andover Technology Partners. August 19, 2021. Document ID No. EPA–HQ–OAR–2018–0794–4583.

[39] Assessment of Potential Revisions to the Mercury and Air Toxics Standards. Andover Technology Partners. June 15, 2023. Docket ID No. EPA–HQ–OAR–2018–0794. June 2023. Also available at *https://www.andovertechnology.com/wp-content/uploads/2023/06/C_23_CAELP_Final.pdf.*

[40] See for example the PM CEMS Thirty Boiler Operating Day Rolling Average Reports for Duke's Roxboro Steam Electric Plant in North Carolina and at Minnesota Power's Boswell Energy Center in Minnesota. These reports and those from other EGUs reporting emission levels at or lower than 0.010 lb/MMBtu are available electronically by searching in the EPA's Web Factor Information Retrieval System (WebFIRE) Report Search and Retrieval portion of the Agency's WebFIRE internet website at *https://cfpub.epa.gov/webfire/reports/esearch.cfm.*

minimum mass sample or mass volume per run and adjusting the PM CEMS QA acceptability criteria, to reduce the challenges with using PM CEMS. Moreover, the 30-boiler-operating-day averaging period of the limit provides flexibility for owners and operators to account for equipment malfunctions and other issues. Consistent with the discussion in the 2023 Proposal,[41] the Agency finds that PM CEMS are the best choice for this rule's compliance monitoring as they provide increased emissions transparency, ability for EGU owner/operators to quickly detect and correct potential control or operational problems, and greater assurance of continuous compliance. While PM CEMS can produce values at lower levels provided correlations are developed appropriately, the Agency established the final fPM limit of 0.010 lb/MMBtu after considering factors such as run times necessary to develop correlations, potential random error effects, and costs.

Comment: Commenters stated that the EPA's cost estimates contradict the Agency's suggestion that the use of PM CEMS is a more cost-effective monitoring approach than quarterly testing, especially for units that qualify as LEE. They said that the EPA used estimates from the Institute of Clean Air Companies (ICAC) or Envea/Altech which do not include numerous costs associated with PM CEMS that make them not cost-effective, such as the cost of intermittent stack testing associated with the PS–11 correlations and the ongoing costs of RCAs and RRA, which are a large part of the costs associated with PM CEMS and would rise substantially in conjunction with the proposed new PM limits. The commenters said that the ICAC estimated range of PM CEMS installation costs are particularly understated and outdated and should be ignored by the Agency. They said that the EPA estimates may also understate PM CEMS cost by assuming the most commonly used light scattering based PM CEMS will be used for all applications. The commenters said that while more expensive, a significant number of beta gauge PM CEMS are used for MATS compliance, especially where PM spiking is used for PS–11 correlation and RCA testing and that this higher degree of accuracy from beta gauge PM CEMS may be needed for sources without a margin of compliance under the new, more stringent emission limit.

Response: The EPA disagrees with the commenters' suggestion that the Agency is required to select the most cost-effective approach for compliance monitoring. Rather, the Agency selects the approach that best provides assurance that emission limits are met. PM CEMS annual costs represent a very small fraction of a typical coal-fired EGU's operating costs and revenues. As described in the *Ratio of Revised Estimated Non-Beta Gauge PM CEMS EUAC to 2022 Average Coal-Fired EGU Gross Profit* memorandum, available in the docket, if all coal-fired EGUs were to purchase and install new PM CEMS, the Equivalent Uniform Annual Cost (EUAC) would represent less than four hundredths of a percent of the average annual operating expenses from coal-fired EGUs.

Further, as described in the *Revised Estimated Non-Beta Gauge PM CEMS and Filterable PM Testing Costs* technical memorandum, available in the rulemaking docket, the EPA calculated average costs for PM CEMS and quarterly testing from values submitted by commenters in response to the proposal's solicitation, which are discussed in section IV.D. of the preamble. Based on the commenters' suggestions, these revised costs include the costs of intermittent stack testing associated with the PS–11 correlations and ongoing costs of RCAs and RRAs. While the average EUAC for PM CEMS exceeds the average annual cost of quarterly stack emission testing, the cost for PM CEMS does not include important additional benefits associated with providing continuous emissions data to EGU owners or operators, regulators, nearby community members, or the general public. As a reminder, the EPA is not obligated to choose the most inexpensive approach for compliance demonstrations, particularly when all benefits are not monetized, even though costs can be an important consideration. Consistent with the discussion contained in the 2023 Proposal at 88 FR 24872, the Agency finds the increased transparency of EGU fPM emissions and the ability to quickly detect and correct potential control or operational problems, along with greater assurance of continuous compliance makes PM CEMS the best choice for this rule's compliance monitoring.

The Agency acknowledges the commenters' suggestions that EGU owners or operators may find that using beta gauge PM CEMS is most appropriate for the lower fPM emission limit in the rule; such suggestions are consistent with the Agency's view, as expressed in 88 FR 24872. However, the Agency believes other approaches, including spiking, can also ease correlation testing for PM CEMS. Moreover, the Agency anticipates that the new fPM limit will increase demand for, and perhaps spur increased production of, beta gauge PM CEMS.

D. What is the rationale for our final approach and decisions for the filterable PM (as a surrogate for non-Hg HAP metals) standard and compliance demonstration options?

The EPA is finalizing a lower fPM emission standard of 0.010 lb/MMBtu for coal-fired EGUs, as a surrogate for non-Hg HAP metals, and the use of PM CEMS for compliance demonstration purposes for coal- and oil-fired EGUs (with the exception of limited-use liquid oil-fired EGUs) based on developments in the performance of sources within the category since the EPA finalized MATS and the advantages conferred by using CEMS for compliance. As described in the 2023 Proposal, non-Hg HAP metals are predominately a component of fPM, and control of fPM results in concomitant reduction of non-Hg HAP metals (with the exception of Se, which may be present in the filterable fraction or in the condensable fraction as the acid gas, SeO_2). The EPA observes that since MATS was finalized, the vast majority of covered units have significantly outperformed the standard, with a small number of units lagging behind and emitting significantly higher levels of these HAP in communities surrounding those units. The EPA deems it appropriate to require these lagging units to bring their pollutant control performance up to that of their peers. Moreover, the EPA concludes that requiring use of PM CEMS for compliance yields manifold benefits, including increased emissions transparency and data availability for owners and operators and for nearby communities.

The EPA's conclusions with regard to the fPM standard and requirement to use PM CEMS for compliance demonstration are closely related, both in terms of CAA section 112(d)(6)'s direction for the EPA to reduce HAP emissions based on developments in practices, processes, and control technologies, and in terms of technical compatibility.[42] The EPA finds that the manifold benefits of PM CEMS render it appropriate to promulgate an updated fPM emission standard as a surrogate for non-Hg HAP metals for which PM CEMS can be used to monitor

[41] See 88 FR 24872.

[42] As noted in section III.A. above, there are nonetheless independent reasons for adopting both the revision to the fPM standard and the PM CEMS compliance demonstration requirement and each of these changes would continue to be workable without the other in effect, such that the EPA finds the two revisions are severable from each other.

compliance. However, as the fPM limit is lowered, operators may encounter difficulties establishing and maintaining existing correlations for the PM CEMS and may therefore be unable to provide accurate values necessary for compliance. The EPA has determined, based on comments and on the additional analysis described below, that the lowest possible fPM limit considering these challenges at this time is 0.010 lb/MMBtu with adjusted QA criteria. Therefore, the EPA determined that this two-pronged approach—requiring PM CEMS in addition to a lower fPM limit—is the most stringent option that balances the benefits of using PM CEMS with the emission reductions associated with the tightened fPM emission standard. Further, the EPA finds that the more stringent limit of 0.006 lb/MMBtu fPM cannot be adequately monitored with PM CEMS at this time, because the random error component of measurement uncertainty from correlation stack testing is too large and the QA criteria passing rate for PM CEMS is too small to provide accurate (and therefore enforceable) compliance values. Below, we further describe our rationale for each change.

1. Rationale for the Final Filterable PM Emission Standard

In the 2023 Proposal, the Agency proposed a lower fPM emission standard for coal-fired EGUs as a surrogate for non-Hg HAP metals based on developments in practices, processes, and control technologies pursuant to CAA section 112(d)(6), including the EPA's assessment of the differing performance of sources within the category and updated information about the cost of controls. As described in the 2023 Proposal, non-Hg HAP metals are predominately a component of fPM, and control of fPM results in reduction of non-Hg HAP metals (with the exception of Se, which may be present in the filterable fraction or in the condensable fraction as the acid gas, SeO_2).

In conducting this technology review, the EPA found important developments that informed its proposal. First, from reviewing historical information contained in WebFIRE,[43] the EPA observed that most EGUs were reporting fPM emission rates well below the 0.030 lb/MMBtu standard. The fleet was achieving these performance levels at lower costs than estimated during promulgation of the 2012 MATS Final Rule. Second, there are technical developments and improvements in PM control technology since the 2012 MATS Final Rule that informed the 2023 Proposal.[44] For example, while ESP technology has not undergone fundamental changes since 2011, industry has learned and adopted ''best practices'' associated with monitoring ESP operation more carefully since the 2012 MATS Final Rule. For FFs, more durable materials have been developed since the 2012 MATS Final Rule, which are less likely to fail due to chemical, thermal, or abrasion failure and create risks of high PM emissions. For instance, fiberglass (once the most widely used material) has largely been replaced by more reliable and easier to clean materials, which are more costly. Coated fabrics, such as Teflon or P84 felt, also clean easier than other fabrics, which can result in less frequent cleaning, reducing the wear that could damage filter bags and reduce the effectiveness of PM capture.

To examine potential revisions, the EPA evaluated fPM compliance data for the coal-fired fleet and evaluated the control efficiency and costs of PM controls to achieve a lower fPM standard. Based on comments received on the 2023 Proposal, the EPA reviewed additional fPM compliance data for 62 EGUs at 33 facilities (see 2024 Technical Memo and attachments for detailed information). The review of additional fPM compliance data showed that more EGUs had previously demonstrated an ability to meet a lower fPM rate, as shown in figure 4 of the 2024 Technical Memo. Compared to the 2023 Proposal where 91 percent of existing capacity demonstrated an ability to meet 0.010 lb/MMBtu, the updated analysis showed that 93 percent are demonstrating the ability to meet 0.010 lb/MMBtu with existing controls. The EPA received comments on the cost assumptions for upgrading PM controls and found that the costs estimated at proposal were not only too high, but that the cost effectiveness of PM upgrades was also underestimated (*i.e.,* the standard is more cost-effective than the EPA believed at proposal).

The EPA is finalizing the fPM emission limit of 0.010 lb/MMBtu with adjusted QA criteria, based on developments since 2012, for the reasons described in this final rule and in the 2023 Proposal as the lowest achievable fPM limit that allows for the use of PM CEMS for compliance demonstration purposes. First, this level of control ensures that the highest emitters bring their performance to a level where the vast majority of the fleet is already performing. For example, as described above, the majority of the existing coal-fired fleet subject to this final rule has previously demonstrated an ability to comply with the lower 0.010 lb/MMBtu fPM limit at least 99 percent of the time during one quarter, in addition to meeting the lower fPM limit on average across all quarters assessed. The Agency estimates that only 33 EGUs are currently operating above this revised limit. Compared to some of the best performing EGUs, the 33 EGUs requiring additional PM control upgrades or maintenance are more likely to have an ESP instead of a FF and to demonstrate compliance using intermittent stack testing. In addition, most of these EGUs have operated at a higher level of utilization than the coal-fired fleet on average.

Second, as discussed in section II.A.2. above, Congress updated CAA section 112 in the 1990 Clean Air Act Amendments to achieve significant reductions in HAP emissions, which it recognized are particularly harmful pollutants, and implemented a regime under which Congress directed the EPA to make swift and substantial reductions to HAP based upon the most stringent standards technology could achieve. This is evidenced by Congress's charge to the EPA to ''require the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emissions),'' that is achievable accounting for ''the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements. . . .'' CAA section 112(d)(2). Further, by creating separate and distinct requirements for the EPA to consider updates to CAA section 112 pursuant to both technology review under CAA section 112(d)(6) and residual risk review under CAA section 112(f)(2), Congress anticipated that the EPA would strengthen standards pursuant to technology reviews ''as necessary (taking into account developments in practices, processes, and control technologies),'' CAA section 112(d)(6), even after the EPA concluded there was an ample margin of safety based on the risks that the EPA can quantify.[45] As the EPA explained in the

[43] WebFIRE includes data submitted to the EPA from the Electronic Reporting Tool (ERT) and is searchable at *https://cfpub.epa.gov/webfire/reports/esearch.cfm.*

[44] Analysis of PM and Hg Emissions and Controls from Coal-Fired Power Plants. Andover Technology Partners. August 19, 2021. Document ID No. EPA–HQ–OAR–2018–0794–4583.

[45] EPA's CAA section 112(f)(2) quantitative risk assessments evaluate cancer risk associated with a lifetime of exposure to HAP emissions from each source in the source category, the potential for HAP exposure to cause adverse chronic (or long-term) noncancer health effects, and the potential for HAP

proposal, the EPA does consider costs, technical feasibility, and other factors when evaluating whether it is necessary to revise existing emission standards under CAA section 112(d)(6) to ensure the standards ''require the maximum degree of emissions reductions . . . achievable.'' CAA section 112(d)(2). The text, structure, and history of this provision demonstrate Congress's direction to the EPA to require reduction in HAP where technology is available to do so and the EPA accounts for the other statutory factors.

Accordingly, the EPA finds that bringing this small number of units to the performance levels of the rest of the fleet serves Congress's mandate to the EPA in CAA section 112(d)(6) to continually consider developments ''that create opportunities to do even better.'' *See LEAN,* 955 F.3d at 1093. As such, the EPA has a number of times in the past updated its MACT standards to reflect developments where the majority of sources were already outperforming the original MACT standards.[46] Indeed, this final rule is consistent with the EPA's authority pursuant to CAA section 112(d)(6) to take developments in practices, processes, and control technologies into account to determine if more stringent standards are achievable than those initially set by the EPA in establishing MACT floors, based on developments that occurred in the interim. *See LEAN* v. *EPA,* 955 F.3d 1088, 1097–98 (D.C. Cir. 2020). The technological standard approach of CAA section 112 is based on the premise that, to the extent there are controls available to reduce HAP emissions, and those controls are of reasonable cost, sources should be required to use them.

The fleet has been able to ''over comply'' with the existing fPM standard due to the very high PM control effectiveness of well-performing ESPs and FFs, often exceeding 99.9 percent. But the performance of a minority of units lags well behind the vast majority of the fleet. As indicated by the two highest fPM rates,[47] EGUs without the most effective PM controls have not been able to demonstrate fPM rates comparable to the rest of the fleet. Specifically, the Colstrip facility, a 1,500 MW subbituminous-fired power plant located in Colstrip, Montana, operates the only two coal-fired EGUs in the country without the most modern PM controls (*i.e.,* ESP or FF). Instead, this facility utilizes venturi wet scrubbers as its primary PM control technology and has struggled to meet the original 0.030 lb/MMBtu fPM limit, even while employing emissions averaging across the operating EGUs at the facility. Colstrip is also the only facility where the EPA estimates the current controls would be unable to meet a lower fPM limit. Specifically, the 2018 second quarter compliance stack tests showed average fPM emission rates above the 0.030 lb/MMBtu fPM limit, in violation of its Air Permit. Talen Energy, one of the owners of the facility, agreed to pay $450,000 to settle these air quality violations.[48] As a result, the plant was offline for approximately 2.5 months while the plant's operator worked to correct the problem. Comments from Colstrip's majority owners discuss the efforts this facility has undergone to improve their wet PM scrubbers, which they state remove 99.7 percent of the fly ash particulate but agree with the EPA that additional controls would be needed to meet a 0.010 lb/MMBtu limit. However, as stated in *NorthWestern Energy's Annual PCCAM Filing and Application of Tariff Changes*,[49] ''Colstrip has a history of operating very close to the upper end limit: for 43 percent of the 651 days of compliance preceding the forced outage its [Weighted Average Emission Rate or] WAER was within 0.03 lb/dekatherm[50] of the limit [. . . to comply with the Air Permit and MATS, Colstrip's WAER must be equal to or less than 0.03 lb/dekatherm].''

The Northern Cheyenne Reservation is 20 miles from the Colstrip facility and the Tribe exercised its authority in 1977 to require additional air pollution controls on the new Colstrip units (Colstrip 3 and 4, the same EGUs still operating today), recognizing the area as a Class I airshed under the CAA. According to comments submitted by the Northern Cheyenne Tribe, their tribal members—both those living on the Reservation and those living in the nearby community of Colstrip—have been disproportionally impacted by exposure to HAP emissions from the Colstrip facility.[51]

The EPA believes a fPM emission limit of 0.010 lb/MMBtu appropriately takes into consideration the costs of controls. The EPA evaluated the costs to improve current PM control systems and the cost to install better performing PM controls (*i.e.,* a new FF) to achieve a more stringent emission limit. Costs of PM upgrades are much lower than the EPA estimated in 2012, and the Agency revised its costs assumptions as described in the 2024 Technical Memo, available in the docket. Table 4 of this document summarizes the updated cost effectiveness of the three fPM emission limits considered in the 2023 Proposal for the existing coal-fired fleet. For the purpose of estimating cost effectiveness, the analysis presented in this table, described in detail in the 2023 and 2024 Technical Memos, is based on the observed emission rates of all existing coal-fired EGUs except for those that have announced plans to retire by the end of 2028. The analysis presented in table 4 estimated the costs associated for each unit to upgrade their existing PM controls to meet a lower fPM standard. In the cases where existing PM controls would not achieve the necessary reductions, unit-specific FF install costs were estimated. Unlike the cost and benefit projections presented in the RIA, the estimates in this table do not account for any future changes in the composition of the operational coal-fired EGU fleet that are likely to occur by 2028 as a result of other factors affecting the power sector, such as the IRA, future regulatory actions, or changes in economic conditions. For example, of the more than 14 GW of coal-fired capacity that the EPA estimates would require control improvements to achieve the final fPM rate, less than 12 GW is projected to be

exposure to cause adverse acute (or short-term) noncancer health effects.

[46] See, *e.g., National Emission Standards for Hazardous Air Pollutants: Site Remediation Residual Risk and Technology Review,* 85 FR 41680, 41698 (July 10, 2020) (proposed 84 FR 46138, 46161; September 3, 2019)) (requiring compliance with more stringent equipment leak definitions under a technology review, which were widely adopted by industry); *National Emissions Standards for Mineral Wool Production and Fiberglass Manufacturing,* 80 FR 45280, 45307 (July 29, 2015) (adopting more stringent limits for glass-melting furnaces under a technology review where the EPA found that ''all glass-melting furnaces were achieving emission reductions that were well below the existing MACT standards regardless of the control technology in use''); *National Emissions Standards for Hazardous Air Pollutants From Secondary Lead Smelting,* 77 FR 556, 564 (January 5, 2012) (adopting more stringent stack lead emission limit under a technology review ''based on emissions data collected from industry, which indicated that well-performing baghouses currently used by much of the industry are capable of achieving outlet lead concentrations significantly lower than the [current] limit.'').

[47] See figure 4 of the 2024 Technical Memo.

[48] See Document CLT–1T Testimony, CLT–11, and CL–12 in Docket 190882 at *https://www.utc.wa.gov/documents-and-proceedings/dockets.*

[49] See NorthWestern Energy's Annual PCCAM Filing and Application for Approval of Tariff Changes, Docket No. 2019.09.058, Final Order 7708f paragraph 21 (November 18, 2020) (noting that ''Colstrip has a history of operating very close to the upper end limit''), available at *https://reddi.mt.gov/prweb.*

[50] For reference, a dekatherm is equivalent to one million Btus (MMBtu).

[51] See Document ID No. EPA–HQ–OAR–2018–5984 at *https://www.regulations.gov.*

operational in 2028 (see section 3 of the RIA for this final rule).

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Table 4. Summary of the Updated Cost Effectiveness Analysis for Three Potential fPM Limits[1]

	Potential fPM emission limit (lb/MMBtu)		
	0.015	0.010	0.006
Affected Units (Capacity, GW)	11 (4.7)	33 (14.1)	94 (41.3)
Annual Cost ($M, 2019 dollars)	38.8	87.2	398.8
fPM Reductions (tpy)	1,258	2,526	5,849
Total Non-Hg HAP Metals Reductions (tpy)	3.0	8.3	22.7
Total Non-Hg HAP Metals Cost Effectiveness ($k/ton)	13,050	10,500	17,500
Total Non-Hg HAP Metals Cost Effectiveness ($/lb)	6,500	5,280	8,790

[1] This analysis used reported fPM compliance data for 296 coal-fired EGUs to develop unit-specific average and lowest achieved fPM rate values to determine if the unit, with existing PM controls, could achieve a lower fPM limit. Using the compliance data, the EPA evaluated costs to upgrade existing PM controls, or if necessary, install new controls in order to meet a lower fPM limit.

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The EPA has updated its costs analyses for this final rule based on comments received and additional data review, which is described in more detail in the 2024 Technical Memo available in the docket. In response to commenters stating that the use of the lowest quarter's 99th percentile, or the lowest achievable fPM rate, is not indicative of overall EGU operation and emission performance, the EPA added a review of average fPM rates. In these updated analyses, both the lowest quarter's 99th percentile and the average fPM rate must be below the potential fPM limit for the EPA to assume no additional upgrades are needed to meet a revised limit. If an EGU has previously demonstrated an ability to meet a potential lower fPM limit, but the average fPM rate is greater than the potential limit, the analysis for the final rule has been updated to assume increased bag replacement frequency (for units with FFs) or operation and maintenance costing $100,000/year (2022$). This additional cost represents increased vigilance in maintaining ESP performance and includes technician labor to monitor performance of the ESP and to periodically make typical repairs (*e.g.,* replacement of failed insulators, damaged electrodes or other internals that may fail, repairing leaks in the ESP casing, ductwork, or expansion joints, and periodic testing of ESP flow balance and any needed adjustments).

Additionally, the Agency received comments that the PM upgrade costs estimated at proposal were too high on a dollar per ton basis and these costs have been updated and are provided in the 2024 Technical Memo. Specifically, commenters demonstrated that the observed percent reductions in fPM attributable to ESP upgrades were significantly greater than the percent reductions that the EPA had assumed for the proposed rule. Additionally, commenters demonstrated that ESP performance guarantees for coal-fired utility boilers were much lower than the EPA was aware of at proposal. These updates, as well as improving our methodology which increases the number of EGUs estimated to need PM upgrades, slightly lower the dollar per ton estimates from what was presented in the 2023 Proposal.

The EPA considers costs in various ways, depending on the rule and affected sector. For example, the EPA has considered, in previous CAA section 112 rulemakings, cost effectiveness, the total capital costs of proposed measures, annual costs, and costs compared to total revenues (*e.g.,* cost to revenue ratios).[52] As much of the

[52] See, *e.g., National Emission Standards for Hazardous Air Pollutants: Mercury Cell Chlor-Alkali Plants Residual Risk and Technology Review,* 87 FR 27002, 27008 (May 6, 2022) (considered annual costs and average capital costs per facility in technology review and beyond-the-floor analysis); *National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review,*

fleet is already reporting fPM emission rates below 0.010 lb/MMBtu, both the total costs and non-Hg HAP metal reductions of the revised limit are modest in context of total PM upgrade control costs and emissions of the coal fleet. The cost-effectiveness estimate for EGUs reporting average fPM rates above the final fPM emission limit of 0.010 lb/MMBtu is $10,500,000/ton of non-Hg HAP metals, slightly lower than the range presented in the 2023 Proposal.

Further, the EPA finds that costs for facilities to meet the revised fPM emission limit represent a small fraction of typical capital and total expenditures for the power sector. In the 2022 Proposal (reaffirming the appropriate and necessary finding), the EPA evaluated the compliance costs that were projected in the 2012 MATS Final Rule relative to the typical annual revenues, capital expenditures, and total (capital and production) expenditures.[53] 87 FR 7648–7659 (February 9, 2022); 80 FR 37381 (June 30, 2015). Using electricity sales data from the U.S. Energy Information Administration (EIA), the EPA updated the analysis presented in the 2022 Proposal. We find revenues from retail electricity sales increased from $333.5 billion in 2000 to a peak of $429.6 billion in 2008 (an increase of about 29 percent during this period) and slowly declined since to a post-2011 low of $388.6 billion in 2020 (a decrease of about 10 percent from its peak during this period) in 2019 dollars.[54] Revenues increased in 2022 to nearly the same amount as the 2008 peak ($427.8 billion). The annual control cost estimate for the final fPM standard based on the cost-effectiveness analysis in table 4 (see section 1c of the 2024 Technical Memo) of this document is a very small share of total power sector sales (about 0.03 percent of the lowest year over the 2000 to 2019 period). Making similar comparisons of the estimated capital and total compliance costs to historical trends in sector-level capital and production costs, respectively, would yield similarly small estimates. Therefore, as in previous CAA section 112 rulemakings, the EPA considered costs in many ways, including cost effectiveness, the total capital costs of proposed measures, annual costs, and costs compared to total revenues to determine the appropriateness of the revised fPM standard under the CAA section 112(d)(6) technology review, and determined the costs are reasonable.

In this final rule, the EPA finds that costs of the final fPM standard are reasonable, and that the revised fPM standard appropriately balances the EPA's obligation under CAA section 112 to achieve the maximum degree of emission reductions considering statutory factors, including costs. Further, the EPA finds that its consideration of costs is consistent with D.C. Circuit precedent, which has found that CAA section 112(d)(2) expressly authorizes cost consideration in other aspects of the standard-setting process, such as CAA section 112(d)(6), *see Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667, 673–74 (D.C. Cir. 2013), and that CAA section 112 does not mandate a specific method of cost analysis in an analogous situation when considering the beyond-the-floor review. *See NACWA* v. *EPA,* 734 F.3d 1115, 1157 (D.C. Cir. 2013) (finding the statute did not ''mandate a specific method of cost analysis''); *see also NRDC* v. *EPA,* 749 F.3d 1055, 1060–61 (D.C. Cir. 2014).

As discussed in section IV.C.1. in response to comments regarding the relatively higher dollar per ton cost effectiveness of the final fPM standard, the EPA finds that in the context of this industry and this rulemaking, the updated standards are an appropriate exercise of the EPA's standard setting authority pursuant to the CAA section 112(d)(6) technology review. As commenters rightly note, the EPA routinely considers the cost effectiveness of potential standards where it can consider costs under CAA section 112, *e.g.,* in conducting beyond-the-floor analyses and technology reviews, to determine the achievability of a potential control option. And the D.C. Circuit recognized that the EPA's interpretation of costs as ''allowing consideration of cost effectiveness was reasonable.'' *NRDC* v. *EPA,* 749 F.3d 1055, 1060–61 (D.C. Cir. 2014) (discussing the EPA's consideration of cost effectiveness pursuant to a CAA section 112(d)(2) beyond-the-floor analysis). However, cost effectiveness is not the sole factor that the EPA considers when determining the achievability of a potential standard in conducting a technology review, nor is cost effectiveness the only value that the EPA considers with respect to costs.[55] Some commenters pointed to other rulemakings (which are discussed in section IV.C.1. above) where the EPA determined not to pursue potential control options with relatively higher cost-effectiveness estimates as compared to prior CAA section 112 rulemakings. However, there were other factors that the EPA considered, in addition to cost effectiveness, that counseled against pursuing such updates. In this rulemaking, the EPA finds that several factors discussed throughout this record make promulgation of the new fPM standard appropriate under CAA section 112(d)(6). First, a wide majority of units have invested in the most-effective PM controls and are already demonstrating compliance with the new fPM standard and at lower costs than assumed during promulgation of the original MATS fPM emission limit. Of the 33 EGUs that the EPA estimated would require control improvements to meet a 0.010 lb/MMBtu fPM standard, only two are not using the most effective PM control technologies available. The EPA assumed that these two units would need to install FFs to achieve the 0.010 lb/MMBtu emission standard, and the cost of those FF retrofits accounts for 42 percent of the total annualized costs presented in table 4. Further, 11 EGUs that the EPA assumed would require different levels of ESP upgrades to meet the 0.010 lb/MMBtu emission standard (all of which have announced retirement dates between 2031 and 2042 resulting in shorter assumed amortization periods) account for about 57 percent of the total annualized costs. The remaining 1 percent of the total annualized costs are associated with 10 EGUs with existing FFs that the EPA

87 FR 1616, 1635 (proposed January 11, 2022) (considered total annual costs and capital costs, annual costs, and costs compared to total revenues in proposed beyond-the-floor analysis); *Phosphoric Acid Manufacturing and Phosphate Fertilizer Production RTR and Standards of Performance for Phosphate Processing,* 80 FR 50386, 50398 (August 19, 2015) (considered total annual costs and capital costs compliance costs and annualized costs for technology review and beyond the floor analysis); *National Emissions Standards for Hazardous Air Pollutants: Ferroalloys Production,* 80 FR 37366, 37381 (June 30, 2015) (considered total annual costs and capital costs, annual costs, and costs compared to total revenues in technology review); *National Emission Standards for Hazardous Air Pollutants: Off-Site Waste and Recovery Operations,* 80 FR 14248, 14254 (March 18, 2015) (considered total annual costs and capital costs, and average annual costs and capital costs and annualized costs per facility in technology review); *National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plants,* 77 FR 58220, 58226 (September 19, 2012) (considered total annual costs and capital costs in technology review); *Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews,* 77 FR 49490, 49523 (August 16, 2012) (considered total capital costs and annualized costs and capital costs in technology review). *C.f. NRDC* v. *EPA,* 749 F.3d 1055, 1060 (D.C. Cir. 2014).

[53] See Cost TSD for 2022 Proposal at Document ID No. EPA–HQ–OAR–2018–0794–4620 at *https://www.regulations.gov.*

[54] 2019 dollars were used for consistency with the 2023 Proposal.

[55] See note 50, above, for examples of other costs metrics the EPA has considered in prior CAA section 112 rulemakings.

assumes will require bag upgrades or increased bag changeouts and 10 EGUs that are assumed to need additional operation and maintenance of existing ESPs, which is further explained in the 2024 Technical Memo. Since only a small handful of units emit significantly more than peer facilities, the Agency finds these upgrades appropriate. Additionally, the size and unique nature of the coal-fired power sector, and the emission reductions that will be achieved by the new standard, in addition to the costs, make promulgation of the new standard appropriate under CAA section 112(d)(6).

The power sector also operates differently than other industries regulated under CAA section 112.[56] For example, the power sector is publicly regulated, with long-term decision-making and reliability considerations made available to the public; it is a data-rich sector, which generally allows the EPA access to better information to inform its regulation; and the sector is in the midst of an energy generation transition leading to plant retirements that are independent of EPA regulation. Because of the relative size of the power sector, while cost effectiveness of the final standard is relatively high as compared to prior CAA section 112 rulemakings involving other industries, costs represent a much smaller fraction of industry revenue. In the likely case that the power sector's transition to lower-emitting generation is accelerated by the IRA, for example, the total costs and emission reductions achieved by each final fPM standard in table 4 of this document would also be an overestimate.

As demonstrated in the proposal, the power sector, as a whole, is achieving fPM emission rates that are well below the 0.030 lb/MMBtu standard from the 2012 Final MATS Rule, with the exception of a few outlier facilities. The EPA estimates that only one facility (out of the 151 evaluated coal-fired facilities), which does not have the most modern PM pollution controls and has been unable to demonstrate an ability to meet a lower fPM limit, will be required to install the most-costly upgrade to meet the revised standards, which significantly drives up the cost of this final rule. However, the higher costs for one facility to install demonstrated improvements to its control technology should not prevent the EPA from establishing achievable standards for the sector under the EPA's CAA section 112(d)(6) authority. Instead, the EPA finds that it is consistent with its CAA section 112(d)(6) authority to consider the performance of the industry at large. The average fPM emissions of the industry demonstrate the technical feasibility of higher emitting facilities to meet the new standard and shows there are proven technologies that if installed at these units will allow them to significantly lower fPM and non-Hg HAP metals emissions.

In this rulemaking, the EPA also determined not to finalize a more stringent standard for fPM emissions, such as a limit of 0.006 lb/MMBtu or lower, which the EPA took comment on in the 2023 Proposal. The EPA declines to finalize an emission standard of 0.006 lb/MMBtu or lower primarily due to technical limitations in using PM CEMS for compliance demonstration purposes described in the next section. The EPA has determined that a fPM emission standard of 0.010 lb/MMBtu is the lowest that would also allow the use of PM CEMS for compliance demonstration. Additionally, the EPA also considered the overall higher costs associated with a more stringent standard as compared to the final standard, which the EPA considered under the technology review.

Additionally, compliance with a fPM emission limit of 0.006 lb/MMBtu could only be demonstrated using periodic stack testing that would require test run durations longer than 4 hours [57] and would not provide the source, the public, and regulatory authorities with continuous, transparent data for all periods of operation. Establishing a fPM limit of 0.006 lb/MMBtu while maintaining the current compliance demonstration flexibilities of quarterly ''snapshot'' stack testing would, theoretically, result in greater emission reductions; however, the measured emission rates are only representative of rates achieved at optimized conditions at full load. While coal-fired EGUs have historically provided baseload generation, they are being dispatched much more as load following generating sources due to the shift to more available and cheaper natural gas and renewable generation. As such, traditional generation assets—such as coal-fired EGUs—will likely continue to have more startup and shutdown periods, more periods of transient operation as load following units, and increased operation at minimum levels, all of which can produce higher PM emission rates. Maintaining the status quo with quarterly stack testing will likely mischaracterize emissions during these changing operating conditions. Thus, while a fPM emission limit of 0.006 lb/MMBtu paired with use of quarterly stack testing may appear to be more stringent than the 0.010 lb/MMBtu standard paired with use of PM CEMS that the EPA is finalizing in this rule, there is no way to confirm emission reductions during periods in between quarterly tests when emission rates may be higher. Therefore, the Agency is finalizing a fPM limit of 0.010 lb/MMBtu with the use of PM CEMS as the only means of compliance demonstration. The EPA has determined that this combination of fPM limit and compliance demonstration represents the most stringent available option taking into account the statutory considerations.

The EPA also determined not to finalize a fPM standard of 0.015 lb/MMBtu, which the EPA took comment on in the 2023 Proposal, because the EPA determined that a standard of 0.010 lb/MMBtu is appropriate for the reasons discussed above.

In this rule, the EPA is also reaching a different conclusion from the 2020 Technology Review with respect to the fPM emission standard and requirements to utilize PM CEMS. As discussed in section II.D. above, the 2020 Technology Review did not consider developments in the cost and effectiveness of proven technologies to control fPM as a surrogate for non-Hg HAP metals emissions, nor did the EPA evaluate the current performance of emission reduction control equipment and strategies at existing MATS-affected EGUs. In this rulemaking, in which the EPA reviewed the findings of the 2020 Technology Review, the Agency determined there are important developments regarding the emissions performance of the coal-fired EGU fleet, and the costs of achieving that performance that are appropriate for the EPA to consider under its CAA section 112(d)(6) authority, and which are the basis for the revised emissions standards the EPA is promulgating through this final rule.

The 2012 MATS Final Rule contains emission limits for both individual and total non-Hg HAP metals (*e.g.,* lead, arsenic, chromium, nickel, and cadmium), as well as emission limits for fPM. Those non-Hg HAP metals

[56] This is a fact which Congress recognized in requiring the EPA to first determine whether regulation of coal-fired EGUs was ''appropriate and necessary'' under CAA section 112(n)(1)(A) before proceeding to regulate such facilities under CAA section 112's regulatory scheme.

[57] Run durations greater than 4 hours would ensure adequate sample collection and lower random error contributions to measurement uncertainty for a limit of 0.006 lb/MMBtu. The EPA aims to keep run durations as short as possible, generally at least one but no more than 4 hours in length, in order to minimize impacts to the facility (*e.g.,* overall testing campaign testing costs, employee focused attention and safety).

emission limits serve as alternative emission limits because fPM was found to be a surrogate for either individual or total non-Hg HAP metals emissions. While EGU owners or operators may choose to demonstrate compliance with either the individual or total non-Hg HAP metals emission limits, the EPA is aware of just one owner or operator who has provided non-Hg HAP metals data—both individual and total—along with fPM data, for compliance demonstration purposes. This is for a coal refuse-fired EGU with a generating capacity of 46.1 MW. Given that owners or operators of all the other EGUs that are subject to the requirements in MATS have chosen to demonstrate compliance with only the fPM emission limit, the EPA proposed to remove the total and individual non-Hg HAP metals emission limits from all existing MATS-affected EGUs and solicited comment on our proposal. In the alternative, the EPA took comment on whether to retain total and/or individual non-Hg HAP metals emission limits that have been lowered proportionally to the revised fPM limit (*i.e.,* revised lower by two-thirds to be consistent with the revision of the fPM standard from 0.030 lb/MMBtu to 0.010 lb/MMBtu).

Commenters urged the EPA to retain the non-Hg HAP metals limits, arguing it is incongruous for the EPA to eliminate the measure for the pollutants that are the subject of regulation under CAA section 112(d)(6), notwithstanding the fact that the fPM limit serves as a more easily measurable surrogate for these HAP metals. Additionally, some commenters stated that the inability to monitor HAP metals directly will significantly impair the EPA's ability to revise emission standards in the future.

After considering comments, the EPA determined to promulgate revised total and individual non-Hg HAP metals emission limits for coal-fired EGUs that are lowered proportionally to the revised fPM standard. Just as this rule requires owners or operators to demonstrate continuous compliance with fPM limits, owners or operators who choose to demonstrate compliance with these alternative limits will need to utilize approaches that can measure non-Hg HAP metals on a continuous basis—meaning that intermittent emissions testing using Reference Method 29 will not be a suitable approach. Owners or operators may petition the Administrator to utilize an alternative test method that relies on continuous monitoring (*e.g.,* multi-metal CMS) under the provisions of 40 CFR 63.7(f). The EPA disagrees with the suggestion that failure to monitor HAP metals directly could impair the ability to revise those standards in the future.

2. Rationale for the Final Compliance Demonstration Options

In the 2023 Proposal, the EPA proposed to require that coal- and oil-fired EGUs utilize PM CEMS to demonstrate compliance with the fPM standard used as a surrogate for non-Hg HAP metals. The EPA proposed the requirement for PM CEMS based on its assessment of costs of PM CEMS versus stack testing, and the many other benefits of using PM CEMS including increased transparency and accelerated identification of anomalous emissions. In particular, the EPA noted the ability for PM CEMS to provide continuous feedback on control device and plant operations and to provide EGU owners and operators, regulatory authorities, and members of nearby communities with continuous assurance of compliance with emissions limits as an important benefit. Further, the EPA explained in the 2023 Proposal that PM CEMS are currently in use by approximately one-third of the coal-fired fleet, and that PM CEMS can provide low-level measurements of fPM from existing EGUs.

After considering comments and conducting further analysis,[58] the EPA is finalizing the use of PM CEMS for compliance demonstration purposes for coal- and oil-fired EGUs pursuant to its CAA section 112(d)(6) authority. As discussed in section IV.D.1. above, Congress intended for CAA section 112 to achieve significant reductions in HAP, which it recognized as particularly harmful pollutants. The EPA finds that the benefits of PM CEMS to provide real-time information to owners and operators (who can promptly address any problems with emissions control equipment), to regulators, to adjacent communities, and to the general public, further Congress's goal to ensure that emission reductions are consistently maintained. The EPA determined not to require PM CEMS for existing IGCC EGUs, described in section VI.D., due to technical issues calibrating CEMS on these types of EGUs due to the difficulty in preparing a correlation range because these EGUs are unable to de-tune their fPM controls and their existing emissions are less than one-tenth of the final emission limit. Further, the EPA finds additional authority to require the use of PM CEMS under CAA section 114(a)(1)(C), which allows that the EPA may require a facility that ''may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this chapter'' to ''install, use, and maintain such monitoring equipment'' on a ''on a one-time, periodic or continuous basis.'' 114(a)(1)(C).

From the EPA's review of PM CEMS, the Agency determined that a fPM standard of 0.010 lb/MMBtu with adjusted QA criteria—used to verify consistent correlation of CEMS data initially and over time—is the lowest fPM emission limit possible at this time with use of PM CEMS.[59] PM CEMS correlated using these values will ensure accurate measurements—either above, at, or below this emission limit. As discussed in section IV.D.1. above, one of the reasons the EPA determined not to finalize a more stringent standard for fPM is because it would prove challenging to verify accurate measurement of fPM using PM CEMS. Specifically, as mentioned in the *Suitability of PM CEMS Use for Compliance Determination for Various Emission Levels,* memorandum, available in the docket, no fPM standard more stringent than 0.010 lb/MMBtu with adjusted QA criteria is expected to have acceptable passing rates for the QA checks or acceptable random error for reference method testing.

At proposal, the EPA estimated that the EUAC of PM CEMS was $60,100 (88 FR 24873). Based on comments the EPA received on the costs and capabilities of PM CEMS and additional analysis the EPA conducted, the EPA determined that the revised EUAC of PM CEMS is higher than estimated at proposal. The EPA now estimates that the EUAC of non-beta gauge PM CEMS is $72,325, which is 17 percent less than what was estimated for the 2012 MATS Final Rule. That amount is somewhat greater than the revised estimated costs of infrequent emission testing (generally quarterly)—the revised average estimated costs of such infrequent emissions testing using EPA Method 5I[60] is $60,270.[61]

In choosing a compliance demonstration requirement, the EPA considers multiple factors, including

[58] The EPA explains additional analyses of PM CEMS in the memos titled *Suitability of PM CEMS Use for Compliance Determination for Various Emissions Levels* and *Summary of Review of 36 PM CEMS Performance Test Reports versus PS11 and Procedure 2 of 40 CFR part 60, appendices B and F, respectively,* which are available in the docket.

[59] The EPA notes that the fPM standard [0.010 lb/MMBtu] is based on hourly averages obtained from PM CEMS over 30 boiler operating days [see 40 CFR 63.10021(b)].

[60] Method 5I is one of the EPA's reference test methods for PM. See 40 CFR part 60, appendix A.

[61] See *Revised Estimated Non-Beta Gauge PM CEMS and Filterable PM Testing Costs* memorandum, available in the docket.

costs, benefits of the compliance technique, technical feasibility and commercial availability of the compliance method, ability of personnel to conduct the compliance method, and continuity of data used to assure compliance. PM CEMS are readily available and in widespread use by the electric utility industry, as evidenced by the fact that over 100 EGUs already utilize PM CEMS for compliance demonstration purposes. Moreover, the electric utility industry and its personnel have demonstrated the ability to install, operate, and maintain numerous types of CEMS—including PM CEMS. As mentioned earlier, EGU owners and/or operators who chose PM CEMS for compliance demonstration have attested in their submitted reports to the suitability of their PM CEMS to measure at low emission levels, certifying fPM emissions lower than 0.010 lb/MMBtu with their existing correlations developed using emission levels at 0.030 lb/MMBtu. The EPA conducted a review of eight EGUs with varying fPM control devices that rely on PM CEMS that showed certified emissions ranging from approximately 0.002 lb/MMBtu to approximately 0.007 lb/MMBtu. The EPA's review analyzed 30 boiler operating day rolling averages obtained from reports posted to WebFIRE for the third quarter of 2023 from these eight EGUs.[62]

As described in the *Summary of Review of 36 PM CEMS Performance Test Reports versus PS11 and Procedure 2 of 40 CFR part 60, Appendices B and F* memorandum, available in the docket, the EPA investigated how well a sample of EGUs using PM CEMS for compliance purposes would meet initial and ongoing QA requirements at various emission limit levels, even though no change in actual EGU operation occurred. As described in the aforementioned *Suitability of PM CEMS Use for Compliance Determination for Various Emission Levels* memorandum, as the emission limit is lowered, the ability to meet both components necessary to correlate PM CEMS—acceptable random error and QA passing rate percentages—becomes more difficult. Based on this additional analysis and review, the EPA determined to finalize requirements to use PM CEMS with adjusted QA criteria and a 0.010 lb/MMBtu fPM emission limit as the most stringent limit possible with PM CEMS.

Use of PM CEMS can provide EGU owners or operators with an increased ability to detect and correct potential problems before degradation of emission control equipment, reduction or cessation of electricity production, or exceedances of regulatory emission standards. As mentioned in the *Ratio of Revised Estimated Non-Beta Gauge PM CEMS EUAC to 2022 Average Coal-Fired EGU Gross Profit* memorandum, using PM CEMS can be advantageous, particularly since their EUAC is offset if their use allows owners or operators to avoid 3 or more hours of generating downtime per year.

In deciding whether to finalize the proposal to use PM CEMS as the only compliance demonstration method for non-IGCC coal- and oil-fired EGUs, the Agency assessed the costs and benefits afforded by requiring use of only PM CEMS as compared to continuing the current compliance demonstration flexibilities (*i.e.,* allowing use of either PM CEMS or infrequent PM emissions stack testing). As mentioned above, the average annual cost for quarterly stack testing provided by commenters is about $12,000 less than the EUAC for PM CEMS. While no estimate of quantified benefits was provided by commenters, the EPA recognizes that the 35,040 15-minute values provided by a PM CEMS used at an EGU operating during a 1-year period is over 243 times as much information as is provided by quarterly testing with three 3-hour run durations. This additional, timely information provided by PM CEMS affords the adjacent communities, the general public, and regulatory authorities with assurances that emission limits and operational processes remain in compliance with the rule requirements. It also provides EGU owners or operators with the ability to quickly detect, identify, and correct potential control device or operational problems before those problems become compliance issues. When establishing emission standards under CAA section 112, the EPA must select an approach to compliance demonstration that best assures compliance is being achieved.

The continuous monitoring of fPM required in this rule provides several benefits which are not quantified in this rule, including greater certainty, accuracy, transparency, and granularity in fPM emissions information than exists today. Continuous measurement of emissions accounts for changes to processes and fuels, fluctuations in load, operations of pollution controls, and equipment malfunctions. By measuring emissions across all operations, power plant operators and regulators can use the data to ensure controls are operating properly and to assess compliance with relevant standards. Because CEMS enable power plant operators to quickly identify and correct problems with pollution control devices, it is possible that continuous monitoring could lead to lower fPM emissions for periods of time between otherwise required intermittent testing, currently up to 3 years for some units.

To illustrate the potentially substantial differences in fPM emissions between intermittent and continuous monitoring, the EPA analyzed emissions at several EGUs for which both intermittent and continuous monitoring data are available. This analysis is provided in the 2024 Technical Memo, available in the rulemaking docket. For example, one 585-MW bituminous-fired EGU, with a cold-side ESP for PM control, has achieved LEE status for fPM and is currently required to demonstrate compliance with an emission standard of 0.015 lb/MMBtu using intermittent stack testing every 3 years. In the most recent LEE compliance report, submitted on February 25, 2021, the unit submitted the result of an intermittent stack test with an emission rate of 0.0017 lb/MMBtu. In the subsequent 36 months over which this unit is currently not subject to any further compliance testing, continuous monitoring demonstrates that the fPM emission rate increased substantially. At one point, the continuously monitored 30-day rolling average emissions rate[63] was nine times higher than the intermittent stack test average, reaching the fPM LEE limit of 0.015 lb/MMBtu. In this example, the actual continuously monitored daily average emissions rate over the February 2021 to April 2023 period ranged from near-zero to 0.100 lb/MMBtu. Emissions using either the stack test average or hourly PM CEMS data were calculated for 2022 for this unit. Both approaches indicate fPM emissions well below the allowable levels for a fPM limit of 0.010 lb/MMBtu, while estimates using PM CEMS are about 2.5 times higher than the stack test estimate. Additional examples of differences between intermittent stack testing and continuous monitoring are provided in the 2024 Technical Memo, including for periods when PM CEMS data is lower

[62] See Third Quarter 2023 p.m. CEMS Thirty Boiler Operating Day Rolling Average Reports for Iatan Generating Station units 1 and 2, Missouri; Marshall Steam Station units 1 and 3, North Carolina; Kyger Creek Station unit 3, Ohio; Virginia City Hybrid Energy Center units 1 and 2, Virginia; and Ghent Generating Station unit 1, Kentucky. These reports are available electronically by searching in the WebFIRE Report Search and Retrieval portion of the Agency's WebFIRE internet website at *https://cfpub.epa.gov/webfire/reports/esearch.cfm.*

[63] The 30-day rolling average emission rate was calculated by taking daily fPM rate averages over a 30-day operating period while filtering out hourly fPM data during periods of startup and shutdown.

than the stack test averages,[64] which further illustrate real-life scenarios in which fPM emissions for compliance methods may be substantially different.

The potential reduction in fPM and non-Hg HAP metals emission resulting from the information provided by continuous monitoring coupled with corrective actions by plant operators could be sizeable over the total capacity that the EPA estimates would install PM CEMS under this rule (nearly 82 GW). Furthermore, the potential reduction in non-Hg HAP metal emissions would likely reduce exposures to people living in proximity to the coal-fired EGUs potentially impacted by the amended fPM standards. The EPA has found that populations living near coal-fired EGUs have a higher percentage of people living below two times the poverty level than the national average.

In addition to significant value of further pollution abatement, the CEMS data are transparent and accessible to regulators, stakeholders, and the public, fostering greater accountability. Transparency of EGU emissions as provided by PM CEMS, along with real-time assurance of compliance, has intrinsic value to the public and communities as well as instrumental value in holding sources accountable. This transparency is facilitated by a requirement for electronic reporting of fPM emissions data by the source to the EPA. This emissions data, once submitted, becomes accessible and downloadable—along with other operational and emissions data (*e.g.,* for SO_2, CO_2, NO_X, Hg, *etc.*) for each covered source.

On balance, the Agency finds that the benefits of emissions transparency and the continuous information stream provided by PM CEMS coupled with the ability to quickly detect and correct problems outweigh the minor annual cost differential from quarterly stack testing. The EPA is finalizing, as proposed, the use of PM CEMS to demonstrate compliance with the fPM emission standards for coal- and oil-fired EGUs (excluding IGCC units and limited-use liquid-oil-fired EGUs).

More information on the proposed technology review can be found in the 2023 Technical Memo (Document ID No. EPA–HQ–OAR–2018–0794–5789), in the preamble for the 2023 Proposal (88 FR 24854), and the 2024 Technical Memo, available in the docket. For the reasons discussed above, pursuant to CAA section 112(d)(6), the EPA is finalizing, as proposed, the use of PM CEMS (with adjusted QA criteria as a result of review of comments) for the compliance demonstration of the fPM emission standard (as a surrogate for non-Hg HAP metal) for coal- and oil-fired EGUs, and the removal of the fPM and non-Hg HAP metals LEE provisions.

V. What is the rationale for our final decisions and amendments to the Hg emission standard for lignite-fired EGUs from review of the 2020 Technology Review?

A. What did we propose pursuant to CAA section 112(d)(6) for the lignite-fired EGU subcategory?

In the 2012 MATS Final Rule, the EPA finalized a Hg emission standard of 4.0E-06 lb/MMBtu (4.0 lb/TBtu) for a subcategory of existing lignite-fired EGUs.[65] The EPA also finalized a Hg emission standard of 1.2E-06 lb/MMBtu (1.2 lb/TBtu) for coal-fired EGUs not firing lignite (*i.e.,* for EGUs firing anthracite, bituminous coal, subbituminous coal, or coal refuse); and the EPA finalized a Hg emission output-based standard for new lignite-fired EGUs of 0.040 lb/GWh and a Hg emission output-based standard for new non-lignite-fired EGUs of 2.0E-04 lb/GWh. In 2013, the EPA reconsidered the Hg emission standard for new non-lignite-fired EGUs and revised the output-based standard to 0.003 lb/GWh (see 78 FR 24075).

As explained in the 2023 Proposal, Hg emissions from the power sector have declined since promulgation of the 2012 MATS Final Rule with the installation of Hg-specific and other control technologies and as more coal-fired EGUs have retired or reduced utilization. The EPA estimated that 2021 Hg emissions from coal-fired EGUs were 3 tons (a 90 percent decrease compared to pre-MATS levels). However, units burning lignite (or permitted to burn lignite) accounted for a disproportionate amount of the total Hg emissions in 2021. As shown in table 5 in the 2023 Proposal (88 FR 24876), 16 of the top 20 Hg-emitting EGUs in 2021 were lignite-fired EGUs. Overall, lignite-fired EGUs were responsible for almost 30 percent of all Hg emitted from coal-fired EGUs in 2021, while generating about 7 percent of total 2021 megawatt-hours. Lignite accounted for 8 percent of total U.S. coal production in 2021.

Prior to the 2023 Proposal, the EPA assembled information on developments in Hg emission rates and installed controls at lignite-fired EGUs from operational and emissions information that is provided routinely to the EPA for demonstration of compliance with MATS and from information provided to the EIA. In addition, the EPA's final decisions were informed by information that was submitted as part of a CAA section 114 information survey (2022 ICR). The EPA also revisited information that was used in establishing the emission standards in the 2012 Final MATS Rule and considered information that was submitted during the public comment period for the 2023 Proposal. From that information, the EPA determined, as explained in the 2023 Proposal, that there are available cost-effective control technologies and improved methods of operation that would allow existing lignite-fired EGUs to achieve a more stringent Hg emission standard. As such, the EPA proposed a revised Hg emission standard for existing EGUs firing lignite (*i.e.,* for those in the ''units designed for low rank virgin coal'' subcategory). Specifically, the EPA proposed that such lignite-fired units must meet the same emission standard as existing EGUs firing other types of coal (*e.g.,* anthracite, bituminous coal, subbituminous coal, and coal refuse), which is 1.2 lb/TBtu (or an alternative output-based standard of 0.013 lb/GWh). The EPA did not propose to revise the Hg emission standards either for existing EGUs firing non-lignite coal or for new non-lignite coal-fired EGUs.[66]

B. How did the technology review change for the lignite-fired EGU subcategory?

The outcome of the technology review for the Hg standard for existing lignite-fired EGUs has not changed since the 2023 Proposal. However, in response to comments, the EPA expanded its review to consider additional coal compositional data and the impact of sulfur trioxide (SO_3) in the flue gas.

[64] See Case Study 2 in the 2024 Technical Memo, which shows long time periods of PM CEMS data below the most recent RRA. Note this unit uses PM CEMS for compliance with the fPM standard, so the RRA is used as an indicator of stack test results.

[65] The EPA referred to this subcategory in the final rule as ''units designed for low rank virgin coal.'' The EPA went on to specify that such a unit is designed to burn and is burning non-agglomerating virgin coal having a calorific value (moist, mineral matter-free basis) of less than 19,305 kJ/kg (8,300 Btu/lb) and that is constructed and operates at or near the mine that produces such coal. The EPA also finalized an alternative output-based emission standard of 0.040 lb/GWh. Currently, the approximately 22 units that are permitted as lignite-fired EGUs are located exclusively in North Dakota, Texas, and Mississippi.

[66] As stated in the 2023 Proposal, when proposed revisions to existing source emission standards are more stringent than the corresponding new source emission standard, the EPA proposes to revise the corresponding new source standard to be at least as stringent as the proposed revision to the existing source standard. This is the case with the Hg emission standard for new lignite-fired sources, which will be adjusted to be as stringent as the existing source standard.

C. What key comments did we receive on the Hg emission standard for lignite-fired EGUs, and what are our responses?

The Agency received both supportive and critical comments on the proposed revision to the Hg emission standard for existing lignite-fired EGUs. Some commenters agreed with the EPA's decision to not propose revisions to the Hg emission standards for non-lignite-fired EGUs, while others disagreed. Significant comments are summarized below, and the Agency's responses are provided.

Comment: Several commenters stated that industry experience confirms that stringent limits on power plant Hg emissions can be readily achieved at lower-than-predicted costs and thus should be adopted nationally through CAA section 112(d)(6). They said that at least 14 states have, for years, enforced state-based limits on power plant Hg emissions, and nearly every one of those states has imposed more stringent emission limits than those proposed in this rulemaking or in the final 2012 MATS Final Rule. The commenters said that these lower emissions limits have resulted in significant and meaningful Hg emission reductions, which have proven to be both achievable and cost-effective.

Some commenters recommended that the EPA revise the Hg limits to levels that are much more stringent than existing or proposed standards for both EGUs firing non-lignite coals and those firing lignite. They claimed that more stringent Hg emission standards are supported by developments in practices, processes, and control technologies. They pointed to a 2021 report by Andover Technology Partners, which details advances in control technologies that support more stringent Hg standards for all coal-fired EGUs.[67] These advances include advanced activated carbon sorbents with higher capture capacity at lower injection rates and carbon sorbents that are tolerant of flue gas species.

Response: The EPA has taken these comments and the referenced information into consideration when establishing the final emission standards. The EPA disagrees that the Agency should, in this final rule, revise the Hg limits for all coal-fired EGUs to levels more stringent than the current or proposed standards. The Agency did not propose in the 2023 Proposal to revise the Hg emission standard for ''not-low-rank coal units'' (*i.e.,* those EGUs that are firing on coals other than lignite) and did not suggest an emission standard for lignite-fired EGUs more stringent than the 1.2 lb/TBtu emission standard that was proposed. However, the EPA will continue to review emission standards and other rule requirements as part of routine CAA section 112(d)(6) technology reviews, which are required by statute to be conducted at least every 8 years. If we determine in subsequent CAA section 112(d)(6) technology reviews that further revisions to Hg emission standards (or to standards for other HAP or surrogate pollutants) are warranted, then we will propose revisions at that time. We discuss the rationale for the final emission standards in section V.D. of this preamble and in more detail in the 2024 Technical Memo.

Comment: Several commenters challenged the data that the EPA used in the CAA 112(d)(6) technology review. Commenters stated that the information collected by the EPA via the CAA section 114 request consisted of 17 units each submitting two 1-week periods of data and associated operational data preselected by the EPA, and that only a limited number of the EGUs reported burning only lignite. Other EGUs reported burning primarily refined coal, co-firing with natural gas, and firing or co-firing with large amounts of subbituminous coal (referencing table 7 in the 2023 Proposal). Commenters stated that if the EPA's intent was to assess the Hg control performance of lignite-fired EGUs, then the EGUs evaluated should have burned only lignite, not refined coal, subbituminous coal, or natural gas.

Response: The EPA disagrees with the commenters' argument that the Agency should have only considered emissions and operational data from EGUs that were firing only lignite. The EPA's intent was to evaluate the Hg emission control performance of units that are permitted to burn lignite and are thus subject to a Hg emission standard of 4.0 lb/TBtu. According to fuel use information supplied to EIA on form 923,[68] 13 of 22 EGUs that were designed to burn lignite utilized ''refined coal'' to some extent in 2021, as summarized in table 7 in the 2023 Proposal preamble (88 FR 24878). EIA form 923 does not specify the type of coal that is ''refined'' when reporting boiler or generator fuel use. For the technology review, the EPA assumed that the facilities utilized ''refined lignite,'' as reported in fuel receipts on EIA form 923. In any case, firing of refined lignite or subbituminous coal or co-firing with natural gas or fuel oil are considered to be Hg emission reduction strategies for a unit that is subject to an emission standard of 4.0 lb/TBtu, which was based on the use of lignite as its fuel.

In a related context, in *U.S. Sugar Corp.* v. *EPA,* the D.C. Circuit held that the EPA could not exclude unusually high performing units within a subcategory from the Agency's determination of MACT floor standards for a subcategory pursuant to CAA section 112(d)(3). 830 F.3d 579, 631–32 (D.C. Cir. 2016) (finding ''an unusually high-performing source should be considered[,]'' in determining MACT floors for a subcategory, and that ''its performance suggests that a more stringent MACT standard is appropriate.''). While the technology review at issue here is a separate and distinct analysis from the MACT floor setting requirements at issue in *U.S. Sugar* v. *EPA,* similarly here the EPA finds it is appropriate to consider emissions from all units that are permitted to burn lignite and are therefore subject to the prior Hg emission standard of 4.0 lb/TBtu and are part of the lignite-fired EGU subcategory, for the purposes of determining whether more stringent standards are appropriate under a technology review. However, while the EPA has considered the emissions performance of all units within the lignite-fired EGU subcategory, it is not the performance of units that are firing or co-firing with other non-lignite fuels that provide the strongest basis for the more stringent standard. Rather, the most convincing evidence to support the more stringent standard is that there are EGUs that are permitted to fire lignite—and are only firing lignite—that have demonstrated an ability to meet the more stringent standard of 1.2 lb/TBtu.

Comment: Several commenters claimed that, rather than using actual measured Hg concentrations in lignite that had been provided in the CAA section 114 request responses (and elsewhere), the EPA used Integrated Planning Model (IPM) data to assign inlet Hg concentrations to various lignite-fired EGUs. Some commenters asserted that the actual concentration of Hg in lignite is higher than those assumed by the EPA and that there is considerable variability in the concentration of Hg in the lignite used in these plants. As a result, the commenters claimed, the percent Hg capture needed to achieve the proposed 1.2 lb/TBtu emission standard would be higher than that assumed by the EPA in the 2023 Proposal.

[67] Analysis of PM and Hg Emissions and Controls from Coal-Fired Power Plants. Andover Technology Partners. August 19, 2021. Document ID No. EPA–HQ–OAR–2018–0794–4583.

[68] *https://www.eia.gov/electricity/data/eia923/.*

Response: In the 2023 Proposal, the EPA assumed a Hg inlet concentration (*i.e.,* concentration of Hg in the fuel) that reflected the maximum Hg content of the range of feedstock coals that the EPA assumes is available to each of the plants in the IPM. In response to comments received on the proposal, the EPA has modified the Hg inlet concentration assumptions for each unit to reflect measured Hg concentrations in lignite using information provided by commenters and other sources, including measured Hg concentrations in fuel samples from the Agency's 1998 Information Collection Request (1998 ICR). This is explained in additional detail below in section V.D.1. and in a supporting technical memorandum titled *1998 ICR Coal Data Analysis Summary of Findings.* However, this adjustment in the assumed concentration of Hg in the various fuels did not change the EPA's overall conclusion that there are available controls and improved methods of operation that will allow lignite-fired EGUs to meet a more stringent Hg emission standard of 1.2 lb/TBtu.

Comment: Some commenters claimed that the Agency failed to account for compositional differences in lignite as compared to those of other types of coal—especially in comparison to subbituminous coal.

Response: The EPA disagrees with these commenters. In the 2023 Proposal, the EPA emphasized the similarities between lignite and subbituminous coal—especially regarding the fuel properties that most impact the control of Hg. The EPA noted that lignite and subbituminous coal are both low rank coals with low halogen content and explained that the halogen content of the coal—especially chlorine—strongly influences the oxidation state of Hg in the flue gas stream and, thereby, directly influences the ability to capture and contain the Hg before it is emitted into the atmosphere. The EPA further noted that the fly ashes from lignite and subbituminous coals tend to be more alkaline (relative to that from bituminous coal) due to the lower amounts of sulfur and halogen and to the presence of a more alkaline and reactive (non-glassy) form of calcium in the ash. Due to the natural alkalinity, subbituminous and lignite fly ashes can effectively neutralize the limited free halogen in the flue gas and prevent oxidation of gaseous elemental Hg vapor (Hg^0). This lack of free halogen in the flue gas challenges the control of Hg from both subbituminous coal-fired EGUs and lignite-fired EGUs as compared to the Hg control of EGUs firing bituminous coal. The EPA noted in the 2023 Proposal, however, that control strategies and control technologies have been developed and utilized to introduce halogens to the flue gas stream, and that EGUs firing subbituminous coals have been able to meet (and oftentimes emit at emission rates that are considerably lower than) the 1.2 lb/TBtu emission standard in the 2012 MATS Final Rule. Therefore, while the EPA acknowledges that there are differences in the composition of the various coal types, there are available control technologies that allow EGUs firing any of those coal types to achieve an emission standard of 1.2 lb/TBtu. The EPA further notes that North Dakota and Texas lignites are much more similar in composition and in other properties to Wyoming subbituminous coal than either coal type is to eastern bituminous coal. Both lignite and subbituminous coal are lower heating value fuels with high alkaline content and low natural halogen. In contrast, eastern bituminous coals are higher heating value fuels with high natural halogen content and low alkalinity. But while Wyoming subbituminous coal is much more similar to lignite than it is to eastern bituminous coals, EGUs firing subbituminous coal must meet the same Hg emission standard (1.2 lb/TBtu) as EGUs firing bituminous coal. The EPA further acknowledges the differences in sulfur content between subbituminous coal and lignite and its impact is discussed in the following comment summary and response.

Comment: Some commenters claimed that the EPA did not account for the impacts of the higher sulfur content of lignite as compared to that of subbituminous coal, and that such higher sulfur content leads to the presence of additional SO_3 in the flue gas stream. The commenters noted that the presence of SO_3 is known to negatively impact the effectiveness of activated carbon for Hg control.

Response: The EPA agrees with the commenters that the Agency did not fully address the potential impacts of SO_3 on the control of Hg from lignite-fired EGUs in the 2023 Proposal. However, in response to these comments, the EPA conducted a more robust evaluation of the impact of SO_3 in the flue gas of lignite-fired EGU and determined that it does not affect our previous determination that there are control technologies and methods of operation that are available to EGUs firing lignite that would allow them to meet a Hg emission standard of 1.2 lb/TBtu—the same emission standard that must be met by EGUs firing all other types of coal. As discussed in more detail below, the EPA determined that there are commercially available advanced ''SO_3 tolerant'' Hg sorbents and other technologies that are specifically designed for Hg capture in high SO_3 flue gas environments. These advanced sorbents allow for capture of Hg in the presence of SO_3 and other challenging flue gas environments at costs that are consistent with the use of conventional pre-treated activated carbon sorbents.[69] The EPA has considered the additional information regarding the role of flue gas SO_3 on Hg control and the information on the availability of advanced ''SO_3 tolerant'' Hg sorbents and other control technologies and finds that this new information does not change the Agency's determination that a Hg emission standard of 1.2 lb/TBtu is achievable for lignite-fired EGUs.

Comment: Several commenters noted the EPA made improper assumptions to reach the conclusion that the revised Hg emissions limit is achievable and claimed that none of the 22 lignite-fired EGUs are currently in compliance with the proposed 1.2 lb/TBtu Hg emission standard and that the EPA has not shown that any EGU that is firing lignite has demonstrated that it can meet the proposed Hg emission standard.

Response: The EPA disagrees with commenters' assertion and maintains that the Agency properly determined that the proposed, more stringent Hg emission standard can be achieved, cost-effectively, using available control technologies and improved methods of operation. Further, the EPA notes that, contrary to commenters' claim, there are, in fact, EGUs firing lignite that have demonstrated an ability to meet the more stringent 1.2 lb/TBtu Hg emission standard. Twin Oaks units 1 and 2 are lignite-fired EGUs operated by Major Oak Power, LLC, and located in Robertson County, Texas. In the 2023 Proposal (see 88 FR 24879 table 8), we showed that 2021 average Hg emission rates for Twin Oaks 1 and 2 (listed in the table as Major Oak #1 and Major Oak #2) were 1.24 lb/TBtu and 1.31 lb/TBtu, respectively, which are emission rates that are just slightly above the final emission limit. Both units at Major Oak have qualified for LEE status for Hg. To demonstrate LEE status for Hg an EGU owner/operator must conduct an initial EPA Method 30B test over 30 days and follow the calculation procedures in the final rule to document a potential to emit (PTE) that is less than 10 percent of the applicable Hg emissions limit (for

[69] See Tables 8 and 9 from ''Analysis of PM and Hg Emissions and Controls from Coal-Fired Power Plants'', Andover Technology Partners (August 2021); available in the rulemaking docket at Docket ID: EPA–HQ–OAR–2018–4583.

lignite-fired EGUs this would be a rate of 0.40 lb/TBtu) *or* less than 29 lb of Hg per year. If an EGU qualifies as a LEE for Hg, then the owner/operator must conduct subsequent performance tests on an annual basis to demonstrate that the unit continues to qualify. In their most recent compliance reports [70] (dated November 14, 2023), Major Oak Power, LLC, summarized the performance testing. Between August 1 and September 19, 2023, Major Oak Power, LLC, personnel performed a series of performance tests for Hg on Twin Oaks units 1 and 2. The average Hg emissions rate for the 30-boiler operating day performance tests was 1.1 lb/TBtu for unit 1 and 0.91 lb/TBtu for unit 2. The EGUs demonstrated LEE status by showing that each of the units has a Hg PTE of less than 29 lb per year. Further, in LEE demonstration testing for the previous year (2022), Major Oak Power, LLC, found that the average Hg emissions rate for the 30-boiler operating day performance test was 0.86 lb/TBtu for unit 1 and 0.63 lb/TBtu for unit 2.

In the 2023 LEE demonstration compliance report, Twin Oaks unit 1 was described as a fluidized bed boiler that combusts lignite and is equipped with fluidized bed limestone (FBL) injection for SO_2 control, selective non-catalytic reduction (SNCR) for control of nitrogen oxides (NO_X), and a baghouse (FF) for PM control. In addition, unit 1 has an untreated activated carbon injection (UPAC) system as well as a brominated powdered activated carbon (BPAC) injection system for absorbing vapor phase Hg in the effluent upstream of the baghouse. Twin Oaks unit 2 is described in the same way.

Similarly, Red Hills units 1 and 2, located in Choctaw County, Mississippi,[71] also demonstrated 2021 annual emission rates while firing lignite from an adjacent mine of 1.33 lb/TBtu and 1.35 lb/TBtu, which are reasonably close to the proposed Hg emission standard of 1.2 lb/TBtu to demonstrate achievability. In 2022, average Hg emission rates for Red Hills unit 1 and unit 2, again while firing Mississippi lignite, were 1.73 lb/TBtu and 1.75 lb/TBtu, respectively. The EPA also notes that, as shown below in table 5, lignite mined in Mississippi has the highest average Hg content—as compared to lignites mined in Texas and North Dakota.

The performance of Twin Oaks units 1 and 2 and Red Hills Generating Facility units 1 and 2 clearly demonstrate the achievability of the proposed 1.2 lb/TBtu emission standard by lignite-fired EGUs. However, even if there were no lignite-fired EGUs that are meeting (or have demonstrated an ability to meet) the more stringent Hg emission standard, that would not mean that the more stringent emission standard was not achievable. Most Hg control technologies are ''dial up'' technologies—for example, sorbents or chemical additives have injection rates that can be ''dialed'' up or down to achieve a desired Hg emission rate. In response to the EPA's 2022 CAA section 114 information request, some responding owners/operators indicated that sorbent injection rates were set to maintain a Hg emission rate below the 4.0 lb/TBtu emission limit. In some instances, operators of EGUs reported that they were not injecting any Hg sorbent and were able to meet the less stringent emission standard. Most units that are permitted to meet a Hg emission standard of 4.0 lb/TBtu have no reason to ''over control'' since doing so by injecting more sorbent would increase their operating costs. So, it is unsurprising that many units that are permitted to fire lignite have reported Hg emission rates between 3.0 and 4.0 lb/TBtu.

While most lignite-fired EGUs have no reason to ''over control'' beyond their permitted emission standard of 4.0 lb/TBtu, Twin Oaks units 1 and 2 do have such motivation. As mentioned earlier, those sources have achieved LEE status for Hg (by demonstrating a Hg PTE of less than 29 lb/yr) and they must conduct annual performance tests to show that the units continue to qualify. According to calculations provided in their annual LEE certification, to maintain LEE status, the units could emit no more than 1.79 lb/TBtu and maintain a PTE of less than 29 lb/TBtu. So, the facilities are motivated to over control beyond 1.79 lb/TBtu (which, as described earlier in this preamble, they have consistently done).

Comment: To highlight the difference in the ability of lignite-fired and subbituminous-fired EGUs to control Hg, one commenter created a table to show a comparison between the Big Stone Plant (an EGU located in South Dakota firing subbituminous coal) and Coyote Station (an EGU located in North Dakota firing lignite). Additionally, the commenter included figures showing rolling 30-boiler operating day average Hg emission rates and the daily average ACI feed rates for Big Stone and Coyote EGUs for years 2021–2022. Their table showed that Big Stone and Coyote are similarly configured plants that utilize the same halogenated ACI for Hg control. The commenters said, however, that Coyote Station's average sorbent feed rate on a lb per million actual cubic feet (lb/MMacf) basis is more than three times higher than that for Big Stone, yet Coyote Station's average Hg emissions on a lb/TBtu basis are more than five times higher than Big Stone.

Response: The EPA agrees that the Big Stone and Coyote Station units referenced by the commenter are similarly sized and configured EGUs, with the Big Stone unit in South Dakota firing subbituminous coal and the Coyote Station unit in North Dakota firing lignite. However, there are several features of the respective units that can have an impact on the control of Hg. First, and perhaps the most significant, the Big Stone unit has a selective catalytic reduction (SCR) system installed for control of NOx. The presence of an SCR is known to enhance the control of Hg—especially in the presence of chemical additives. The Coyote Station EGU does not have an installed SCR. Further, both EGUs have a dry FGD scrubber and FF baghouse installed for SO_2/acid gas and fPM control. The average sulfur content of North Dakota lignite is approximately 2.5 times greater than that of Wyoming subbituminous coal. However, the average SO_2 emissions from the Coyote Station EGU (0.89 lb/MMBtu) were approximately 10 times higher than the SO_2 emissions from the Big Stone EGU (0.09 lb/MMBtu). The Big Stone dry scrubber/FF was installed in 2015; while the dry scrubber/FF at Coyote Station was installed in 1981—approximately 31 years earlier. So, considering the presence of an SCR—which is known to enhance Hg control—and newer and better performing downstream controls, it is unsurprising that there are differences in the control of Hg at the two EGUs. In addition, since the Coyote Station has been subject to a Hg emission standard of 4.0 lb/TBtu, there would be no reason for the operators to further optimize its control system to achieve a lower emission rate. And, as numerous commenters noted, the Hg content of North Dakota is higher than that of Wyoming subbituminous coal.

Comment: Some commenters claimed that the EPA has not adequately justified a reversal in the previous policy to establish a separate subcategory for lignite-fired EGUs.

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[70] See page 1–1 of the 2023 Compliance Reports for Twin Oaks 1 and 2 available in the rulemaking docket at EPA–HQ–OAR–2018–0794.

[71] Choctaw Generation LP leases and operates the Red Hills Power Plant. The plant supplies electricity to the Tennessee Valley Authority (TVA) under a 30-year power purchase agreement. The lignite output from the adjacent mine is 100 percent dedicated to the power plant. *https://www.purenergyllc.com/projects/choctaw-generation-lp-red-hills-power-plant/#page-content.*

Response: In developing the 2012 Final MATS Rule, the EPA examined the EGUs in the top performing 12 percent of sources for which the Agency had Hg emissions data. In examining that data, the EPA observed that there were no lignite-fired EGUs among the top performing 12 percent of sources for Hg emissions. The EPA then determined that this indicated that there is a difference in the Hg emissions from lignite-fired EGUs when compared to the Hg emissions from EGUs firing other coal types (that were represented among the top performing 12 percent). That determination was not based on any unique property or characteristic of lignite—only on the observation that there were no lignite-fired EGUs among the best performing 12 percent of sources (for which the EPA had Hg emissions data). In fact, as noted in the preamble for the 2012 Final MATS Rule, the EPA ''believed at proposal that the boiler size was the cause of the different Hg emissions characteristics.'' See 77 FR 9378.

The EPA ultimately concluded that it is appropriate to continue to base the subcategory definition, at least in part, on whether the EGUs were ''designed to burn and, in fact, did burn low rank-virgin coal'' (*i.e.,* lignite), but that it is not appropriate to continue to use the boiler size criteria (*i.e.,* the height-to-depth ratio). However, the EPA ultimately finalized the ''unit designed for low rank virgin coal'' subcategory based on the characteristics of the EGU—not on the properties of the fuel. ''We are finalizing that the EGU is considered to be in the ''unit designed for low rank virgin coal'' subcategory if the EGU: (1) meets the final definitions of ''fossil fuel-fired'' and ''coal-fired electric utility steam generating unit;'' and (2) is designed to burn and is burning non-agglomerating virgin coal having a calorific value (moist, mineral matter-free basis) of less than 19,305 kJ/kg (8,300 Btu/lb) and that is constructed and operates at or near the mine that produces such coal.'' See 77 FR 9369.

While, in the 2012 MATS Final Rule, the EPA based the lignite-fired EGU subcategory on the design and operation of the EGUs, the EPA did not attribute the observed differences in Hg emissions to any unique characteristic(s) of lignite. As the EPA clearly noted in the 2023 Proposal, there are, in fact, characteristics of lignite that make the control of Hg more challenging. These include the low natural halogen content, the high alkalinity of the fly ash, the sulfur content, the relatively higher Hg content, and the relatively higher variability of Hg content. However, as the EPA has explained, these characteristics that make the control of Hg more challenging are also found in non-lignite fuels. Subbituminous coals also have low natural halogen content and high fly ash alkalinity. Eastern and central bituminous coals also have high sulfur content. Bituminous and anthracitic waste coals (coal refuse) have very high and variable Hg content. EGUs firing any of these non-lignite coals have been subject to—and have demonstrated compliance with—the more stringent Hg emission standard of 1.2 lb/TBtu.

The EPA has found it appropriate to reverse the previous policy because the decision to subcategorize ''units designed for low rank virgin coal'' in the 2012 MATS Final Rule was based a determination that there were differences in Hg emissions from lignite-fired EGUs as compared to EGUs firing non-lignite coals. That perceived difference was based on an observation that there were no lignite-fired EGUs in the top performing 12 percent of EGUs for which the Agency had Hg emissions data and on an assumption that the perceived difference in emissions was somehow related to the design and operation of the EGU. The EPA is unaware of any distinguishing features of EGUs that were designed to burn lignite that would impact the emissions of Hg. Further, the EPA does not now view the fact that there were no lignite-fired EGUs in the population of the best-performing 12 percent of EGUs for which the Agency had Hg emissions data to represent a ''difference in emissions.''

But, on re-examination of the data, the EPA has concluded that the Hg emissions from the 2010 ICR for the lignite-fired EGUs were not clearly distinctive from the Hg emissions from EGUs firing non-lignite coal. In setting the emission standards for the 2012 MATS Final Rule, the EPA had available and useable Hg emissions data from nearly 400 coal-fired EGUs (out of the 1,091 total coal-fired EGUs operating at that time). However, the EPA only had available and useable data from nine lignite-fired EGUs with reported floor Hg emissions ranging from 1.0 to 10.9 lb/TBtu. But these were not outlier emission rates. EGUs firing bituminous coal reported Hg emissions as high as 30.0 lb/TBtu; and those firing subbituminous coal reported Hg emissions as high as 9.2 lb/TBtu.

D. What is the rationale for our final approach and decisions for the lignite-fired EGU Hg standard?

In the 2023 Proposal, the EPA proposed to determine that there are developments in available control technologies and methods of operation that would allow lignite-fired EGUs to meet a more stringent Hg emission standard of 1.2 lb/TBtu—the same Hg emission standard that must be met by coal-fired EGUs firing non-lignite coals (*e.g.,* anthracite, bituminous coal, subbituminous coal, coal refuse, *etc.*). After consideration of public comments received on the proposed revision of the Hg emission standard, the EPA continues to find that the evidence supports that there are commercially available control technologies and improved methods of operation that allow lignite-fired EGUs to meet the more stringent Hg emission standard that the EPA proposed. As noted above, lignite-fired EGUs also comprise some of the largest sources of Hg emissions within this source category and are responsible for a disproportionate share of Hg emissions relative to their generation. While previous EPA assessments have shown that current modeled exposures [of Hg] are well below the reference dose (RfD), we conclude that further reductions of Hg emissions from lignite-fired EGUs covered in this final action should further reduce exposures including for the subsistence fisher sub-population. This anticipated exposure is of particular importance to children, infants, and the developing fetus given the developmental neurotoxicity of Hg. Therefore, in this final action, the EPA is revising the Hg emission standard for lignite-fired EGUs from the 4.0 lb/TBtu standard that was finalized in the 2012 MATS Final Rule to the more stringent emission standard of 1.2 lb/TBtu, as proposed. The rationale for the Agency's final determination is provided below.

In this final rule, the EPA is also reaching a different conclusion from the 2020 Technology Review with respect to the Hg emission standard for lignite-fired EGUs. As discussed in section II.D. above, the 2020 Technology Review did not evaluate the current performance of emission reduction control equipment and strategies at existing lignite-fired EGUs. Nor did the 2020 Technology Review specifically address the discrepancy between Hg emitted from lignite-fired EGUs and non-lignite coal-fired EGUs or consider the improved performance of injected sorbents or chemical additives, or the development of SO_3-tolerant sorbents. Based on the EPA's review in this rulemaking which considered such information, the Agency determined that there are available control technologies that allow EGUs firing lignite to achieve an emission standard of 1.2 lb/TBtu,

consistent with the Hg emission standard required for non-lignite coal-fired EGUs, which the EPA is finalizing pursuant to its CAA section 112(d)(6) authority.

1. Mercury Content of Lignite

For analyses supporting the proposal, the EPA assumed ''Hg Inlet'' levels (*i.e.,* Hg concentration in inlet fuel) that are consistent with those assumed in the Agency's power sector model (IPM) and then adjusted accordingly to reflect the 2021 fuel blend for each unit. Several commenters indicated that the Hg content of lignite fuels is much higher and has greater variability than the EPA assumed.

To support the development of the NESHAP for the Coal- and Oil-Fired EGU source category, the Agency conducted a 2-year data collection effort which was initiated in 1998 and completed in 2000 (1998 ICR). The ICR had three main components: (1) identifying all coal-fired units owned and operated by publicly owned utility companies, federal power agencies, rural electric cooperatives, and investor-owned utility generating companies; (2) obtaining accurate information on the amount of Hg contained in the as-fired coal used by each electric utility steam generating unit with a capacity greater than 25 MW electric, as well as accurate information on the total amount of coal burned by each such unit; and (3) obtaining data by coal sampling and stack testing at selected units to characterize Hg reductions from representative unit configurations.

The ICR captured the origin of the coal burned, and thus provided a pathway for linking emission properties to coal basins. The 1998–2000 ICR resulted in more than 40,000 data points indicating the coal type, sulfur content, Hg content, ash content, chlorine content, and other characteristics of coal burned at coal-fired utility boilers greater than 25 MW.

Annual fuel characteristics and delivery data reported on EIA form 923 also provide continual data points on coal heat content, sulfur content, and geographic origin, which are used as a check against characteristics initially identified through the 1998 ICR.

For this final rule, the EPA re-evaluated the 1998 ICR data.[72] Specifically, the EPA evaluated the coal Hg data to characterize the Hg content of lignite, which is mined in North Dakota, Texas, and Mississippi, and to characterize by seam and by coal delivered to a specific plant.[73] The results are presented as a range of Hg content of the lignites as well as the mean and median Hg content. The EPA also compared the fuel characteristics of lignites mined in North Dakota, Texas, and Mississippi against coals mined in Wyoming (subbituminous coal), Pennsylvania (mostly upper Appalachian bituminous coal), and Kentucky (mostly lower Appalachian bituminous coal). The Agency also included in the re-evaluation, coal analyses that were submitted in public comments by North American Coal (NA Coal). In addition to the Hg content, the analysis included the heating value and the sulfur, chlorine, and ash content for each coal that is characterized.

The analysis showed that lignite mined in North Dakota had a mean Hg content of 9.7 lb/TBtu, a median Hg content of 8.5 lb/TBtu, and a Hg content range of 2.2 to 62.1 lb/TBtu. Other characteristics of North Dakota lignite include an average heating value (dry basis) of 10,573 Btu/lb, an average sulfur content of 1.19 percent, an average ash content of 13.5 percent, and an average chlorine content of 133 parts per million (ppm). In response to comments on the 2023 Proposal, for analyses supporting this final action, the EPA has revised the assumed Hg content of lignite mined in North Dakota to 9.7 lb/TBtu versus the 7.81 lb/TBtu assumed in the 2023 Proposal.

Similarly, the analysis showed that lignite mined in Texas had a mean and median Hg content of 25.0 lb/TBtu and 23.8 lb/TBtu, respectively, and a Hg content range from 0.7 to 92.0 lb/TBtu. Other characteristics include an average heating value (dry basis) of 9,487 Btu/lb, an average sulfur content of 1.42 percent, an average ash content of 24.6 percent, and an average chlorine content of 233 ppm. In response to comments on the 2023 Proposal, for analyses supporting this final action, the EPA has revised the assumed Hg content of lignite mined in Texas to 25.0 lb/TBtu versus the range of 14.65 to 14.88 lb/TBtu that was assumed for the 2023 Proposal.

Lignite mined in Mississippi had the highest mean Hg content at 34.3 lb/TBtu and the second highest median Hg emissions rate, 30.1 lb/TBtu. The Hg content ranged from 3.6 to 91.2 lb/TBtu. Lignite from Mississippi had an average heating value (dry basis) of 5,049 Btu/lb and a sulfur content of 0.58 percent. In response to comments submitted on the 2023 Proposal, for analyses supporting this final action, the EPA assumed a Hg content of 34.3 lb/TBtu for lignite mined in Mississippi versus the 12.44 lb/TBtu assumed for the proposal.

The EPA 1998 ICR dataset did not contain information on lignite from Mississippi, which resulted in a smaller number of available data points (227 in Mississippi lignite versus 864 for North Dakota lignite and 943 for Texas lignite). Table 5 of this document more fully presents the characteristics of lignite from North Dakota, Texas, and Mississippi.

[72] Technical Support Document ''*1998 ICR Coal Data Analysis Summary of Findings*'' available in the rulemaking docket at EPA–HQ–OAR–2018–0794.

[73] In 2022, over 99 percent of all lignite was mined in North Dakota (56.2 percent), Texas (35.9 percent), and Mississippi (7.1 percent). Small amounts (less than 1 percent) of lignite were also mined in Louisiana and Montana. See Table 6. ''Coal Production and Number of Mines by State and Coal Rank'' from EIA Annual Coal Report, available at *https://www.eia.gov/coal/annual/.*

Table 5. Characteristics of Lignite mined in North Dakota, Texas, and Mississippi from the EPA 1998 ICR Dataset

	North Dakota	Texas	Mississippi
Number of data points	864	943	227
Range of Hg content (lb/TBtu)	2.2 – 62.1	0.7 – 92.0	3.6 – 91.2
Mean Hg content (lb/TBtu)	9.7	25.0	34.3
Median Hg content (lb/TBtu)	8.5	23.8	30.1
Heating value average (Btu/lb, dry)	10,573	9,486	5,049
Sulfur content average (%, dry)	1.12	1.42	0.58
Ash content average (%, dry)	13.54	24.60	N/A
Chlorine content average (ppm, dry)	133	232	N/A

Coals mined in Kentucky, Pennsylvania, and Wyoming were also analyzed for comparison. The types of coal (all non-lignite) included bituminous, bituminous-high sulfur, bituminous-low sulfur, subbituminous, anthracite, waste anthracite, waste bituminous, and petroleum coke. Bituminous coal accounted for 92 percent of the data points from Kentucky and 75 percent of the data points from Pennsylvania. Subbituminous coal accounted for 96 percent of the data points from Wyoming.

Bituminous coals from Kentucky had a mean Hg emissions content of 7.2 lb/TBtu (ranging from 0.7 to 47.4 lb/TBtu), an average heating value (dry basis) of 13,216 Btu/lb, an average sulfur content of 1.43 percent, an average ash content of 10.69 percent, and an average chlorine content of 1,086 ppm.

Bituminous coals from Pennsylvania had a mean Hg emissions rate of 14.5 lb/TBtu (ranging from 0.1 to 86.7 lb/TBtu), an average heating value (dry basis) of 13,635 Btu/lb, an average sulfur content of 1.88 percent, an average ash content of 10.56 percent, and an average chlorine content of 1,050 ppm.

Subbituminous coals from Wyoming had a mean Hg rate of 5.8 lb/TBtu, an average heating value (dry basis) of 12,008 Btu/lb, an average sulfur content of 0.44 percent, an average ash content of 7.19 percent, and an average chlorine content of 127 ppm. Table 6 of this document shows the characteristics of bituminous coal from Kentucky and Pennsylvania and subbituminous coal from Wyoming.

Table 6. Characteristics of Bituminous and Subbituminous Coals mined in Kentucky, Pennsylvania, and Wyoming from the EPA 1998 ICR Dataset

	Kentucky (Bituminous)	Pennsylvania (Bituminous)	Wyoming (Subbituminous)
Number of data points	5,340	3,072	6,467
Range of Hg content (lb/TBtu)	0.7 – 47.4	0.1 – 86.7	0.7 – 40.7
Mean Hg content (lb/TBtu)	7.2	14.5	5.8
Median Hg content (lb/TBtu)	6.7	9.7	2.4
Heating value average (Btu/lb, dry)	13,216	13,635	12,008
Sulfur content average (%, dry)	1.43	1.88	0.44
Ash content average (%, dry)	10.69	10.56	7.19
Chlorine content average (ppm, dry)	1,086	1,050	127

Several commenters claimed that one of the factors that contributes to the challenge of controlling Hg emissions from EGUs firing lignite is the variability of the Hg content in lignite. However, as can be seen in table 5 and table 6 of this document, all coal types examined by the EPA contain a variable content of Hg. The compliance demonstration requirements in the 2012 MATS Final Rule were designed to accommodate the variability of Hg in coal by requiring compliance with the respective Hg emission standards over a 30-operating-day rolling average period. When examining the Hg emissions for EGUs firing on the various coal types (including those firing Wyoming subbituminous coal, which has the lowest mean and median Hg content and the narrowest range of Hg content), daily emissions often exceed the applicable emission standard (sometimes considerably). However, averaging emissions over a rolling 30-operating-day period effectively dampens the impacts of fuel Hg content

variability. For example, in figure 1 (a graph) of this document, the 2022 Hg emissions from Dave Johnston unit BW41, a unit firing subbituminous coal, are shown. The graph shows both the daily Hg emissions and the 30-operating-day rolling average Hg emissions. As can be seen in the graph, the daily Hg emissions very often exceed the 1.2 lb/TBtu emission rate; however, the 30-operating-day rolling average is consistently below the emission limit (the annual average emission rate is 0.9 lb/TBtu).

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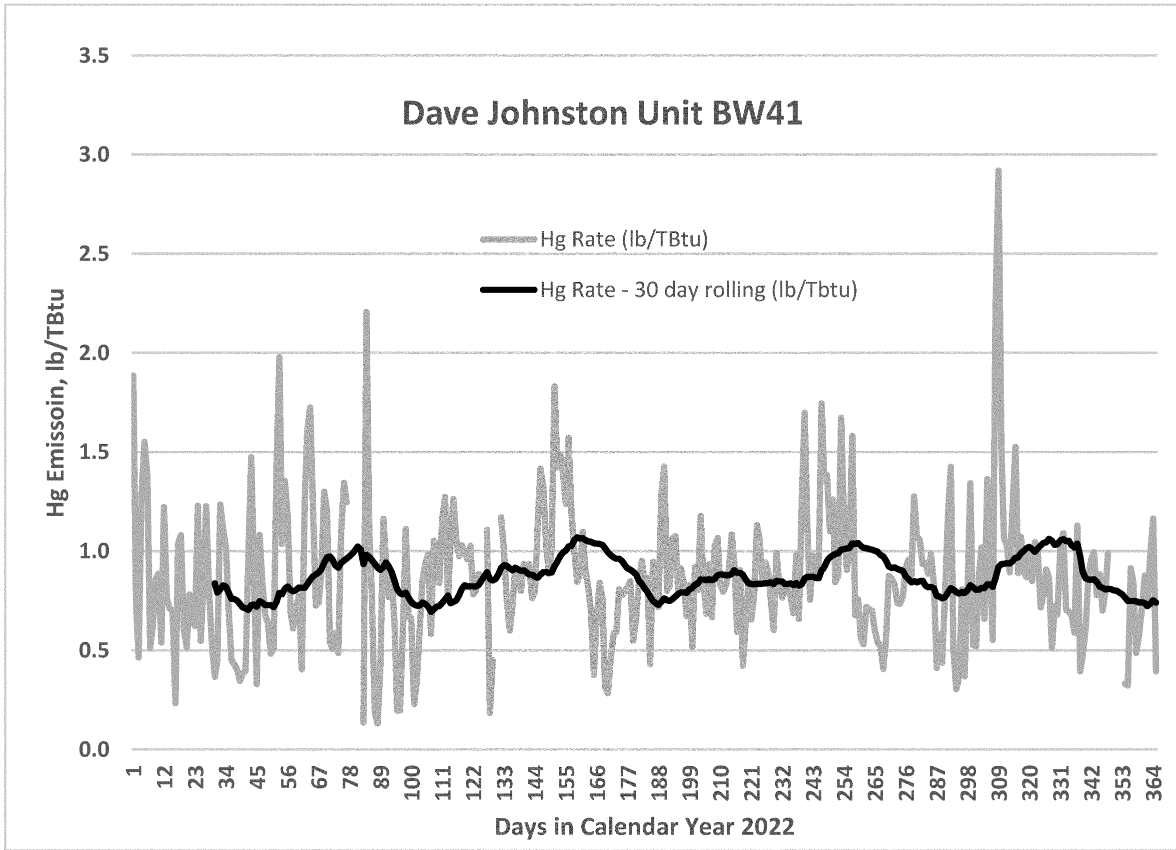

Figure 1. 2022 Daily and 30-Day Rolling Average Hg Emission Rates (lb/TBtu)

From Dave Johnston Unit BW41, a subbituminous-fired EGU in Wyoming.

A similar effect can be seen with the 2022 daily and 30-operating-day rolling average Hg emissions from Leland Olds unit 1, an EGU firing North Dakota lignite, shown in figure 2 of this document.

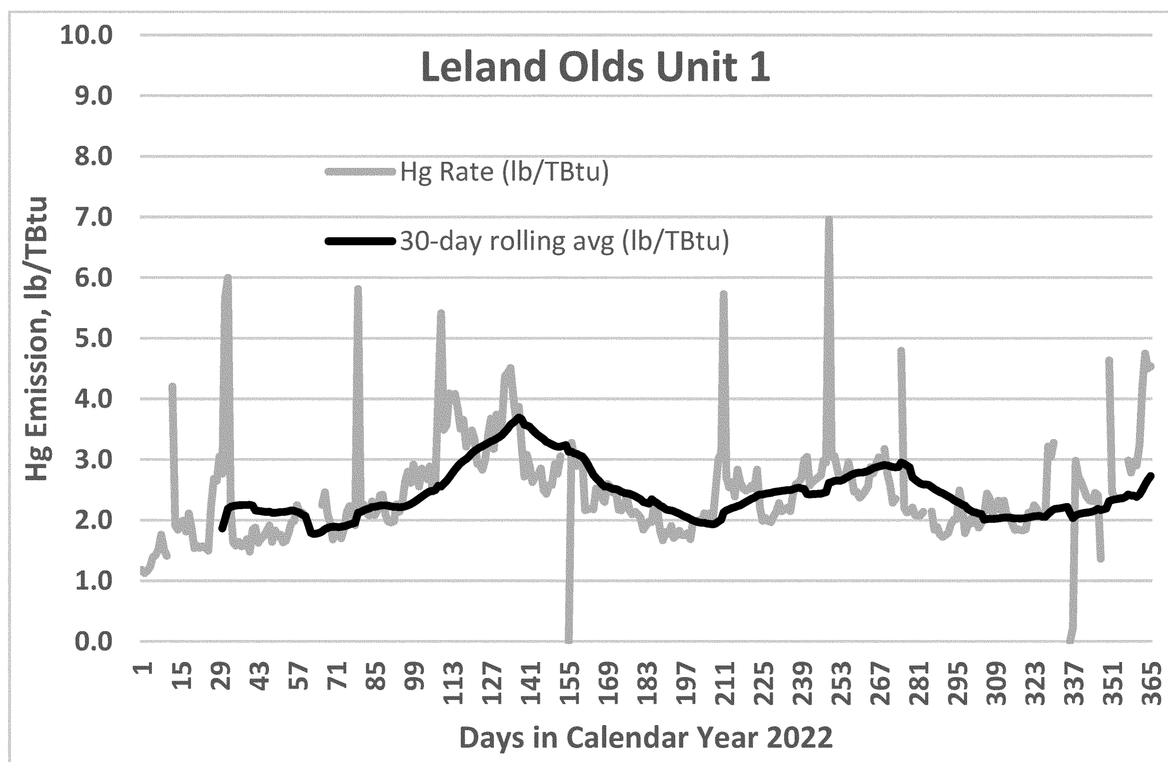

Figure 2. Daily and 30-Day Rolling Average Hg Emission Rates (lb/TBtu) from Leland Olds Unit 1, lignite-fired EGU in North Dakota.

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As with the EGU firing subbituminous coal, the daily Hg emissions very often exceed the emission limit (in this case 4.0 lb/TBtu); however, the 30-operating-day rolling average is consistently below the applicable emission limit (the 2022 annual average emission rate for Leland Olds unit 1 is 2.3 lb/TBtu).

2. The Impact of Halogen Content of Lignite on Hg Control

In the 2023 Proposal, the EPA explained that during combustion of coal, the Hg contained in the coal is volatilized and converted to Hg^0 vapor in the high-temperature regions of the boiler. Hg^0 vapor is difficult to capture because it is typically nonreactive and insoluble in aqueous solutions. However, under certain conditions, the Hg^0 vapor in the flue gas can be oxidized to divalent Hg (Hg^{2+}). The Hg^{2+} can bind to the surface of solid particles (*e.g.,* fly ash, injected sorbents) in the flue gas stream, often referred to as ''particulate bound Hg'' (Hg_p) and be removed in a downstream PM control device. Certain oxidized Hg compounds that are water soluble may be further removed in a downstream wet scrubber. The presence of chlorine in gas-phase equilibrium favors the formation of mercuric chloride ($HgCl_2$) at flue gas cleaning temperatures. However, Hg^0 oxidation reactions are kinetically limited as the flue gas cools, and as a result Hg may enter the flue gas cleaning device(s) as a mixture of Hg^0, Hg^{2+} compounds, and Hg_p.

This partitioning into various species of Hg has considerable influence on selection of Hg control approaches. In tables 5 and 6 of this document, the chlorine content of bituminous coals mined in Kentucky and Pennsylvania averaged 1,086 ppm and 1,050 ppm, respectively. In comparison, the average chlorine content of Wyoming subbituminous coal is 127 ppm; while the chlorine contents of lignite mined in North Dakota and Texas are 133 ppm and 232 ppm, respectively. In general, because of the presence of higher amounts of halogen (especially chlorine) in bituminous coals, most of the Hg in the flue gas from bituminous coal-fired boilers is in the form of Hg^{2+} compounds, typically $HgCl_2$, and is more easily captured in downstream control equipment. Conversely, both subbituminous coal and lignite have lower natural halogen content compared to that of bituminous coals, and the Hg in the flue gas from boilers firing those fuels tends to be in the form of Hg^0 and is more challenging to control in downstream control equipment.

While some bituminous coal-fired EGUs require the use of additional Hg-specific control technology, such as injection of a sorbent or chemical additive, to supplement the control that these units already achieve from criteria pollutant control equipment, these Hg-specific control technologies are often required as part of the Hg emission reduction strategy at EGUs that are firing subbituminous coal or lignite. As described above, the Hg in the flue gas for EGUs firing subbituminous coal or lignite tends to be in the nonreactive Hg^0 vapor phase due to lack of available free halogen to promote the oxidation reaction. To alleviate this challenge, activated carbon and other sorbent providers and control technology vendors have developed methods to introduce halogen into the flue gas to improve the control of Hg emissions from EGUs firing subbituminous coal and lignite. This is primarily through the injection of pre-halogenated (often pre-brominated) activated carbon sorbents or through the injections of halogen-containing chemical additives along with conventional sorbents. In the

2022 CAA section 114 information collection, almost all the lignite-fired units reported use of some sort of halogen additive or injection as part of their Hg control strategy by using refined coal (which typically has added halogen), bromide or chloride chemical additives, pre-halogenated sorbents, and/or oxidizing agents. Again, low chlorine content in the fuel is a challenge that is faced by EGUs firing either subbituminous coals or lignite, and EGUs firing subbituminous coal have been subject to a Hg emission standard of 1.2 lb/TBtu since the MATS rule was finalized in 2012.

3. The Impact of SO_3 on Hg Control

Some commenters noted that the EPA did not account for the impacts of the higher sulfur content of lignite as compared to that of subbituminous coal, and that such higher sulfur content leads to the presence of additional SO_3 in the flue gas stream. As shown in table 5 and table 6 of this document, while the halogen content of subbituminous coal and lignite is similar, the average sulfur content of lignite is more like that of bituminous coal mined in Kentucky and Pennsylvania.

During combustion, most of the sulfur in coal is oxidized into SO_2, and only a small portion is further oxidized to SO_3 in the boiler. In response to environmental requirements, many EGUs have installed SCR systems for NO_X control and FGD systems for SO_2 control. One potential consequence of an SCR retrofit is an increase in the amount of SO_3 in the flue gas downstream of the SCR due to catalytic oxidation of SO_2. Fly ash and condensed SO_3 are the major components of flue gas that contribute to the opacity of a coal plant's stack emissions and the potential to create a visible sulfuric acid ''blue plume.'' In addition, higher SO_3 levels can adversely affect many aspects of plant operation and performance, including corrosion of downstream equipment and fouling of the air preheater (APH). This is primarily an issue faced by EGUs firing bituminous coal. EGUs fueled by subbituminous coal and lignite do not typically have the same problem with blue plume formation. Of the EGUs that are designed to fire lignite, only Oak Grove units 1 and 2, located in Texas, have an installed SCR for NO_X control. Several lignite-fired EGUs utilize SNCR systems for NO_X control, which are less effective for NO_X control as compared to SCR systems. Several commenters claimed that SCR is not a viable NO_X control technology for EGUs firing North Dakota lignite because of catalyst fouling from the high sodium content of the fuel and resulting fly ash.

Coal fly ash is typically classified as acidic (pH less than 7.0), mildly alkaline (pH greater than 7.0 to 9.0), or strongly alkaline (pH greater than 9.0). The pH of the fly ash is usually determined by the calcium/sulfur ratio and the amount of halogen. The ash from bituminous coals tends to be acidic due to the relatively higher sulfur and halogen content and the glassy (nonreactive) nature of the calcium present in the ash. Conversely, the ash from subbituminous coals and lignite tends to be more alkaline due to the lower amounts of sulfur and halogen and a more alkaline and reactive (non-glassy) form of calcium—and, as noted by commenters—the presence of sodium compounds in the ash. The natural alkalinity of the subbituminous and lignite fly ash may effectively neutralize the limited free halogen in the flue gas and prevent oxidation of the Hg^0. However, the natural alkalinity also helps to minimize the impact of SO_3, because a common control strategy for SO_3 is the injection of alkaline sorbents (dry sorbent injection, DSI).

Still, as commenters correctly noted, the presence of SO_3 in the flue gas stream is also known to negatively impact the effectiveness of sorbent injection for Hg control. This impact has been known for some time, and control technology researchers and vendors have developed effective controls and strategies to minimize the impact of SO_3.[74] As noted above, coal-fired EGUs utilizing bituminous coal—which also experience significant rates of SO_3 formation in the flue gas stream—have also successfully demonstrated the application of Hg control technologies to meet a standard of 1.2 lb/TBtu.

The AECOM patented SBS Injection™ (''sodium-based solution'') technology has been developed for control of SO_3, and co-control of Hg has also been demonstrated. A sodium-based solution is injected into the flue gas, typically ahead of the APH or, if present, the SCR. By removing SO_3 prior to these devices, many of the adverse effects of SO_3 can be successfully mitigated. AECOM has more recently introduced their patented HBS Injection™ technology for effective Hg oxidation and control.[75] This new process injects halogen salt solutions into the flue gas, which react in-situ to form halogen species that effectively oxidize Hg. The HBS Injection™ can be co-injected with the SBS Injection™ for effective SO_3 control and Hg oxidation/control.

Other vendors also offer technologies to mitigate the impact of SO_3 on Hg control from coal combustion flue gas streams. For example, Calgon Carbon offers their ''sulfur tolerant'' Fluepac ST, which is a brominated powdered activated carbon specially formulated to enhance Hg capture in flue gas treatment applications with elevated levels of SO_3.[76] In testing in a bituminous coal combustion flue gas stream containing greater than 10 ppm SO_3, the Fluepac ST was able to achieve greater than 90 percent Hg control at injection rates of a third or less as compared to injection rates using the standard brominated sorbent.

Babcock & Wilcox (B&W) offers dry sorbent injection systems that remove SO_3 before the point of activated carbon sorbent injection to mitigate the impact of SO_3.[77] Midwest Energy Emissions Corporation (ME_2C) offers ''high-grade sorbent enhancement additives—injected into the boiler in minimal amounts'' that work in conjunction with proprietary sorbent products to ensure maximum Hg capture. ME_2C claims that their Hg control additives and proprietary sorbent products are ''high-sulfur-tolerant and SO_3-tolerant sorbents.'' [78]

Cabot Norit Activated Carbon is the largest producer of powdered activated carbon worldwide.[79] Cabot Norit offers different grades of their DARCO® powdered activated carbon (PAC) for Hg removal at power plants. These grades include non-impregnated PAC which are ideal when most of the Hg is in the oxidized state; impregnated PAC for removing oxidized and Hg^0 from flue gas; special impregnated PAC used in conjunction with DSI systems (for control of acid gases); and special impregnated ''sulfur resistant'' PAC for flue gases that contains higher concentrations of acidic gases like SO_3.

[74] The mention of specific products by name does not imply endorsement by the EPA. The EPA does not endorse or promote any particular control technology. The EPA mentions specific product names here to emphasize the broad range of products and vendors offering sulfur tolerant Hg control technologies.

[75] *https://www.aecom.com/wp-content/uploads/2019/07/10_EUEC_P_PT_Brochure_HBS_InjectionTechnology_20160226_singles.pdf.*

[76] *https://www.calgoncarbon.com/app/uploads/DS-FLUEST15-EIN-E1.pdf.*

[77] *https://www.babcock.com/assets/PDF-Downloads/Emissions-Control/E101-3200-Mercury-and-HAPs-Emissions-Control-Brochure-Babcock-Wilcox.pdf.*

[78] ME2C 2016 Corporate Brochure, available in the rulemaking docket at EPA–HQ–OAR–2018–0794.

[79] *https://norit.com/application/power-steel-cement/power-plants.*

Similarly, ADA–ES offers FastPAC™ Platinum 80,[80] an activated carbon sorbent that was specifically engineered for SO_3 tolerance and for use in applications where SO_3 levels are high. So, owner/operators of lignite-fired EGUs can choose from a range of technologies and technology providers that offer Hg control options in the presence of SO_3. The EPA also notes that SO_3 is more often an issue with EGUs firing eastern bituminous coal—as those coals typically have higher sulfur content and lower ash alkalinity. Those bituminous coal-fired EGUs are subject to—and have demonstrated compliance with—an emission standard of 1.2 lb/TBtu.

[80] *https://www.advancedemissionssolutions.com/ADES-Investors/ada-products-and-services/default.aspx.*

4. Cost Considerations for the More Stringent Hg Emission Standard

From the 2022 CAA section 114 information survey, most lignite-fired EGUs utilized a control strategy that included sorbent injection coupled with chemical additives (usually halogens). In the beyond-the-floor analysis in the 2012 MATS Final Rule, we noted that the results from various demonstration projects suggested that greater than 90 percent Hg control can be achieved at lignite-fired units using brominated activated carbon sorbents at an injection rate of 2.0 lb/MMacf (*i.e.,* 2.0 pounds of sorbent injected per million actual cubic feet of flue gas) for units with installed FFs for PM control and at an injection rate of 3.0 lb/MMacf for units with installed ESPs for PM control. As shown in table 7 of this document, all units (in 2022) would have needed to control their Hg emissions to 95 percent or less to meet an emission standard of 1.2 lb/TBtu. Based on this, we expect that the units could meet the final, more stringent, emission standard of 1.2 lb/TBtu by utilizing brominated activated carbon at the injection rates suggested in the beyond-the-floor memorandum from the 2012 MATS Final Rule.

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Table 7. Measured Hg Emissions and Estimated Control Performance of Lignite-Fired EGUs in 2022

EGU	Estimated 2022 Hg Inlet[81] (lb/TBtu)	Estimated Hg Control (%) at 4.0 lb/TBtu	Estimated Hg Control (%) at 1.2 lb/TBtu	2022 Measured Hg Emissions (lb/TBtu)	Estimated 2022 Hg Control (%)
North Dakota EGUs					
Antelope Valley 1	11.2	64.4	89.3	3.03	73.0
Antelope Valley 2	11.2	64.4	89.3	3.00	73.3
Coal Creek 1	9.7	58.7	87.6	3.43	64.6
Coal Creek 2	9.7	58.7	87.6	3.87	60.1
Coyote 1	9.7	58.6	87.6	2.28	76.4
Leland Olds 1	11.3	64.5	87.6	2.34	79.3
Leland Olds 2	11.3	64.5	87.6	3.10	72.5
Milton R Young 1	9.7	58.6	87.6	3.02	68.8
Milton R Young 2	9.7	58.6	87.6	3.00	69.0
Spiritwood Station 1	9.2	56.5	87.0	2.14	76.8
Texas and Mississippi EGUs					
Limestone 1*	5.8	30.7	79.2	0.78	86.5
Limestone 2*	5.8	30.7	79.2	0.85	85.3
Major Oak Power 1	24.9	84.0	95.2	0.86	96.5
Major Oak Power 2	24.9	84.0	95.2	0.63	97.5
Martin Lake 1*	5.8	31.0	79.3	1.53	73.6
Martin Lake 2*	5.8	31.0	79.3	2.50	56.9
Martin Lake 3*	5.8	31.0	79.3	2.36	59.3
Oak Grove 1	24.8	83.9	95.2	2.53	89.8
Oak Grove 2	24.8	83.9	95.2	2.23	91.0
San Miguel 1	28.9	86.2	95.9	3.03	89.5
Red Hills 1	22.9	82.6	94.8	1.73	92.5
Red Hills 2	22.9	82.6	94.8	1.75	92.4

* These units, which are permitted to fire lignite, utilized primarily subbituminous coal in 2022.

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To determinethe cost effectiveness of that strategy, we calculated the cost per lb of Hg controlled for a model 800 MW lignite-fired EGU, as described in the 2024 Technical Memo. We calculated the cost of injecting brominated activated carbon sorbent at injection rates suggested in the beyond-the-floor memorandum from the 2012 MATS Final Rule (*i.e.,* 2.0 lb/MMacf and 3.0 lb/MMacf) and at a larger injection rate of 5.0 lb/MMacf to achieve an emission rate of 1.2 lb/TBtu. We also calculated the incremental cost to meet the more stringent emission rate of 1.2 lb/TBtu versus the cost to meet an emission rate of 4.0 lb/TBtu using non-brominated activated carbon sorbent at an emission rate of 2.5 lb/MMacf. For an 800 MW lignite-fired EGU, the cost effectiveness of using the brominated carbon sorbent at an injection rate of 3.0 lb/MMacf was $3,050 per lb of Hg removed while the incremental cost effectiveness was $10,895 per incremental lb of Hg removed at a brominated activated carbon injection rate of 3.0 lb/MMacf. The cost effectiveness of using the brominated carbon sorbent at an injection rate of 5.0 lb/MMacf was $5,083 per lb of Hg removed while the incremental cost effectiveness was $28,176 per incremental lb of Hg removed. The actual cost effectiveness is likely lower than either of these estimates as it is unlikely that sources will need to inject brominated activated carbon sorbent at rates as high as 5.0 lb/MMacf (from the 2022 CAA section 114 information collection, the Oak Grove units were injecting less than 0.5 lb/MMacf) and is either well below or reasonably consistent with the cost effectiveness that the EPA has found to

[81] Estimated Hg inlet values are based on fuel use data from EIA Form 923 and assumed Hg content of coals as shown in Table 5 and Table 6 in this preamble.

be acceptable in previous rulemakings for Hg controls.[82]

In addition to cost effectiveness, the EPA finds that the revised Hg emission standard for lignite-fired units appropriately considers the costs of controls, both total costs and as a fraction of total revenues, along with other factors that the EPA analyzed pursuant to its CAA section 112(d)(6) authority. Similar to the revised fPM emission standard (as a surrogate for non-Hg HAP metals) discussed in section IV. of this preamble, the EPA anticipates that the total costs of controls (which consists of small annual incremental operating costs) to comply with the revised Hg emission standard will be a small fraction of the total revenues for the impacted lignite-fired units. The EPA expects that sources will be able to meet the revised emission standard using existing controls (*e.g.,* using existing sorbent injection equipment), and that significant additional capital investment is unlikely. If site-specific conditions necessitate minor capital improvements to the ACI control technology, it is important to note that any incremental capital would be small relative to ongoing sorbent costs accounted for in this analysis. Further, in addition to the EPA finding that costs are reasonable for the revised Hg standard for lignite-fired EGUs, the revised standard will also bring these higher emitting sources of Hg emission in line with Hg emission rates that are achieved by non-lignite-fired EGUs. As mentioned earlier in this preamble, in 2021, lignite-fired EGUs were responsible for almost 30 percent of all Hg emitted from coal-fired EGUs while generating about 7 percent of total megawatt-hours.

Despite the known differences in the quality and composition of the various coal types, the EPA can find no compelling reasons why EGUs that are firing lignite cannot meet the same emission limit as EGUs that are firing other types of coal (*e.g.,* eastern and western bituminous coal, subbituminous coal, and anthracitic and bituminous waste coal). Each of the coal types/ranks has unique compositions and properties. Low halogen content in coal is known to make Hg capture more challenging. But, both lignites and subbituminous coals have low halogen content with higher alkaline content. Lignites tend to have average higher Hg content than subbituminous and bituminous coals—especially lignites mined in Mississippi and Texas. However, waste coals (anthracitic and bituminous coal refuse) tend to have the highest average Hg content. Lignites tend to have higher sulfur content than that of subbituminous coals and the sulfur in the coal can form SO_3 in the flue gas. This SO_3 is known to make Hg capture using sorbent injection more challenging. However, bituminous coals and waste coals have similar or higher levels of sulfur. The formation of SO_3 is more significant with these coals. Despite all the obstacles and challenges presented to EGUs firing non-lignite coals, all of those EGUs have been subject to the more stringent Hg emission limit of 1.2 lb/TBtu—and emit at or below that emission limit since the rule was fully implemented. Advanced, better performing Hg controls—including ''SO_3 tolerant'' sorbents—are available to allow lignite-fired EGUs to also emit at or below the more stringent Hg emission limit of 1.2 lb/TBtu. As mentioned earlier in this preamble, in 2021, lignite-fired EGUs were responsible for almost 30 percent of all Hg emitted from coal-fired EGUs while generating about 7 percent of total megawatt-hours.

VI. What is the rationale for our other final decisions and amendments from review of the 2020 Technology Review?

A. What did we propose pursuant to CAA section 112(d)(6) for the other NESHAP requirements?

The EPA did not propose any changes to the organic HAP work practice standards, acid gas standards, continental liquid oil-fired EGU standards, non-continental liquid oil-fired EGUs, limited-use oil-fired EGU standards, or standards for IGCC EGUs. The EPA proposed to require that IGCC EGUs use PM CEMS for compliance demonstration with their fPM standard.

The EPA did note in the 2023 Proposal that there have been several recent temporary and localized increases in oil combustion at continental liquid oil-fired EGUs during periods of extreme weather conditions, such as the 2023 polar vortex in New England. As such, the EPA solicited comment on whether the current definition of the limited-use liquid oil-fired subcategory remains appropriate or if, given the increased reliance on oil-fired generation during periods of extreme weather, a period other than the current 24-month period or a different threshold would be more appropriate for the current definition. The EPA also solicited comment on the appropriateness of including new HAP standards for EGUs subject to the limited use liquid oil-fired subcategory, as well as on the means of demonstrating compliance with the new HAP standards.

B. How did the technology review change for the other NESHAP requirements?

The technology review for the organic HAP work practice standards, acid gas standards, and standards for oil-fired EGUs has not changed from the proposal.

The proposed technology review with respect to the use of PM CEMS for compliance demonstration by IGCC EGUs has changed due to comments received on the very low fPM emission rates and on technical challenges with certifying PM CEMS on IGCC EGUs. Therefore, the Agency is not finalizing the required use of PM CEMS for compliance demonstration with the fPM emission standard at IGCC EGUs.

C. What key comments did we receive on the other NESHAP requirements, and what are our responses?

Comment: Commenters urged the EPA to retain the current definition of the limited-use liquid oil-fired subcategory and not to impose new HAP standards on EGUs in this subcategory, given that there are already limits on the amount of fuel oil that can be burned. Commenters noted that the Agency has not identified any justification for the costs required for implementation and compliance with new HAP standards for limited-use liquid oil-fired EGUs. Some commenters alleged that any changes to the existing HAP standards for EGUs in the limited-use liquid oil-fired subcategory may complicate reliability management during cold winter spells or other extreme weather events.

Response: The Agency did not propose changes to the limited-use liquid oil-fired EGU subcategory or to the requirements for such units. To evaluate the potential HAP emission impact of liquid oil-fired EGUs[83] during extreme weather events, the Agency reviewed the 2022 fPM emissions of 11 liquid oil-fired EGUs in the Northeast U.S. that were operated during December 2022 Winter Storm Elliot, as described in the 2024 Technical Memo. The review found that total non-Hg HAP metal emissions during 2022 from the 11 oil-fired EGUs in New England were very small—approximately 70 times lower than the non-Hg HAP metal emissions estimated from oil-fired units

[82] For example, the EPA proposed that $27,500 per lb of Hg removed was cost-effective for the Primary Copper RTR (87 FR 1616); and approximately $27,000 per lb of Hg ($2021) was found to be cost-effective in the beyond-the-floor analysis supporting the 2012 MATS Final Rule.

[83] Oil-fired EGUs burning residual fuel oil have generally higher emission rates of HAP compared to that from the use of other types of fuel.

in Puerto Rico, which were among the facilities with the highest (but acceptable) residual risk in the 2020 Residual Risk Review.[84] The EPA will continue to monitor the emissions from the dispatch of limited-use liquid oil-fired EGUs—especially during extreme weather events.

In addition, the Agency reviewed the performance of PM CEMS for compliance demonstration at oil-fired EGUs. Given the higher emission rates and limits from this subcategory of EGUs, the Agency did not find any of the correlation issues with the use of PM CEMS with oil-fired EGUs similar to those that were discussed earlier for coal-fired EGUs. Moreover, the benefits of PM CEMS use that were described earlier (*i.e.,* emissions transparency, operational feedback, *etc.*) translate well to oil-fired EGUs; therefore, the EPA is finalizing the requirement for oil-fired EGUs (excluding limited-use liquid oil-fired EGUs) to use PM CEMS for compliance demonstration, as proposed.

Comment: One commenter recommended that units involved with carbon capture and sequestration (CCS) projects retain the option to use stack testing for compliance demonstration. They said that PM emissions would be measured from the stack downstream of the carbon capture system (they specifically mentioned the carbon capture system being contemplated to be built to capture CO_2 emission from the Milton R. Young Station facility in North Dakota). The commenters said that PM CEMS correlation testing will cause operational impacts on the CCS operations due to operational changes or reduced control efficiencies that temporarily increase PM emissions for long time periods, resulting in CCS operations being adversely affected or even shut down for long periods.

Response: The Agency disagrees with the commenter's recommendation that units utilizing a carbon capture system should be able to continue to use periodic stack testing for compliance demonstration. At the present time, the many ways that CCS can be employed and deployed at coal-fired EGUs supports the use of PM CEMS for compliance purposes. For example, measures (such as a bypass stack) are available that would minimize the operational impacts on the carbon capture system and would allow for proper PM CEMS correlations. Furthermore, the Agency finds that the increased transparency and the improved ability to detect and correct potential control or operational problems offered by PM CEMS, as well as the greater assurance of continuous compliance, outweigh the minor operational impacts potentially experienced. To the extent that a specific coal- or oil-fired EGU utilizing CCS wishes to use an alternative test method for compliance demonstration purposes, its owner or operator may submit a request to the Administrator under the provisions of 40 CFR 63.7(f).

D. What is the rationale for our final approach and decisions regarding the other NESHAP requirements?

The Agency did not receive comments that led to any changes in the outcome of the technology review for other NESHAP requirements as presented in the 2023 Proposal. The Agency did not propose any changes for the current requirements for organic HAP work practice standards, acid gas standards, or standards for oil-fired EGUs and therefore no changes are being finalized.

The EPA is aware of two existing IGCC facilities that meet the definition of an IGCC EGU. The Edwardsport Power Station, located in Knox County, Indiana, includes two IGCC EGUs that had 2021 average capacity factors of approximately 85 percent and 67 percent. These EGUs have LEE qualification for PM, with most current test results of 0.0007 and 0.0003 lb/MMBtu, respectively. The Polk Power Station, located in Polk County, Florida, had a 2021 average capacity factor of approximately 70 percent but burned only natural gas in 2021 (*i.e.,* operating essentially as a natural gas combined cycle turbine EGU). Before this EGU switched to pipeline quality natural gas as a fuel, it qualified for PM LEE status in 2018; to the extent that the EGU again operates as an IGCC, it could continue to claim PM LEE status. While this subcategory has a less stringent fPM standard of 0.040 lb/MMBtu (as compared to that of coal-fired EGUs), recent compliance data indicate fPM emissions well below the most stringent standard option of 0.006 lb/MMBtu that was evaluated for coal-fired EGUs.

The EPA is not finalizing the required use of PM CEMS for compliance demonstration for IGCC EGUs due to technical limitations expressed by commenters. For example, commenters noted that due to differences in stack design, the only possible installation space for a PM CEMS on an IGCC facility is on a stack with elevated grating, exposing the instrument to the elements, which would impact the sensitivity and accuracy of a PM CEMS. Additionally, there are no PM control devices at an IGCC unit available for de-tuning, which is necessary for establishing a correlation curve under PS–11. The EPA has considered these comments and agrees with these noted challenges to the use of PM CEMS at IGCC EGUs and, for those reasons, the EPA is not finalizing the proposed requirement for IGCCs to use PM CEMS for compliance demonstration, thus IGCCs will continue to demonstrate compliance via fPM emissions testing. As a result of comments we received on coal-fired run durations and our consideration on those comments, along with the low levels of reported emissions, the EPA determined that owners or operators of IGCCs will need to ensure each run has a minimum sample volume of 2 dscm or a minimum mass collection of 3 milligrams. In addition, IGCC EGUs will continue to be able to obtain and maintain PM LEE status.

VII. Startup Definition for the Coal- and Oil-Fired EGU Source Category

A. What did we propose for the Coal- and Oil-Fired EGU source category?

In the 2023 Proposal, the EPA proposed to remove the alternative work practice standards, *i.e.,* those contained in paragraph (2) of the definition of "startup" in 40 CFR 63.10042 from the rule based on a petition for reconsideration from environmental groups that was remanded to the EPA in *Chesapeake Climate Action Network* v. *EPA,* 952 F.3d 310 (D.C. Cir. 2020), and responding in part to a separate petition for reconsideration from environmental groups, that sought the EPA's reconsideration of certain aspects of the 2020 Residual Risk Review.[85] The first option under paragraph (1) defines startup as either the first-ever firing of fuel in a boiler for the purpose of producing electricity, or the firing of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose, including onsite use. In the second option, startup is defined as the period in which operation of an EGU is initiated for any purpose, and startup begins with either the firing of any fuel in an EGU for the purpose of producing electricity or useful thermal energy (such as heat or steam) for industrial, commercial, heating, or cooling purposes (other than the first-ever firing of fuel in a boiler following construction of the boiler) or for any other purpose after a shutdown

[84] See *Residual Risk Assessment for the Coal- and Oil-Fired EGU Source Category in Support of the 2019 Risk and Technology Review Proposed Rule* (Docket ID No. EPA–HQ–OAR–2018–0794–0014).

[85] See Document ID No. EPA–HQ–OAR–2018–0794–4565 at *https://www.regulations.gov.*

event. Startup ends 4 hours after the EGU generates electricity that is sold or used for any purpose (including onsite use), or 4 hours after the EGU makes useful thermal energy for industrial, commercial, heating, or cooling purposes, whichever is earlier.

As described in the 2023 Proposal, the Agency proposed to remove paragraph (2) of the definition of ''startup'' as part of our obligation to address the remand on this issue. In addition, as the majority of EGUs currently rely on work practice standards under paragraph (1) of the definition of ''startup,'' we believe this change is achievable by all EGUs and would result in little to no additional expenditures, especially since the additional reporting and recordkeeping requirements associated with use of paragraph (2) would no longer apply. Lastly, the time period for engaging PM or non-Hg HAP metal controls after non-clean fuel use, as well as for full operation of PM or non-Hg HAP metal controls, is expected to be reduced when transitioning to paragraph (1), therefore increasing the duration in which pollution controls are employed and lowering emissions.

B. How did the startup provisions change for the Coal- and Oil-Fired EGU source category?

The EPA is finalizing the amendment to remove paragraph (2) from the definition of ''startup'' as proposed.

C. What key comments did we receive on the startup provisions, and what are our responses?

We received both supportive and adverse comments on the proposed removal of paragraph (2) of the definition of ''startup.'' The summarized comments and the EPA's responses are provided in the *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review Proposed Rule Response to Comments* document. The most significant adverse comments and the EPA's responses are provided below.

Comment: Commenters recommended that the 4-hour startup definition should continue to be allowed as removing it for simplicity is not an adequate justification. They said the EPA is conflating the MACT standard-setting process with this RTR process. Although the EPA notes that the best performing 12 percent of sources do not need this alternative startup definition, commenters stated that this change is beyond the scope of the technology review. Commenters asserted that the EPA's determination that only eight EGUs are currently using that option is insufficient justification for eliminating the definition. Given that the 2023 Proposal did not identify any flaws with the current definition, the commenters stated that the EPA should explain why elimination of the 4-hour definition from MATS is appropriate when there are units currently relying on it. Commenters also stated that the EPA should consider providing reasonable exemptions for the EGUs that currently use that definition, thus gradually phasing out the definition without imposing any additional compliance burdens. The commenters also argued that with potentially lower fPM standards, more facilities may need the additional flexibility allowed by this definition of startup as their margin of compliance is reduced. They noted that startup or non-steady state operation is not conducive to CEMS accuracy and that it may create false reporting of emissions data biased either high or low depending on the actual conditions.

Commenters stated that several facilities are currently required to use the 4-hour startup definition per federal consent decrees or state agreements. They said such a scenario provides clear justification for a limited exemption, as MATS compliance should not result in an EGU violating its consent decree. Commenters noted other scenarios where state permits have special conditions with exemptions from emission limits during ramp-up or ramp-down periods. They said many facilities alleviate high initial emissions by using alternate fuels to begin the combustion process, which has been demonstrated as a Best Management Practice and to lower emissions. Commenters noted that the permit modification process, let alone any physical or operational modifications to the facility, could take significantly longer than the 180-day compliance deadline, depending on public comments, meetings, or contested hearing requests made during the permit process.

Commenters stated the startup definition paragraph (2) has seen limited use due to the additional reporting requirements that the EPA imposed on sources that chose to use the definition, which they believe are unnecessary and should be removed from the rule. The commenters said that the analysis the EPA conducted during the startup/shutdown reconsideration in response to *Chesapeake Climate Action Network* v. *EPA,* 952 F.3d 310 (D.C. Cir. 2020) showed that the definition was reasonable, and they argued that the definition may be needed if the EPA further reduces the limits, given the transitory nature of unit and control operation during these periods. Commenters also stated that the startup definition paragraph (2) is beneficial to units that require extended startups. They said including allowances for cold startup conditions could allow some EGUs to continue operation until more compliant generation is built, which would help facilitate a smooth transition to newer plants that meet the requirements without risking the reliability of the electric grid. Commenters also noted that some control devices, such as ESPs, may not be operating fully even when the plant begins producing electricity.

Commenters stated that the EPA should consider allowing the use of diluent cap values from 40 CFR part 75. As these are limited under MATS, commenters noted that startup and shutdown variations are more pronounced than if diluent caps were to be allowed. They said that with a lower emissions limitation, the diluent cap would mathematically correct for calculation inaccuracies inherent in emission rate calculation immediately following startup. Commenters stated that relative accuracy test audits (RATA) must be conducted at greater than 50 percent load under 40 CFR part 60 and at normal operating load under 40 CFR part 75. They said that it is not reasonable to require facilities to certify their CEMS, including PM CEMS, at greater than 50 percent capacity and use it for compliance at less than 50 percent capacity. Commenters stated that startups have constantly changing flow and temperatures that do not allow compliance tests to be conducted during these periods.

Response: The Agency disagrees with the commenters who suggest that the 4-hour startup duration should be retained. As mentioned in the 2023 Proposal (88 FR 24885), owners or operators of coal- and oil-fired EGUs that generated over 98 percent of electricity in 2022 have made the requisite adjustments, whether through greater clean fuel capacity, better tuned equipment, better trained staff, a more efficient and/or better design structure, or a combination of factors, to be able to meet the requirements of paragraph (1) of the startup definition. This ability points out an improvement in operation that all EGUs should be able to meet at little to no additional expenditure, since the additional recordkeeping and reporting provisions associated with the work practice standards of paragraph (2) of the startup definition were more expensive than the requirements of paragraph (1) of the definition. As mentioned with respect to gathering

experience with PM CEMS, the Agency believes owners or operators of the 8 EGUs relying on the 4-hour startup period can build on their startup experience gained since finalization of the 2012 MATS Final Rule, along with the experience shared by some of the other EGUs that have been able to conform with startup definition paragraph (1), as well as the experience to be obtained in the period yet remaining before compliance is required; such experience could prove key to aiding source owners or operators in their shift from reliance on startup definition paragraph (2) to startup definition paragraph (1). Should EGU owners or operators find that their attempts to rely on startup definition (1) are unsuccessful after application of that experience, they may request of the Administrator the ability to use an alternate non-opacity standard, as described in the NESHAP general provisions at 40 CFR 63.6(g). Before the Administrator's approval can be granted, the EGU owner or operator's request must appear in the **Federal Register** for the opportunity for notice and comment by the public, as required in 40 CFR 63.6(g)(1).

Regarding consent decrees or state agreements for requirements other than those contained in this rule, while the rule lacks the ability to revise such agreements, the EPA recommends that EGU owners or operators contact the other parties to see what, if any, revisions could be made. Nonetheless, the Agency expects EGU source owners or operators to comply with the revised startup definition by the date specified in this rule. Given the concern expressed by the commenters for some sources, the Agency expects such source owners or operators to begin negotiations with other parties for other non-rule obligations to begin early enough to be completed prior to the compliance date specified in this rule.

The Agency disagrees with the commenters' suggestions that startup definition paragraph (2)'s reporting requirements were too strict to be used. That suggestion is not consistent with the number of commenters who claimed to need to use paragraph (2) of the startup definition, even though only 2.5 percent of EGUs currently rely on this startup definition. The Agency's experience is that almost all EGU source owners or operators have been able to adjust their unit operation such that adherence to startup definition paragraph (1) reduced, if not eliminated, the concern by some about use of startup definition paragraph (1). As mentioned earlier in this document, the better performers in the coal-fired EGU source category no longer need to have, or use, paragraph (2) of the startup definition after gaining experience with using paragraph (1).

The Agency disagrees with the commenter's suggestion that the diluent cap values allowed for use by 40 CFR part 75 be included in the rule, because diluent cap values are already allowed for use during startup and shutdown periods per 40 CFR 63.10007(f)(1). Note that while emission values are to be recorded and reported during startup and shutdown periods, they are not to be used in compliance calculations per 40 CFR 63.10020(e). In addition to diluent cap use during startup and shutdown periods, section 6.2.2.3 of appendix C to 40 CFR part 63, subpart UUUUU allows diluent cap use for PM CEMS during any periods when oxygen or CO_2 values exceed or dip below, respectively, the cap levels. Diluent cap use for other periods from other regulations are not necessary for MATS. The Agency does not understand the commenter's suggestion concerning the load requirement for a RATA. The Agency believes the commenter may have mistaken HCl CEMS requirements, which use RATAs but were not proposed to be changed, with PM CEMS requirements, which do not use RATAs. Since PM CEMS are not subject to RATAs and the Agency did not propose changes to requirements for HCl CEMS, the comment on RATAs being conducted at greater than 50 percent load is moot. The EPA is finalizing the removal of startup definition paragraph (2), as proposed.

D. What is the rationale for our final approach and final decisions for the startup provisions?

The EPA is finalizing the removal of paragraph (2) of the definition of ''startup'' in 40 CFR 63.10042 consistent with reasons described in the 2023 Proposal. As the majority of EGUs are already relying on the work practice standards in paragraph (1) of the startup definition, the EPA finds that such a change is achievable within the 180-day compliance timeline by all EGUs at little to no additional expenditure since the additional reporting and recordkeeping provisions under paragraph (2) were more expensive than paragraph (1). Additionally, the time period for engaging pollution controls for PM or non-Hg HAP metals is expected to be reduced when transitioning to paragraph (1), therefore increasing the duration in which pollution controls are employed and lowering emissions.

VIII. What other key comments did we receive on the proposal?

Comment: Some commenters argued that it is well-established that cost is a major consideration in rulemakings reviewing existing NESHAP under CAA section 112(d)(6). In particular, commenters cited to *Michigan* v. *EPA,* 576 U.S. 743, 759 (2015), to support the argument that the EPA must consider the costs of the regulation in relation to the benefits intended by the statutory requirement mandating this regulation, that is, the benefits of the HAP reductions. Commenters stated that the EPA should not seek to impose the excessive costs associated with this action as there would be no benefit associated with reducing HAP. The commenters said that the EPA certainly should not do so for an industry that is rapidly reducing its emissions because it is on the way to retiring most, if not all, units in the source category in little over a decade. The commenters also claimed that as *Michigan* held that cost and benefits must be considered in determining whether it is ''appropriate'' to regulate EGUs under CAA section 112 in the first place, it necessarily follows that the same threshold must also apply when the EPA subsequently reviews the standards.

Response: The EPA agrees that it is appropriate to take costs into consideration in deciding whether it is necessary to revise an existing NESHAP under CAA section 112(d)(6). As explained in the 2023 Proposal and this document, the EPA has carefully considered the costs of compliance and the effects of those costs on the industry. Although the commenters seem to suggest that the EPA should weigh the costs and benefits of the revisions to the standard, we do not interpret the comments as arguing that the EPA should undertake a formal benefit cost analysis but rather the commenters believe that the EPA should instead limit its analysis supporting the standard to HAP emission reductions. Our consideration of costs in this rulemaking is consistent with the Supreme Court's direction in *Michigan* where the Court noted that ''[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost,'' 576 U.S. 743, 759 (2015), and with comments arguing that the EPA should focus its decision-making on the standard on the anticipated reductions in HAP.

In *Michigan,* the Supreme Court concluded that the EPA erred when it concluded it could not consider costs when deciding as a threshold matter

whether it is ''appropriate and necessary'' under CAA section 112(n)(1)(A) to regulate HAP from EGUs, despite the relevant statutory provision containing no specific reference to cost. 576 U.S. at 751. In doing so, the Court held that the EPA ''must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary'' under CAA section 112. *Id.* at 759. In examining the language of CAA section 112(n)(1)(A), the Court concluded that the phrase ''appropriate and necessary'' was ''capacious'' and held that ''[r]ead naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost.'' *Id.* at 752. As is clear from the record for this rulemaking, the EPA has carefully considered cost in reaching its decision to revise the NESHAP in this action.

The EPA has also taken into account the numerous HAP-related benefits of the final rule in deciding to take this action. These benefits include not only the reduced exposure to Hg and non-Hg HAP metals, but also the additional transparency provided by PM CEMS for communities that live near sources of HAP, and the assurance PM CEMS will provide that the standards are being met on a continuous basis. As discussed in section II.B.2., and section IX.E. many of these important benefits are not able to be monetized. Although this rule will result in the reduction of HAP, including Hg, lead, arsenic, chromium, nickel, and cadmium, data limitations prevent the EPA from assigning monetary value to those reductions. In addition, there are several benefits associated with the use of PM CEMS which are not quantified in this rule.

While the Court's examination of CAA section 112(n)(a)(1) in *Michigan* considered a different statutory provision than CAA section 112(d)(6) under which the EPA is promulgating this rulemaking, the EPA has nonetheless satisfied the Court's directive to consider costs, both in the context of the individual revisions to MATS (as directed by the language of the statute) and in the context of the rulemaking as a whole. Moreover, while the EPA is not required to undertake a ''formal cost benefit analysis in which each advantage and disadvantage [of a regulation] is assigned a monetary value,'' *Michigan,* 576 U.S. at 759, the EPA has contemplated and carefully considered both the advantages and disadvantages of the revisions it is finalizing here, including qualitative and quantitative benefits of the regulation and the costs of compliance.

IX. Summary of Cost, Environmental, and Economic Impacts and Additional Analyses Conducted

The following analyses of costs and benefits, and environmental, economic, and environmental justice impacts are presented for the purpose of providing the public with an understanding of the potential consequences of this final action. The EPA notes that analysis of such impacts is distinct from the determinations finalized in this action under CAA section 112, which are based on the statutory factors the EPA discussed in section II.A. and sections IV. through VII.

The EPA's obligation to conduct an analysis of the potential costs and benefits under Executive Order 12866, discussed in this section and section X.A., is distinct from its obligation in setting standards under CAA section 112 to take costs into account. As explained above, the EPA considered costs in multiple ways in choosing appropriate standards consistent with the requirements of CAA section 112. The benefit-cost analysis is performed to comply with Executive Order 12866. The EPA, however, did not rely on that analysis in choosing the appropriate standard here, consistent with the Agency's longstanding interpretation of the statute. As discussed at length in section II.B.2. above and in the EPA's 2023 final rulemaking finalizing the appropriate and necessary finding (88 FR 13956), historically there have been significant challenges in monetizing the benefits of HAP reduction. Important categories of benefits from reducing HAP cannot be monetized, making benefit-cost analysis ill-suited to the EPA's decision making on regulating HAP emissions under CAA section 112. Further, there are also unquantified emission reductions anticipated from installing PM CEMS, as discussed in section IX.E. For this reason, combined with Congress's recognition of the particular dangers posed by HAP and consequent direction to the EPA to reduce emissions of these pollutants to the ''maximum degree,'' the EPA does not at this time believe it is appropriate to rely on the results of the monetized benefit-cost analysis when setting the standards.

As noted in section X.A. below, the EPA projects that the net monetized benefits of this rule are negative. Many of the benefits of this rule discussed at length in this section and elsewhere in this record, however, were not monetized. This rule will result in the reduction of HAP, including Hg, lead, arsenic, chromium, nickel, and cadmium,[86] consistent with Congress's direction in CAA section 112 discussed in section II.A. of this final rule. At this time, data limitations prevent the EPA from assigning monetary value to those reductions, as discussed in section II.B.2. above.[87] In addition, the benefits of the additional transparency provided by the requirement to use PM CEMS for communities that live near sources of HAP, and the assurance PM CEMS provide that the standards are being met on a continuous basis were not monetized due to data limitations. While the EPA does not believe benefit-cost analysis is the right way to determine the appropriateness of a standard under CAA section 112, the EPA notes that when all of the costs and benefits are considered (including non-monetized benefits), this final rule is a worthwhile exercise of the EPA's CAA section 112(d)(6) authority.

A. What are the affected facilities?

The EPA estimates that there are 314 coal-fired EGUs [88] and 58 oil-fired EGUs that will be subject to this final rule by the compliance date.

B. What are the air quality impacts?

The EPA estimated emission reductions under the final rule for the years 2028, 2030, and 2035 based upon IPM projections. The quantified emissions estimates were developed with the EPA's Power Sector Modeling Platform 2023 using IPM, a state-of-the-art, peer-reviewed dynamic, deterministic linear programming model of the contiguous U.S. electric power sector. IPM provides forecasts of least-cost capacity expansion, electricity dispatch, and emission control strategies while meeting electricity demand and various environmental, transmission, dispatch, and reliability constraints. IPM's least-cost dispatch

[86] As of 2023, three of the HAP metals or their compounds emitted by EGUs (arsenic, chromium, and nickel) are classified as carcinogenic to humans. More details are available in section II.B.2. and Chapter 4.2.2 of the RIA.

[87] *See also National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding,* 88 FR 13956, 13970–73 (March 6, 2023) (for additional discussion regarding the limitations to monetizing and quantifying most benefits from HAP reductions in the 2023 rulemaking finalizing the appropriate and necessary finding).

[88] The number of coal-fired affected EGUs is larger than the 296 coal-fired EGUs assessed for the fPM standard in section IV. because it includes four EGUs that burn petroleum coke (which are a separate subcategory for MATS) and 14 EGUs without fPM compliance data available on the EPA's Compliance and Emissions Data Reporting Interface (CEDRI), *https://www.epa.gov/electronic-reporting-air-emissions/cedri.*

solution is designed to ensure generation resource adequacy, either by using existing resources or through the construction of new resources. IPM addresses reliable delivery of generation resources for the delivery of electricity between the 78 IPM regions, based on current and planned transmission capacity, by setting limits to the ability to transfer power between regions using the bulk power transmission system. The model includes state-of-the-art estimates of the cost and performance of air pollution control technologies with respect to Hg and other HAP controls.

The quantified emission reduction estimates presented in the RIA include reductions in pollutants directly covered by this rule, such as Hg, and changes in other pollutants emitted from the power sector as a result of the compliance actions projected under this final rule. Table 8 of this document presents the projected emissions under the final rule. Note that, unlike the cost-effectiveness analysis presented in sections IV. and V. of this preamble, the projections presented in table 8 are incremental to a projected baseline which reflects future changes in the composition of the operational coal-fired EGU fleet that are projected to occur by 2035 as a result of factors affecting the power sector, such as the IRA, promulgated regulatory actions, or changes in economic conditions.

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Table 8. Projected EGU Emissions in the Baseline and Under the Final Rule: 2028, 2030, and 2035[a]

		Total Emissions			
	Year	Baseline	Final Rule	Change from Baseline	% Change
Hg (lb)	2028	6,129	5,129	-999	-16%
	2030	5,863	4,850	-1,013	-17%
	2035	4,962	4,055	-907	-18%
$PM_{2.5}$ (thousand tons)	2028	70.5	69.7	-0.8	-1.1%
	2030	66.3	65.8	-0.5	-0.8%
	2035	50.7	50.2	-0.5	-0.9%
PM_{10} (thousand tons)	2028	79.5	77.4	-2.1	-2.6%
	2030	74.5	73.1	-1.3	-1.8%
	2035	56.0	54.8	-1.2	-2.1%
SO_2 (thousand tons)	2028	454.3	454.0	-0.3	-0.1%
	2030	333.5	333.5	0.0	0.0%
	2035	239.9	239.9	0.0	0.0%
Ozone-season NO_x (thousand tons)	2028	189.0	188.8	-0.165	-0.09%
	2030	174.9	175.4	0.488	0.28%
	2035	116.9	119.1	2.282	1.95%
Annual NO_x (thousand tons)	2028	460.5	460.3	-0.283	-0.06%
	2030	392.8	392.7	-0.022	-0.01%
	2035	253.4	253.5	0.066	0.03%
HCl (thousand tons)	2028	2.5	2.5	0.0	0.0%
	2030	2.2	2.2	0.0	0.0%
	2035	1.5	1.5	0.0	0.1%
CO_2 (million metric tons)	2028	1,158.8	1,158.7	-0.1	0.0%
	2030	1,098.3	1,098.3	0.0	0.0%
	2035	724.2	724.1	-0.1	0.0%

[a] This analysis is limited to the geographically contiguous lower 48 states.

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In addition to the projected emissions impacts presented in table 8, we also estimate that the final rule will reduce at least 7 tons of non-Hg HAP metals in 2028, 5 tons of non-Hg HAP metals in 2030, and 4 tons of non-Hg HAP metals in 2035. These reductions are composed of reductions in emissions of antimony, arsenic, beryllium, cadmium,

chromium, cobalt, lead, manganese, nickel, and selenium.[89]

Importantly, the continuous monitoring of fPM required in this rule will likely induce additional emissions reductions that we are unable to quantify. Continuous measurements of emissions accounts for changes to processes and fuels, fluctuations in load, operations of pollution controls, and equipment malfunctions. By measuring emissions across all operations, power plant operators and regulators can use the data to ensure controls are operating properly and to assess compliance with relevant standards. Because CEMS enable power plant operators to quickly identify and correct problems with pollution control devices, it is possible that fPM emissions could be lower than they otherwise would have been for up to 3 months—or up to 3 years if testing less frequently under the LEE program—at a time. This potential reduction in fPM and non-Hg HAP metals emission resulting from the information provided by continuous monitoring coupled with corrective actions by plant operators could be sizeable over the existing coal-fired fleet and is not quantified in this rulemaking.

Section 3 of the RIA presents a detailed discussion of the emissions projections under the regulatory options as described in the RIA. Section 3 also describes the compliance actions that are projected to produce the emission reductions in table 8 of this preamble. Please see section IX.E. of this preamble and section 4 of the RIA for detailed discussions of the projected health, welfare, and climate benefits of these emission reductions.

C. What are the cost impacts?

The power industry's compliance costs are represented in this analysis as the change in electric power generation costs between the baseline and policy scenarios. In other words, these costs are an estimate of the increased power industry expenditures required to implement the final requirements of this rule. The compliance cost estimates were mainly developed using the EPA's Power Sector Modeling Platform 2023 using IPM. The incremental costs of the final rule's PM CEMS requirement were estimated outside of IPM and added to the IPM-based cost estimate presented here and in section 3 of the RIA.

We estimate the present value (PV) of the projected compliance costs over the 2028 to 2037 period, as well as estimate the equivalent annual value (EAV) of the flow of the compliance costs over this period. All dollars are in 2019 dollars. We estimate the PV and EAV using 2, 3, and 7 percent discount rates.[90] Table 9 of this document presents the estimates of compliance costs for the final rule.

Table 9. Projected Compliance Costs of the Final Rule, 2028 through 2037 (Millions 2019$, Discounted to 2023)[a]

	2% Discount Rate	3% Discount Rate	7% Discount Rate
PV	860	790	560
EAV	96	92	80

[a] Values have been rounded to two significant figures.

The PV of the compliance costs for the final rule, discounted at the 2 percent rate, is estimated to be about $860 million, with an EAV of about $96 million. At the 3 percent discount rate, the PV of the compliance costs of the final rule is estimated to be about $790 million, with an EAV of about $92 million. At the 7 percent discount rate, the PV of the compliance costs of the rule is estimated to be about $560 million, with an EAV of about $80 million.

We note that IPM provides the EPA's best estimate of the costs of the rules to the electricity sector and related energy sectors (*i.e.,* natural gas, coal mining). These compliance cost estimates are used as a proxy for the social cost of the rule. For a detailed description of these compliance cost projections, please see section 3 of the RIA, which is available in the docket for this action.

D. What are the economic impacts?

The Agency estimates that this rule will require additional fPM and/or Hg removal at less than 15 GW of operable capacity in 2028, which is about 14 percent of the total coal-fired EGU capacity projected to operate in that year. The units requiring additional fPM and/or Hg removal are projected to generate less than 2 percent of total generation in 2028. Moreover, the EPA does not project that any EGUs will retire in response to the standards promulgated in this final rule.

Consistent with the small share of EGUs required to reduce fPM and/or Hg emissions rates, this final action has limited energy market implications. There are limited impacts on energy prices projected to result from this final rule. On a national average basis,

[89] Note that modeled projections include total PM_{10} and total $PM_{2.5}$. The EPA estimated non-Hg HAP metals reductions by multiplying the ratio of non-Hg HAP metals to fPM by modeled projections of total PM_{10} reductions under the rule. The ratios of non-Hg HAP metals to fPM were based on analysis of 2010 MATS Information Collection Request (ICR) data. As there may be substantially more fPM than PM_{10} reduced by the control techniques projected to be used under this rule, these estimates of non-Hg HAP metals reductions are likely underestimates. More detail on the estimated reduction in non-Hg HAP metals can be found in the docketed memorandum *Estimating Non-Hg HAP Metals Reductions for the 2024 Technology Review for the Coal-Fired EGU Source Category.*

[90] Results using the 2 percent discount rate were not included in the proposal for this action. The 2003 version of OMB's Circular A–4 had generally recommended 3 percent and 7 percent as default rates to discount social costs and benefits. The analysis of the proposed rule used these two recommended rates. In November 2023, OMB finalized an update to Circular A–4, in which it recommended the general application of a 2 percent rate to discount social costs and benefits (subject to regular updates). The Circular A–4 update also recommended consideration of the shadow price of capital when costs or benefits are likely to accrue to capital. As a result of the update to Circular A–4, we include cost and benefits results calculated using a 2 percent discount rate.

delivered coal, natural gas, and retail electricity prices are not projected to change. The EPA does not project incremental changes in existing operational capacity to occur in response to the final rule. Coal production for use in the power sector is not projected to change significantly by 2028.

The short-term estimates for employment needed to design, construct, and install the control equipment in the 3-year period before the compliance date are also provided using an approach that estimates employment impacts for the environmental protection sector based on projected changes from IPM on the number and scale of pollution controls and labor intensities in relevant sectors. Finally, some of the other types of employment impacts that will be ongoing are estimated using IPM outputs and labor intensities, as reported in section 5 of the RIA.

E. What are the benefits?

The RIA for this action analyzes the benefits associated with the projected emission reductions under this rule. This final rule is projected to reduce emissions of Hg and non-Hg HAP metals, as well as $PM_{2.5}$, SO_2, NO_X and CO_2 nationwide. The potential impacts of these emission reductions are discussed in detail in section 4 of the RIA. The EPA notes that the benefits analysis is distinct from the statutory determinations finalized herein, which are based on the statutory factors the EPA is required to consider under CAA section 112. The assessment of benefits described here and in the RIA is presented solely for the purposes of complying with Executive Order 12866, as amended by Executive Order 14094, and providing the public with a complete depiction of the impacts of the rulemaking.

Hg is a persistent, bioaccumulative toxic metal emitted from power plants that exists in three forms: gaseous elemental Hg, inorganic Hg compounds, and organic Hg compounds (*e.g.,* methylmercury). Hg can also be emitted in a particle-bound form. Elemental Hg can exist as a shiny silver liquid, but readily vaporizes into air. Airborne elemental Hg does not quickly deposit or chemically react in the atmosphere, resulting in residence times that are long enough to contribute to global scale deposition. Oxidized Hg and particle-bound Hg deposit quickly from the atmosphere impacting local and regional areas in proximity to sources. Methylmercury is formed by microbial action in the top layers of sediment and soils, after Hg has precipitated from the air and deposited into waterbodies or land. Once formed, methylmercury is taken up by aquatic organisms and bioaccumulates up the aquatic food web. Larger predatory fish may have methylmercury concentrations many times that of the concentrations in the freshwater body in which they live.

All forms of Hg are toxic, and each form exhibits different health effects. Acute (short-term) exposure to high levels of elemental Hg vapors results in central nervous system (CNS) effects such as tremors, mood changes, and slowed sensory and motor nerve function. Chronic (long-term) exposure to elemental Hg in humans also affects the CNS, with effects such as erethism (increased excitability), irritability, excessive shyness, and tremors. The major effect from chronic ingestion or inhalation of low levels of inorganic Hg is kidney damage.

Methylmercury is the most common organic Hg compound in the environment. Acute exposure of humans to very high levels of methylmercury results in profound CNS effects such as blindness and spastic quadriparesis. Chronic exposure to methylmercury, most commonly by consumption of fish from Hg contaminated waters, also affects the CNS with symptoms such as paresthesia (a sensation of pricking on the skin), blurred vision, malaise, speech difficulties, and constriction of the visual field. Ingestion of methylmercury can lead to significant developmental effects, such as IQ loss measured by performance on neurobehavioral tests, particularly on tests of attention, fine motor-function, language, and visual spatial ability. In addition, evidence in humans and animals suggests that methylmercury can have adverse effects on both the developing and the adult cardiovascular system, including fatal and non-fatal ischemic heart disease (IHD). Further, nephrotoxicity, immunotoxicity, reproductive effects (impaired fertility), and developmental effects have been observed with methylmercury exposure in animal studies.[91] Methylmercury has some genotoxic activity and can cause chromosomal damage in several experimental systems. The EPA has concluded that mercuric chloride and methylmercury are possibly carcinogenic to humans.[92 93]

The projected emissions reductions of Hg are expected to lower deposition of Hg into ecosystems and reduce U.S. EGU attributable bioaccumulation of methylmercury in wildlife, particularly for areas closer to the effected units subject to near-field deposition. Subsistence fishing is associated with vulnerable populations. Methylmercury exposure to subsistence fishers from lignite-fired units is below the current RfD for methylmercury neurodevelopmental toxicity. The EPA considers exposures at or below the RfD for methylmercury unlikely to be associated with appreciable risk of deleterious effects across the population. However, the RfD for methylmercury does not represent an exposure level corresponding to zero risk; moreover, the RfD does not represent a bright line above which individuals are at risk of adverse effects. Reductions in Hg emissions from lignite-fired facilities should further reduce exposure to methylmercury for subsistence fisher sub-populations located in the vicinity of these facilities, which are all located in North Dakota, Texas, and Mississippi.

In addition, U.S. EGUs are a major source of HAP metals emissions including selenium, arsenic, chromium, nickel, and cobalt, cadmium, beryllium, lead, and manganese. Some HAP metals emitted by U.S. EGUs are known to be persistent and bioaccumulative and others have the potential to cause cancer. Exposure to these HAP metals, depending on exposure duration and levels of exposures, is associated with a variety of adverse health effects. The emissions reductions projected under this final rule are expected to reduce human exposure to non-Hg HAP metals, including carcinogens.

Furthermore, there is the potential for reductions in Hg and non-Hg HAP metal emissions to enhance ecosystem services and improve ecological outcomes. The reductions will potentially lead to positive economic impacts although it is difficult to estimate these benefits and, consequently, they have not been included in the set of quantified benefits.

As explained in section IX.B., the continuous monitoring of fPM required in this rule may induce further reductions of fPM and non-Hg HAP metals than we project in the RIA for

[91] Agency for Toxic Substances and Disease Registry (ATSDR). Toxicological Profile for Mercury. Public Health Service, U.S. Department of Health and Human Services, Atlanta, GA. 2022.

[92] U.S. Environmental Protection Agency. Integrated Risk Information System (IRIS) on Methylmercury. National Center for Environmental Assessment, Office of Research and Development, Washington, DC. 2001.

[93] U.S. Environmental Protection Agency. Integrated Risk Information System (IRIS) on Mercuric Chloride. National Center for Environmental Assessment, Office of Research and Development, Washington, DC. 1995.

this action. As a result, there may be additional unquantified beneficial health impacts from these potential reductions. The continuous monitoring of fPM required in this rule is also likely to provide several additional benefits to the public which are not quantified in this rule, including greater certainty, accuracy, transparency, and granularity in fPM emissions information than exists today.

The rule is also expected to reduce emissions of direct $PM_{2.5}$, NO_X, and SO_2 nationally throughout the year. Because NO_X and SO_2 are also precursors to secondary formation of ambient $PM_{2.5}$, reducing these emissions would reduce human exposure to ambient $PM_{2.5}$ throughout the year and would reduce the incidence of $PM_{2.5}$-attributable health effects. The rule is also expected to reduce ozone-season NO_X emissions nationally in most years of analysis. In the presence of sunlight, NO_X, and volatile organic compounds (VOCs) can undergo a chemical reaction in the atmosphere to form ozone. Reducing NO_X emissions in most locations reduces human exposure to ozone and reduces the incidence of ozone-related health effects, although the degree to which ozone is reduced will depend in part on local concentration levels of VOCs.

The health effect endpoints, effect estimates, benefit unit values, and how they were selected, are described in the technical support document titled *Estimating $PM_{2.5}$ minus; and Ozone-Attributable Health Benefits* (2023). This document describes our peer-reviewed approach for selecting and quantifying adverse effects attributable to air pollution, the demographic and health data used to perform these calculations, and our methodology for valuing these effects.

Because of projected changes in dispatch under the final requirements, the rule is also projected to impact CO_2 emissions. The EPA estimates the climate benefits of CO_2 emission reductions expected from the final rule using estimates of the social cost of carbon (SC–CO_2) that reflect recent advances in the scientific literature on climate change and its economic impacts and that incorporate recommendations made by the National Academies of Science, Engineering, and Medicine.[94] The EPA published and used these estimates in the RIA for the December 2023 Natural Gas Sector final rule titled *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review* (2023 Oil and Natural Gas NSPS/EG).[95] The EPA solicited public comment on the methodology and use of these estimates in the RIA for the Agency's December 2022 Oil and Natural Gas Sector supplemental proposal[96] that preceded the 2023 Oil and Natural Gas NSPS/EG and has conducted an external peer review of these estimates. The response to public comments document and the response to peer reviewer recommendations can be found in the docket for the 2023 Oil and Natural Gas NSPS/EG action. Complete information about the peer review process is also available on the EPA's website.[97]

Section 4.4 within the RIA for this final rulemaking provides an overview of the methodological updates incorporated into the SC–CO_2 estimates used in this final RIA.[98] A more detailed explanation of each input and the modeling process is provided in the final technical report, *EPA Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances.*[99]

The SC–CO_2 is the monetary value of the net harm to society associated with a marginal increase in CO_2 emissions in a given year, or the benefit of avoiding that increase. In principle, SC–CO_2 includes the value of all climate change impacts both negative and positive, including, but not limited to, changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–CO_2, therefore, reflects the societal value of reducing emissions of CO_2 by one metric ton and is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO_2 emissions. In practice, data and modeling limitations restrain the ability of SC–CO_2 estimates to include all physical, ecological, and economic impacts of climate change, implicitly assigning a value of zero to the omitted climate damages. The estimates are, therefore, a partial accounting of climate change impacts and likely underestimate the marginal benefits of abatement.

Table 10 of this document presents the estimated PV and EAV of the projected health and climate benefits across the regulatory options examined in the RIA in 2019 dollars discounted to 2023.

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[94] National Academies of Sciences, Engineering, and Medicine (National Academies). 2017. Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide. National Academies Press.

[95] *Regulatory Impact Analysis of the Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review,* Docket ID No. EPA–HQ–OAR–2021–0317, December 2023.

[96] *Supplemental Notice of Proposed Rulemaking for Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review,* 87 FR 74702 (December 6, 2022).

[97] *https://www.epa.gov/environmental-economics/scghg-tsd-peer-review.*

[98] Note that the RIA for the proposal of this rulemaking used the SC–CO_2 estimates from the Interagency Working Group's (IWG) February 2021 Social Cost of Greenhouse Gases Technical Support Document (TSD) (IWG 2021) to estimate climate benefits. These SC–CO_2 estimates were interim values recommended for use in benefit-cost analyses until updated estimates of the impacts of climate change could be developed. Estimated climate benefits using these interim SC–CO_2 values (IWG 2021) are presented in Appendix B of the RIA for this final rulemaking for comparison purposes.

[99] Supplementary Material for the Regulatory Impact Analysis for the Final Rulemaking, ''Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review,'' *EPA Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances,* Docket ID No. EPA–HQ–OAR–2021–0317, November 2023.

Table 10. Projected Benefits of the Final Rule, 2028 through 2037 (Millions 2019$, Discounted to 2023)[a]

Present Value (PV)			
	2% Discount Rate	3% Discount Rate	7% Discount Rate
Health Benefits[c]	300	260	180
Climate Benefits[d]	130	130	130
Total Monetized Benefits[e]	420	390	300
Equivalent Annual Value (EAV)[b]			
	2% Discount Rate	3% Discount Rate	7% Discount Rate
Health Benefits[c]	33	31	25
Climate Benefits[d]	14	14	14
Total Monetized Benefits[e]	47	45	39
Non-Monetized Benefits	Benefits from reductions of about 900 to 1000 pounds of Hg annually		
	Benefits from reductions of at least 4 to 7 tons of non-Hg HAP metals annually		
	Benefits from improved water quality and availability		
	Benefits from the increased transparency, compliance assurance, and accelerated identification of anomalous emission anticipated from requiring PM CEMS		

[a] Values have been rounded to two significant figures. Rows may not appear to sum correctly due to rounding.

[b] The EAV of benefits are calculated over the 10-year period from 2028 to 2037.

[c] The projected monetized air quality-related benefits include those related to public health associated with reductions in $PM_{2.5}$ and ozone concentrations. The projected health benefits are associated with several point estimates and are presented at real discount rates of 2, 3, and 7 percent.

[d] Monetized climate benefits are based on reductions in CO_2 emissions and are calculated using three different estimates of the social cost of carbon dioxide (SC-CO_2) (under 1.5 percent, 2.0 percent, and 2.5 percent near-term Ramsey discount rates). For the presentational purposes of this table, we show the climate benefits associated with the SC-CO_2 at the 2 percent near-term Ramsey discount rate. Please see section 4 of the RIA for the full range of monetized climate benefit estimates.

[e] The list of non-monetized benefits does not include all potential non-monetized benefits. See table 4-8 of the RIA for a more complete list.

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This final rule is projected to reduce $PM_{2.5}$ and ozone concentrations, producing a projected PV of monetized health benefits of about $300 million, with an EAV of about $33 million discounted at 2 percent. The projected PV of monetized climate benefits of the final rule is estimated to be about $130 million, with an EAV of about $14 million using the SC–$CO_2$ discounted at 2 percent.[100] Thus, this final rule would

[100] Monetized climate benefits are discounted using a 2 percent discount rate, consistent with the EPA's updated estimates of the SC–CO_2. The 2003 version of OMB's Circular A–4 had generally recommended 3 percent and 7 percent as default discount rates for costs and benefits, though as part of the Interagency Working Group on the Social Cost of Greenhouse Gases, OMB had also long recognized that climate effects should be discounted only at appropriate consumption-based discount rates. In November 2023, OMB finalized an update to Circular A–4, in which it recommended the general application of a 2 percent discount rate to costs and benefits (subject to regular updates), as well as the consideration of the shadow price of capital when costs or benefits are likely to accrue to capital (OMB 2023). Because the SC–CO_2 estimates reflect net climate change damages in terms of reduced consumption (or monetary consumption equivalents), the use of the social rate of return on capital (7 percent under

generate a PV of monetized benefits of $420 million, with an EAV of $47 million discounted at a 2 percent rate.

At a 3 percent discount rate, this final rule is expected to generate projected PV of monetized health benefits of $260 million, with an EAV of about $31 million discounted at 3 percent. Climate benefits remain discounted at 2 percent in this benefits analysis and are estimated to be about $130 million, with an EAV of about $14 million using the SC–$CO_2$. Thus, this final rule would generate a PV of monetized benefits of $390 million, with an EAV of $45 million discounted at a 3 percent rate.

At a 7 percent discount rate, this final rule is expected to generate projected PV of monetized health benefits of $180 million, with an EAV of about $25 million discounted at 7 percent. Climate benefits remain discounted at 2 percent in this benefits analysis and are estimated to be about $130 million, with an EAV of about $14 million using the SC–$CO_2$. Thus, this final rule would generate a PV of monetized benefits of $300 million, with an EAV of $39 million discounted at a 7 percent rate.

The benefits from reducing Hg and non-Hg HAP metals and from unquantified improvements in water quality were not monetized and are therefore not directly reflected in the monetized benefit-cost estimates associated with this rulemaking. Potential benefits from the increased transparency and accelerated identification of anomalous emission anticipated from requiring PM CEMS were also not monetized in this analysis and are therefore also not directly reflected in the monetized benefit-cost comparisons. We nonetheless consider these impacts in our evaluation of the net benefits of the rule and find that, if we were able to monetize these beneficial impacts, the final rule would have greater net benefits than shown in table 11 of this document.

F. What analysis of environmental justice did we conduct?

For purposes of analyzing regulatory impacts, the EPA relies upon its June 2016 ''Technical Guidance for Assessing Environmental Justice in Regulatory Analysis,'' which provides recommendations that encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time, resource constraints, and analytical challenges will vary by media and circumstance. The Technical Guidance states that a regulatory action may involve potential EJ concerns if it could: (1) create new disproportionate impacts on communities with EJ concerns; (2) exacerbate existing disproportionate impacts on communities with EJ concerns; or (3) present opportunities to address existing disproportionate impacts on communities with EJ concerns through this action under development.

The EPA's EJ technical guidance states that ''[t]he analysis of potential EJ concerns for regulatory actions should address three questions: (A) Are there potential EJ concerns associated with environmental stressors affected by the regulatory action for population groups of concern in the baseline? (B) Are there potential EJ concerns associated with environmental stressors affected by the regulatory action for population groups of concern for the regulatory option(s) under consideration? (C) For the regulatory option(s) under consideration, are potential EJ concerns created or mitigated compared to the baseline?'' [101]

The environmental justice analysis is presented for the purpose of providing the public with as full as possible an understanding of the potential impacts of this final action. The EPA notes that analysis of such impacts is distinct from the determinations finalized in this action under CAA section 112, which are based solely on the statutory factors the EPA is required to consider under that section. To address these questions in the EPA's first quantitative EJ analysis in the context of a MATS rule, the EPA developed a unique analytical approach that considers the purpose and specifics of this rulemaking, as well as the nature of known and potential disproportionate and adverse exposures and impacts. However, due to data limitations, it is possible that our analysis failed to identify disparities that may exist, such as potential EJ characteristics (*e.g.,* residence of historically red-lined areas), environmental impacts (*e.g.,* other ozone metrics), and more granular spatial resolutions (*e.g.,* neighborhood scale) that were not evaluated. Also due to data and resource limitations, we discuss HAP and climate EJ impacts of this action qualitatively (section 6 of the RIA).

For this rule, we employ two types of analysis to respond to the previous three questions: proximity analyses and exposure analyses. Both types of analysis can inform whether there are potential EJ concerns in the baseline (question 1).[102] In contrast, only the exposure analyses, which are based on future air quality modeling, can inform whether there will be potential EJ concerns after implementation of the regulatory options under consideration (question 2) and whether potential EJ concerns will be created or mitigated compared to the baseline (question 3). While the exposure analysis can respond to all three questions, several caveats should be noted. For example, the air pollutant exposure metrics are limited to those used in the benefits assessment. For ozone, that is the maximum daily 8-hour average, averaged across the April through September warm season (AS–MO3) and for $PM_{2.5}$ that is the annual average. This ozone metric likely smooths potential daily ozone gradients and is not directly relatable to the National Ambient Air Quality Standards (NAAQS), whereas the $PM_{2.5}$ metric is more similar to the long-term $PM_{2.5}$ standard. The air quality modeling estimates are also based on state and fuel level emission data paired with facility-level baseline emissions and provided at a resolution of 12 square kilometers. Additionally, here we focus on air quality changes due to this rulemaking and infer post-policy ozone and $PM_{2.5}$ exposure burden impacts. Note, we discuss HAP and climate EJ impacts of this action qualitatively (section 6 of the RIA).

Exposure analysis results are provided in two formats: aggregated and distributional. The aggregated results provide an overview of potential ozone exposure differences across populations at the national- and state-levels, while the distributional results show detailed information about ozone concentration changes experienced by everyone within each population.

In section 6 of the RIA, we utilize the two types of analysis to address the three EJ questions by quantitatively evaluating: (1) the proximity of affected facilities to various local populations with potential EJ concerns (section 6.4); and (2) the potential for disproportionate ozone and $PM_{2.5}$ concentrations in the baseline and concentration changes after rule implementation across different demographic groups on the basis of race, ethnicity, poverty status, employment status, health insurance status, life expectancy, redlining, Tribal land, age, sex, educational attainment,

OMB Circular A–4 (2003)) to discount damages estimated in terms of reduced consumption would inappropriately underestimate the impacts of climate change for the purposes of estimating the SC–CO_2. See Section 4.4 of the RIA for more discussion.

[101] See *https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis.*

[102] The baseline for proximity analyses is current population information, whereas the baseline for ozone exposure analyses are the future years in which the regulatory options will be implemented (*e.g.,* 2023 and 2026).

and degree of linguistic isolation (section 6.5). It is important to note that due to the small magnitude of underlying emissions changes, and the corresponding small magnitude of the ozone and $PM_{2.5}$ concentration changes, the rule is expected to have only a small impact on the distribution of exposures across each demographic group. Each of these analyses should be considered independently of each other, as each was performed to answer separate questions, and is associated with unique limitations and uncertainties.

Baseline demographic proximity analyses can be relevant for identifying populations that may be exposed to local environmental stressors, such as local NO_2 and SO_2 emitted from affected sources in this final rule, traffic, or noise. The baseline analysis indicates that on average the populations living within 10 kilometers of coal plants potentially impacted by the amended fPM standards have a higher percentage of people living below two times the poverty level than the national average. In addition, on average the percentage of the American Indian population living within 10 kilometers of lignite plants potentially impacted by the amended Hg standard is higher than the national average. Assessing these results, we conclude that there may be potential EJ concerns associated with directly emitted pollutants that are affected by the regulatory action (*e.g.,* SO_2) for various population groups in the baseline (question 1). However, as proximity to affected facilities does not capture variation in baseline exposure across communities, nor does it indicate that any exposures or impacts will occur, these results should not be interpreted as a direct measure of exposure or impact.

As HAP exposure results generated as part of the 2020 Residual Risk Review were below both the presumptive acceptable cancer risk threshold and noncancer health benchmarks and this regulation should further reduce exposure to HAP, there are no ''disproportionate and adverse effects'' of potential EJ concern. Therefore, we did not perform a quantitative EJ assessment of HAP risk. However, the potential reduction in non-Hg HAP metal emissions would likely reduce exposures to people living nearby coal plants potentially impacted by the amended fPM standards.

This rule is also expected to reduce emissions of direct $PM_{2.5}$, NO_X, and SO_2 nationally throughout the year. Because NO_X and SO_2 are also precursors to secondary formation of ambient $PM_{2.5}$ and because NO_X is a precursor to ozone formation, reducing these emissions would impact human exposure. Quantitative ozone and $PM_{2.5}$ exposure analyses can provide insight into all three EJ questions, so they are performed to evaluate potential disproportionate impacts of this rulemaking. Even though both the proximity and exposure analyses can potentially improve understanding of baseline EJ concerns (question 1), the two should not be directly compared. This is because the demographic proximity analysis does not include air quality information and is based on current, not future, population information.

The baseline analysis of ozone and $PM_{2.5}$ concentration burden responds to question 1 from the EPA's EJ technical guidance more directly than the proximity analyses, as it evaluates a form of the environmental stressor targeted by the regulatory action. Baseline $PM_{2.5}$ and ozone exposure analyses show that certain populations, such as residents of redlined census tracts, those linguistically isolated, Hispanic, Asian, those without a high school diploma, and the unemployed may experience higher ozone and $PM_{2.5}$ exposures as compared to the national average. American Indian, residents of Tribal Lands, populations with higher life expectancy or with life expectancy data unavailable, children, and insured populations may also experience disproportionately higher ozone concentrations than the reference group. Hispanic, Black, below the poverty line, and uninsured populations may also experience disproportionately higher $PM_{2.5}$ concentrations than the reference group. Therefore, also in response to question 1, there likely are potential EJ concerns associated with ozone and $PM_{2.5}$ exposures affected by the regulatory action for population groups of concern in the baseline. However, these baseline exposure results have not been fully explored and additional analyses are likely needed to understand potential implications. Due to the small magnitude of the exposure changes across population demographics associated with the rulemaking relative to the magnitude of the baseline disparities, we infer that post-policy EJ ozone and $PM_{2.5}$ concentration burdens are likely to remain after implementation of the regulatory action or alternative under consideration (question 2).

Question 3 asks whether potential EJ concerns will be created or mitigated as compared to the baseline. Due to the very small magnitude of differences across demographic population post-policy ozone and $PM_{2.5}$ exposure impacts, we do not find evidence that potential EJ concerns related to ozone and $PM_{2.5}$ concentrations will be created or mitigated as compared to the baseline.[103]

X. Statutory and Executive Order Reviews

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

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

This action is a ''significant regulatory action,'' as defined under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, *Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review* (Ref. EPA–452/R–24–005), is briefly summarized in section IX. of this preamble and here. This analysis is also available in the docket.

Table 11 of this document presents the estimated PV and EAV of the monetizable projected health benefits, climate benefits, compliance costs, and net benefits of the final rule in 2019 dollars discounted to 2023. The estimated monetized net benefits are the projected monetized benefits minus the projected monetized costs of the final rule.

Under Executive Order 12866, the EPA is directed to consider all of the costs and benefits of its actions, not just those that stem from the regulated pollutant. Accordingly, the projected monetized benefits of the final rule include health benefits associated with projected reductions in $PM_{2.5}$ and ozone concentration. The projected monetized benefits also include climate benefits due to reductions in CO_2 emissions. The projected health benefits are associated with several point estimates and are presented at real discount rates of 2, 3, and 7 percent. The projected climate

[103] Please note that results for ozone and $PM_{2.5}$ exposures should not be extrapolated to other air pollutants that were not included in the assessment, including HAP. Detailed EJ analytical results can be found in section 6 of the RIA.

benefits in this table are based on estimates of the SC–CO_2 at a 2 percent near-term Ramsey discount rate and are discounted using a 2 percent discount rate to obtain the PV and EAV estimates in the table. The power industry's compliance costs are represented in this analysis as the change in electric power generation costs between the baseline and policy scenarios. In simple terms, these costs are an estimate of the increased power industry expenditures required to implement the finalized requirements and represent the EPA's best estimate of the social cost of the final rulemaking.

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Table 11. Projected Monetized Benefits, Compliance Costs, and Net Benefits of the Final Rule, 2028 through 2037 (Millions 2019$, Discounted to 2023)[a]

	Present Value (PV)		
	2% Discount Rate	3% Discount Rate	7% Discount Rate
Health Benefits[c]	300	260	180
Climate Benefits[d]	130	130	130
Compliance Costs	860	790	560
Net Benefits	-440	-400	-260
	Equal Annualized Value (EAV)[b]		
	2% Discount Rate	3% Discount Rate	7% Discount Rate
Health Benefits[c]	33	31	25
Climate Benefits[d]	14	14	14
Compliance Costs	96	92	80
Net Benefits	-49	-47	-41
Non-Monetized Benefits[e]	Benefits from reductions of about 900 to 1000 pounds of Hg annually		
	Benefits from reductions of at least 4 to 7 tons of non-Hg HAP metals annually		
	Benefits from improved water quality and availability		
	Benefits from the increased transparency, compliance assurance, and accelerated identification of anomalous emission anticipated from requiring PM CEMS		

[a] Values have been rounded to two significant figures. Rows may not appear to sum correctly due to rounding.
[b] The EAV of costs and benefits are calculated over the 10-year period from 2028 to 2037.
[c] The projected monetized air quality related benefits include those related to public health associated with reductions in $PM_{2.5}$ and ozone concentrations. The projected health benefits are associated with several point estimates and are presented at real discount rates of 2, 3, and 7 percent.
[d] Monetized climate benefits are based on reductions in CO_2 emissions and are calculated using three different estimates of the SC-CO_2 (under 1.5 percent, 2.0 percent, and 2.5 percent near-term Ramsey discount rates). For the presentational purposes of this table, we show the climate benefits associated with the SC-CO_2 at the 2 percent near-term Ramsey discount rate. Please see section 4 of the RIA for the full range of monetized climate benefit estimates.
[e] The list of non-monetized benefits does not include all potential non-monetized benefits. See table 4-8 of the RIA for a more complete list.

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As shown in table 11 of this document, this rule is projected to reduce $PM_{2.5}$ and ozone concentrations, producing a projected PV of monetized health benefits of about $300 million, with an EAV of about $33 million discounted at 2 percent. The rule is also projected to reduce greenhouse gas emissions in the form of CO_2, producing

a projected PV of monetized climate benefits of about $130 million, with an EAV of about $14 million using the SC–$CO_2$ discounted at 2 percent. Thus, this final rule would generate a PV of monetized benefits of $420 million, with an EAV of $47 million discounted at a 2 percent rate. The PV of the projected compliance costs are $860 million, with an EAV of about $96 million discounted at 2 percent. Combining the projected benefits with the projected compliance costs yields a net benefit PV estimate of −$440 million and EAV of −$49 million.

At a 3 percent discount rate, this rule is expected to generate projected PV of monetized health benefits of $260 million, with an EAV of about $31 million. Climate benefits remain discounted at 2 percent in this net benefits analysis. Thus, this final rule would generate a PV of monetized benefits of $390 million, with an EAV of $45 million discounted at a 3 percent rate. The PV of the projected compliance costs are $790 million, with an EAV of $92 million discounted at 3 percent. Combining the projected benefits with the projected compliance costs yields a net benefit PV estimate of −$400 million and an EAV of −$47 million.

At a 7 percent discount rate, this rule is expected to generate projected PV of monetized health benefits of $160 million, with an EAV of about $23 million. Climate benefits remain discounted at 2 percent in this net benefits analysis. Thus, this final rule would generate a PV of monetized benefits of $300 million, with an EAV of $39 million discounted at a 3 percent rate. The PV of the projected compliance costs are $560 million, with an EAV of $80 million discounted at 7 percent. Combining the projected benefits with the projected compliance costs yields a net benefit PV estimate of −$260 million and an EAV of −$41 million.

The potential benefits from reducing Hg and non-Hg HAP metals and potential improvements in water quality and availability were not monetized and are therefore not directly reflected in the monetized benefit-cost estimates associated with this final rule. Potential benefits from the increased transparency and accelerated identification of anomalous emission anticipated from requiring CEMS were also not monetized in this analysis and are therefore also not directly reflected in the monetized benefit-cost comparisons. We nonetheless consider these impacts in our evaluation of the net benefits of the rule and find, if we were able to quantify and monetize these beneficial impacts, the final rule would have greater net benefits than shown in table 11 of this preamble.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to the OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 2137–12. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0567.

The information collection activities in this rule include continuous emission monitoring, performance testing, notifications and periodic reports, recording information, monitoring and the maintenance of records. The information generated by these activities will be used by the EPA to ensure that affected facilities comply with the emission limits and other requirements. Records and reports are necessary to enable delegated authorities to identify affected facilities that may not be in compliance with the requirements. Based on reported information, delegated authorities will decide which units and what records or processes should be inspected. The recordkeeping requirements require only the specific information needed to determine compliance. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). The burden and cost estimates below represent the total burden and cost for the information collection requirements of the NESHAP for Coal- and Oil-Fired EGUs, not just the burden associated with the amendments in this final rule. The incremental cost associated with these amendments is $2.4 million per year.

Respondents/affected entities: The respondents are owners or operators of coal- and oil-fired EGUs. The North American Industry Classification System (NAICS) codes for the coal- and oil-fired EGU industry are 221112, 221122, and 921150.

Respondent's obligation to respond: Mandatory per 42 U.S.C. 7414 *et seq.*

Estimated number of respondents: 192 per year.[104]

Frequency of response: The frequency of responses varies depending on the burden item. Responses include daily calibrations, monthly recordkeeping activities, semiannual compliance reports, and annual reports.

Total estimated burden: 447,000 hours (per year). Burden is defined at 5 CFR part 1320.3(b).

Total estimated cost: $106,600,000 (per year), includes $53,100,000 in annual labor costs and $53,400,000 annualized capital and operation and maintenance costs.

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 the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

The EPA certifies that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In the 2028 analysis year, the EPA identified 24 potentially affected small entities operating 45 units at 26 facilities, and of these 24, only one small entity may experience compliance cost increases greater than one percent of revenue under the final rule. Details of this analysis are presented in section 5 of the RIA, which is in the public docket.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more (adjusted for inflation) as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The costs involved in this action are estimated not to exceed $100 million or more (adjusted for inflation) in any one year.

E. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive

[104] Each facility is a respondent and some facilities have multiple EGUs.

Order 13175. The Executive order defines tribal implications as ''actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes.'' The amendments in this action would not have a substantial direct effect on one or more tribes, change the relationship between the Federal Government and tribes, or affect the distribution of power and responsibilities between the Federal Government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

Although this action does not have tribal implications as specified in Executive Order 13175, the EPA consulted with tribal officials during the development of this action. On September 1, 2022, the EPA sent a letter to all federally recognized Indian tribes initiating consultation to obtain input on this action. The EPA did not receive any requests for consultation from Indian tribes. The EPA also participated in the September 2022 National Tribal Air Association EPA Air Policy Update Call to solicit input on this action.

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

Executive Order 13045 directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is subject to Executive Order 13045 because it is a significant regulatory action under section 3(f)(1) of Executive Order 12866. Accordingly, we have evaluated the potential for environmental health or safety effects from exposure to HAP, ozone, and $PM_{2.5}$ on children. The EPA believes that, even though the 2020 residual risk assessment showed all modeled exposures to HAP to be below thresholds for public health concern, the rule should reduce HAP exposure by reducing emissions of Hg and non-Hg HAP with the potential to reduce HAP exposure to vulnerable populations, including children. The action described in this rule is also expected to lower ozone and $PM_{2.5}$ in many areas, including those areas that struggle to attain or maintain the NAAQS, and thus mitigate some pre-existing health risks across all populations evaluated, including children. The results of this evaluation are contained in the RIA and are available in the docket for this action.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. For 2028, the compliance year for the standards, the EPA does not project a significant change in retail electricity prices on average across the contiguous U.S., coal-fired electricity generation, natural gas-fired electricity generation, or utility power sector delivered natural gas prices. Details of the projected energy effects are presented in section 3 of the RIA, which is in the public docket.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

The following standards appear in the amendatory text of this document and were previously approved for the locations in which they appear: ANSI/ASME PTC 19.10–1981, ASTM D6348–03(R2010), and ASTM D6784–16.

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

The EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. For this rule, we employ the proximity demographic analysis and the $PM_{2.5}$ and ozone exposure analyses to evaluate disproportionate and adverse human health and environmental effects on communities with EJ concerns that exist prior to the action. The proximity demographic analysis indicates that on average the population living within 10 kilometers of coal plants potentially impacted by the fPM standards have a higher percentage of people living below two times the poverty level than the national average. In addition, on average the percentage of the American Indian population living within 10 kilometers of lignite-fired plants potentially impacted by the Hg standard is higher than the national average. Baseline $PM_{2.5}$ and ozone and exposure analyses show that certain populations, such as residents of redlined census tracts, those linguistically isolated, Hispanic, Asian, those without a high school diploma, and the unemployed may experience disproportionately higher ozone and $PM_{2.5}$ exposures as compared to the national average. American Indian, residents of Tribal Lands, populations with higher life expectancy or with life expectancy data unavailable, children, and insured populations may also experience disproportionately higher ozone concentrations than the reference group. Hispanics, Blacks, those below the poverty line, and uninsured populations may also experience disproportionately higher $PM_{2.5}$ concentrations than the reference group.

The EPA believes that this action is not likely to change existing disproportionate and adverse effects on communities with environmental justice concerns. Only the exposure analyses, which are based on future air quality modeling, can inform whether there will be potential EJ concerns after implementation of the final rule, and whether potential EJ concerns will be created or mitigated. We infer that baseline disparities in ozone and $PM_{2.5}$ concentration burdens are likely to remain after implementation of the final regulatory option due to the small magnitude of the exposure changes across population demographics associated with the rulemaking relative to the baseline disparities. We also do not find evidence that potential EJ concerns related to ozone or $PM_{2.5}$ exposures will be exacerbated or mitigated in the final regulatory option, compared to the baseline due to the very small differences in the magnitude of post-policy ozone and $PM_{2.5}$ exposure impacts across demographic populations. Additionally, the potential reduction in Hg and non-Hg HAP metal emissions would likely reduce exposures to people living nearby coal plants potentially impacted by the amended fPM standards.

The information supporting this Executive Order review is contained in section IX.F. of this preamble and in section 6, Environmental Justice Impacts of the RIA, which is in the public docket (EPA–HQ–OAR–2018–0794).

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action meets the criteria set forth in 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous

substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 63 is amended as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart A—General Provisions

■ 2. In § 63.14, paragraph (f)(1) is amended by removing the text ''tables 4 and 5 to subpart UUUUU'' and adding, in its place, the text ''table 5 to subpart UUUUU''.

Subpart UUUUU—National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units

■ 3. Section 63.9991 is amended by revising paragraph (a)(2) to read as follows:

§ 63.9991 What emission limitations, work practice standards, and operating limits must I meet?

(a) * * *

(2) Before July 6, 2027, you must meet each operating limit in Table 4 to this subpart that applies to your EGU.

* * * * *

■ 4. Amend § 63.10000 by:

■ a. Revising paragraph (c)(1)(i) and paragraph (c)(1)(i)(A);

■ b. Redesignating paragraph (c)(1)(i)(C) as paragraph (c)(1)(i)(D);

■ c. Adding new paragraph (c)(1)(i)(C);

■ d. Revising paragraph (c)(1)(iv);

■ e. Adding new paragraphs (c)(1)(iv)(A) through (C);

■ f. Revising paragraphs (c)(2)(i) and (ii);

■ g. Revising paragraph (d)(5)(i); and

■ h. Revising paragraph (m) introductory text.

The revisions and additions read as follows:

§ 63.10000 What are my general requirements for complying with this subpart?

* * * * *

(c) * * *

(1) * * *

(i) For a coal-fired or solid oil-derived fuel-fired EGU or IGCC EGU, you may conduct initial performance testing in accordance with § 63.10005(h), to determine whether the EGU qualifies as a low emitting EGU (LEE) for one or more applicable emission limits, except as otherwise provided in paragraphs (c)(1)(i)(A) through (C) of this section:

(A) Except as provided in paragraph (c)(1)(i)(D) of this section, you may not pursue the LEE option if your coal-fired, IGCC, or solid oil-derived fuel-fired EGU is equipped with a main stack and a bypass stack or bypass duct configuration that allows the effluent to bypass any pollutant control device.

* * * * *

(C) On or after July 6, 2027, you may not pursue the LEE option for filterable PM, total non-Hg HAP metals, or individual non-Hg HAP metals for coal-fired and solid oil-derived fuel-fired EGUs.

* * * * *

(iv)(A) Before July 6, 2027, if your coal-fired or solid oil derived fuel-fired EGU does not qualify as a LEE for total non-mercury HAP metals, individual non-mercury HAP metals, or filterable particulate matter (PM), you must demonstrate compliance through an initial performance test and you must monitor continuous performance through either use of a particulate matter continuous parametric monitoring system (PM CPMS), a PM CEMS, or, for an existing EGU, compliance performance testing repeated quarterly.

(B) On and after July 6, 2027, you may not pursue or continue to use the LEE option for your coal-fired or solid oil derived fuel-fired EGU for filterable PM or for non-mercury HAP metals. You must demonstrate compliance through an initial performance test, and you must monitor continuous performance with the applicable filterable PM emissions limit through the use of a PM CEMS or HAP metals CMS.

(C) If your IGCC EGU does not qualify as a LEE for total non-mercury HAP metals, individual non-mercury HAP metals, or filterable PM, you must demonstrate compliance through an initial performance test and you must monitor continuous performance through either use of a PM CPMS, a PM CEMS, or, for an existing EGU, compliance performance testing repeated quarterly.

* * * * *

(2) * * *

(i) For an existing liquid oil-fired unit, you may conduct the performance testing in accordance with § 63.10005(h), to determine whether the unit qualifies as a LEE for one or more pollutants. For a qualifying LEE for Hg emissions limits, you must conduct a 30-day performance test using Method 30B at least once every 12 calendar months to demonstrate continued LEE status. For a qualifying LEE of any other applicable emissions limits, you must conduct a performance test at least once every 36 calendar months to demonstrate continued LEE status. On or after July 6, 2027, you may not pursue the LEE option for filterable PM, total non-Hg HAP metals, or individual non-Hg HAP metals.

(ii) Before July 6, 2027, if your liquid oil-fired unit does not qualify as a LEE for total HAP metals (including mercury), individual metals (including mercury), or filterable PM you must demonstrate compliance through an initial performance test and you must monitor continuous performance through either use of a PM CPMS, a PM CEMS, or, for an existing EGU, performance testing conducted quarterly. On and after July 6, 2027, you may not pursue or continue to use the LEE option for your liquid oil-fired EGU for filterable PM or for non-mercury HAP metals. You must demonstrate compliance through an initial performance test, and you must monitor continuous performance with the applicable filterable PM emissions limit through the use of a PM CEMS or HAP metals CMS.

(d) * * *

(5) * * *

(i) Installation of the CMS or sorbent trap monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.,* on or downstream of the last control device). See § 63.10010(a) for further details. For PM CPMS installations (which with the exception of IGCC units, are only applicable before July 6, 2027), follow the procedures in § 63.10010(h).

* * * * *

(m) Should you choose to rely on paragraph (2) of the definition of ''startup'' in § 63.10042 for your EGU (only allowed before January 2, 2025), on or before the date your EGU is subject to this subpart, you must install, verify, operate, maintain, and quality assure each monitoring system necessary for demonstrating compliance with the work practice standards for PM or non-mercury HAP metals controls during startup periods and shutdown periods required to comply with § 63.10020(e). On and after January 2, 2025 you will no longer be able to choose paragraph (2) of the ''startup'' definition in § 63.10042.

* * * * *

■ 5. Amend § 63.10005 by revising paragraphs (a)(1), (b) introductory text, (c), (d)(2) introductory text, (h) introductory text, and (h)(1) introductory text to read as follows:

§ 63.10005 What are my initial compliance requirements and by what date must I conduct them?

(a) * * *

(1) To demonstrate initial compliance with an applicable emissions limit in Table 1 or 2 to this subpart using stack testing, the initial performance test generally consists of three runs at specified process operating conditions using approved methods. Before July 6, 2027, if you are required to establish operating limits (see paragraph (d) of this section and Table 4 to this subpart), you must collect all applicable parametric data during the performance test period. On and after July 6, 2027, the requirements in Table 4 are not applicable, with the exception of IGCC units. Also, if you choose to comply with an electrical output-based emission limit, you must collect hourly electrical load data during the test period.

* * * * *

(b) *Performance testing requirements.* If you choose to use performance testing to demonstrate initial compliance with the applicable emissions limits in Tables 1 and 2 to this subpart for your EGUs, you must conduct the tests according to 40 CFR 63.10007 and Table 5 to this subpart. Notwithstanding these requirements, when Table 5 specifies the use of isokinetic EPA test Method 5, 5I, 5D, 26A, or 29 for a stack test, if concurrent measurement of the stack gas flow rate or moisture content is needed to convert the pollutant concentrations to units of the standard, separate determination of these parameters using EPA test Method 2 or EPA test Method 4 is not necessary. Instead, the stack gas flow rate and moisture content can be determined from data that are collected during the EPA test Method 5, 5I, 5D, 6, 26A, or 29 test (*e.g.,* pitot tube (delta P) readings, moisture collected in the impingers, etc.). For the purposes of the initial compliance demonstration, you may use test data and results from a performance test conducted prior to the date on which compliance is required as specified in 40 CFR 63.9984, provided that the following conditions are fully met:

* * * * *

(c) *Operating limits.* In accordance with § 63.10010 and Table 4 to this subpart, you may be required to establish operating limits using PM CPMS and using site-specific monitoring for certain liquid oil-fired units as part of your initial compliance demonstration. With the exception of IGCC units, on and after July 6, 2027, you may not demonstrate compliance with applicable filterable PM emissions limits with the use of PM CPMS or quarterly stack testing, you may only use PM CEMS.

* * * * *

(d) * * *

(2) For affected coal-fired or solid oil-derived fuel-fired EGUs that demonstrate compliance with the applicable emission limits for total non-mercury HAP metals, individual non-mercury HAP metals, total HAP metals, individual HAP metals, or filterable PM listed in Table 1 or 2 to this subpart using initial performance testing and continuous monitoring with PM CPMS (with the exception of IGCC units, the use of PM CPMS is only allowed before July 6, 2027):

* * * * *

(h) *Low emitting EGUs.* The provisions of this paragraph (h) apply to pollutants with emissions limits from new EGUs except Hg and to all pollutants with emissions limits from existing EGUs. With the exception of IGCC units, on or after July 6, 2027 you may not pursue the LEE option for filterable PM. You may pursue this compliance option unless prohibited pursuant to § 63.10000(c)(1)(i).

(1) An EGU may qualify for low emitting EGU (LEE) status for Hg, HCl, HF, filterable PM, total non-Hg HAP metals, or individual non-Hg HAP metals (or total HAP metals or individual HAP metals, for liquid oil-fired EGUs) if you collect performance test data that meet the requirements of this paragraph (h) with the exception that on or after July 6, 2027, you may not pursue the LEE option for filterable PM, total non-Hg HAP metals, or individual non-Hg HAP metals for any existing, new or reconstructed EGUs (this does not apply to IGCC units), and if those data demonstrate:

* * * * *

■ 6. Amend § 63.10006 by revising paragraph (a) to read as follows:

§ 63.10006 When must I conduct subsequent performance tests or tune-ups?

(a) For liquid oil-fired, solid oil-derived fuel-fired and coal-fired EGUs and IGCC units using PM CPMS before July 6, 2027 to monitor continuous performance with an applicable emission limit as provided for under § 63.10000(c), you must conduct all applicable performance tests according to Table 5 to this subpart and § 63.10007 at least every year. On or after July 6, 2027 you may not use PM CPMS to demonstrate compliance for liquid oil-fired, solid oil-derived fuel-fired and coal-fired EGUs. This prohibition against the use of PM CPMS does not apply to IGCC units.

* * * * *

■ 7. Amend § 63.1007 by revising paragraphs (a)(3) and (c) to read as follows:

§ 63.10007 What methods and other procedures must I use for the performance tests?

(a) * * *

(3) For establishing operating limits with particulate matter continuous parametric monitoring system (PM CPMS) to demonstrate compliance with a PM or non-Hg metals emissions limit (the use of PM CPMS is only allowed before July 6, 2027 with the exception of IGCC units), operate the unit at maximum normal operating load conditions during the performance test period. Maximum normal operating load will be generally between 90 and 110 percent of design capacity but should be representative of site specific normal operations during each test run.

* * * * *

(c) If you choose the filterable PM method to comply with the PM emission limit and demonstrate continuous performance using a PM CPMS as provided for in § 63.10000(c), you must also establish an operating limit according to § 63.10011(b), § 63.10023, and Tables 4 and 6 to this subpart. Should you desire to have operating limits that correspond to loads other than maximum normal operating load, you must conduct testing at those other loads to determine the additional operating limits. On and after July 6, 2027, you must demonstrate continuous compliance with the applicable filterable PM emission standard through the use of a PM CEMS (with the exception that IGCC units are not required to use PM CEMS and may continue to use PM CPMS). Alternatively, you may demonstrate continuous compliance with the non-Hg metals emission standard if you request and receive approval for the use of a HAP metals CMS under § 63.7(f).

* * * * *

■ 8. Amend § 63.10010 by revising paragraphs (a) introductory text, (h) introductory text, (i) introductory text, (j), and (l) introductory text to read as follows:

§ 63.10010 What are my monitoring, installation, operation, and maintenance requirements?

(a) Flue gases from the affected units under this subpart exhaust to the atmosphere through a variety of

different configurations, including but not limited to individual stacks, a common stack configuration or a main stack plus a bypass stack. For the CEMS, PM CPMS (which on or after July 6, 2027 you may not use PM CPMS for filterable PM compliance demonstrations unless it is for an IGCC unit), and sorbent trap monitoring systems used to provide data under this subpart, the continuous monitoring system installation requirements for these exhaust configurations are as follows:

* * * * *

(h) If you use a PM CPMS to demonstrate continuous compliance with an operating limit (only applicable before July 6, 2027 unless it is for an IGCC unit), you must install, calibrate, maintain, and operate the PM CPMS and record the output of the system as specified in paragraphs (h)(1) through (5) of this section.

* * * * *

(i) If you choose to comply with the PM filterable emissions limit in lieu of metal HAP limits (which on or after July 6, 2027 you may not use non-mercury metal HAP limits for compliance demonstrations for existing EGUs unless you request and receive approval for the use of a HAP metals CMS under § 63.7(f)), you may choose to install, certify, operate, and maintain a PM CEMS and record and report the output of the PM CEMS as specified in paragraphs (i)(1) through (8) of this section. With the exception of IGCC units, on or after July 6, 2027 owners/operators of existing EGUs must comply with filterable PM emissions limits in Table 2 of this subpart and demonstrate continuous compliance using a PM CEMS unless you request and receive approval for the use of a HAP metals CMS under § 63.7(f). Compliance with the applicable PM emissions limit in Table 1 or 2 to this subpart is determined on a 30-boiler operating day rolling average basis.

* * * * *

(j) You may choose to comply with the metal HAP emissions limits using CMS approved in accordance with § 63.7(f) as an alternative to the performance test method specified in this rule. If approved to use a HAP metals CMS, the compliance limit will be expressed as a 30-boiler operating day rolling average of the numerical emissions limit value applicable for your unit in tables 1 or 2. If approved, you may choose to install, certify, operate, and maintain a HAP metals CMS and record the output of the HAP metals CMS as specified in paragraphs (j)(1) through (5) of this section.

(1)(i) Install, calibrate, operate, and maintain your HAP metals CMS according to your CMS quality control program, as described in § 63.8(d)(2). The reportable measurement output from the HAP metals CMS must be expressed in units of the applicable emissions limit (*e.g.,* lb/MMBtu, lb/MWh) and in the form of a 30-boiler operating day rolling average.

(ii) Operate and maintain your HAP metals CMS according to the procedures and criteria in your site specific performance evaluation and quality control program plan required in § 63.8(d).

(2) Collect HAP metals CMS hourly average output data for all boiler operating hours except as indicated in section (j)(4) of this section.

(3) Calculate the arithmetic 30-boiler operating day rolling average of all of the hourly average HAP metals CMS output data collected during all nonexempt boiler operating hours data.

(4) You must collect data using the HAP metals CMS at all times the process unit is operating and at the intervals specified in paragraph (a) of this section, except for required monitoring system quality assurance or quality control activities, and any scheduled maintenance as defined in your site-specific monitoring plan.

(i) You must use all the data collected during all boiler operating hours in assessing the compliance with your emission limit except:

(A) Any data collected during periods of monitoring system malfunctions and repairs associated with monitoring system malfunctions. You must report any monitoring system malfunctions as deviations in your compliance reports under 40 CFR 63.10031(c) or (g) (as applicable);

(B) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods. You must report any out of control periods as deviations in your compliance reports under 40 CFR 63.10031(c) or (g) (as applicable);

(C) Any data recorded during required monitoring system quality assurance or quality control activities that temporarily interrupt the measurement of emissions (*e.g.,* calibrations, certain audits, routine probe maintenance); and

(D) Any data recorded during periods of startup or shutdown.

(ii) You must record and report the results of HAP metals CMS system performance audits, in accordance with 40 CFR 63.10031(k). You must also record and make available upon request the dates and duration of periods when the HAP metals CMS is out of control to completion of the corrective actions necessary to return the HAP metals CMS to operation consistent with your site-specific performance evaluation and quality control program plan.

* * * * *

(l) Should you choose to rely on paragraph (2) of the definition of ''startup'' in § 63.10042 for your EGU (only allowed before January 2, 2025), you must install, verify, operate, maintain, and quality assure each monitoring system necessary for demonstrating compliance with the PM or non-mercury metals work practice standards required to comply with § 63.10020(e). On and after January 2, 2025 you will no longer be able to choose paragraph (2) of the ''startup'' definition in § 63.10042 for your EGU.

* * * * *

■ 9. Amend § 63.10011 by revising paragraphs (b), (g)(3), and (4) introductory text to read as follows:

§ 63.10011 How do I demonstrate initial compliance with the emissions limits and work practice standards?

* * * * *

(b) If you are subject to an operating limit in Table 4 to this subpart, you demonstrate initial compliance with HAP metals or filterable PM emission limit(s) through performance stack tests and you elect to use a PM CPMS to demonstrate continuous performance (with the exception of existing IGCC units, on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations with the applicable filterable PM limits and the Table 4 p.m. CPMS operating limits do not apply), or if, for an IGCC unit, and you use quarterly stack testing for HCl and HF plus site-specific parameter monitoring to demonstrate continuous performance, you must also establish a site-specific operating limit, in accordance with § 63.10007 and Table 6 to this subpart. You may use only the parametric data recorded during successful performance tests (*i.e.,* tests that demonstrate compliance with the applicable emissions limits) to establish an operating limit. On or after July 6, 2027 you may not use PM CPMS for compliance demonstrations with the applicable filterable PM limits and the Table 6 procedures for establishing PM CPMS operating limits do not apply unless it is an IGCC unit.

* * * * *

(g) * * *

(3) You must report the emissions data recorded during startup and shutdown. If you are relying on paragraph (2) of the definition of startup in 40 CFR 63.10042 (only allowed before January 2, 2025), then for startup and shutdown incidents that occur on or prior to December 31, 2023, you must also report the applicable supplementary information in 40 CFR 63.10031(c)(5) in the semiannual compliance report. For startup and shutdown incidents that occur on or after January 1, 2024, you must provide the applicable information in 40 CFR 63.10031(c)(5)(ii) and 40 CFR 63.10020(e) quarterly, in PDF files, in accordance with 40 CFR 63.10031(i).

(4) If you choose to use paragraph (2) of the definition of ''startup'' in § 63.10042 (only allowed before January 2, 2025), and you find that you are unable to safely engage and operate your particulate matter (PM) control(s) within 1 hour of first firing of coal, residual oil, or solid oil-derived fuel, you may choose to rely on paragraph (1) of definition of ''startup'' in § 63.10042 or you may submit a request to use an alternative non-opacity emissions standard, as described below.

* * * * *

■ 10. Section 63.10020 is amended by revising paragraphs (e) introductory text and (e)(3)(i) introductory text to read as follows:

§ 63.10020 How do I monitor and collect data to demonstrate continuous compliance?

* * * * *

(e) Additional requirements during startup periods or shutdown periods if you choose to rely on paragraph (2) of the definition of ''startup'' in § 63.10042 for your EGU (only allowed before January 2, 2025).

* * * * *

(3) * * *

(i) Except for an EGU that uses PM CEMS or PM CPMS to demonstrate compliance with the PM emissions limit, or that has LEE status for filterable PM or total non-Hg HAP metals for non-liquid oil-fired EGUs (or HAP metals emissions for liquid oil-fired EGUs), or individual non-mercury metals CMS (except that unless it is for an IGCC unit, on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations with the applicable filterable PM emissions limits, and you may not purse or continue to use the LEE option for filterable PM, total non-Hg HAP metals, or individual non-Hg HAP metals), you must:

* * * * *

■ 11. Section 63.10021 is amended by revising paragraphs (c) introductory text and (i) to read as follows:

§ 63.10021 How do I demonstrate continuous compliance with the emission limitations, operating limits, and work practice standards?

* * * * *

(c) If you use PM CPMS data (only allowed before July 6, 2027 unless it is for an IGCC unit) to measure compliance with an operating limit in Table 4 to this subpart, you must record the PM CPMS output data for all periods when the process is operating and the PM CPMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average data collected by the PM CPMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (*e.g.,* milliamps, PM concentration, raw data signal) on a 30 operating day rolling average basis, updated at the end of each new boiler operating day. Use Equation 9 to determine the 30 boiler operating day average. On or after July 6, 2027 you may not use PM CPMS for compliance demonstrations unless it is for an IGCC unit.

$$30\ boiler\ operating\ day\ average = \frac{\sum_{i=1}^{n} Hpv_i}{n} \quad (Eq.\ 9)$$

Where:

Hpv_i is the hourly parameter value for hour i and n is the number of valid hourly parameter values collected over 30 boiler operating days.

* * * * *

(i) Before January 2, 2025, if you are relying on paragraph 2 of the definition of startup in 40 CFR 63.10042, you must provide reports concerning activities and periods of startup and shutdown that occur on or prior to January 1, 2024, in accordance with 40 CFR 63.10031(c)(5), in your semiannual compliance report. For startup and shutdown incidents that occur on and after January 1, 2024, you must provide the applicable information referenced in 40 CFR 63.10031(c)(5)(ii) and 40 CFR 63.10020(e) quarterly, in PDF files, in accordance with 40 CFR 63.10031(i). On or after January 2, 2025 you may not use paragraph 2 of the definition of startup in 40 CFR 63.10042.

■ 12. Section 63.10022 is amended by revising paragraphs (a)(2) and (3) to read as follows:

§ 63.10022 How do I demonstrate continuous compliance under the emissions averaging provision?

(a) * * *

(2) For each existing unit participating in the emissions averaging option that is equipped with PM CPMS, maintain the average parameter value at or below the operating limit established during the most recent performance test. On or after July 6, 2027 you may not use PM CPMS for filterable PM compliance demonstrations unless it is for an IGCC unit;

(3) For each existing unit participating in the emissions averaging option venting to a common stack configuration containing affected units from other subcategories, maintain the appropriate operating limit for each unit as specified in Table 4 to this subpart that applies. Since on or after July 6, 2027 you may not use PM CPMS, unless it is for an IGCC unit, for compliance demonstrations with the applicable filterable PM limits, the Table 4 p.m. CPMS operating limits do not apply.

* * * * *

■ 13. Section 63.10023 is amended by adding introductory text to the section to read as follows:

§ 63.10023 How do I establish my PM CPMS operating limit and determine compliance with it?

The provisions of this section § 63.10023 are only applicable before July 6, 2027 unless it is for an IGCC unit. On or after July 6, 2027 you may not use PM CPMS, unless it is an IGCC unit, for demonstrating compliance with the filterable PM emissions limits of this subpart.

* * * * *

■ 14. Section 63.10030 is amended by revising paragraphs (e)(3), (8) introductory text, and (8)(i) introductory text to read as follows:

§ 63.10030 What notifications must I submit and when?

* * * * *

(e) * * *

(3) Identification of whether you plan to demonstrate compliance with each applicable emission limit through performance testing; fuel moisture analyses; performance testing with operating limits (*e.g.,* use of PM CPMS—which on or after July 6, 2027—you may not use for filterable PM compliance demonstrations, unless it is for an IGCC unit); CEMS; or a sorbent trap monitoring system.

* * * * *

(8) Identification of whether you plan to rely on paragraph (1) or (2) of the definition of ''startup'' in § 63.10042. On or after January 2, 2025 you may not use paragraph (2) of the definition of startup in § 63.10042.

(i) Before January 2, 2025 should you choose to rely on paragraph (2) of the definition of ''startup'' in § 63.10042 for your EGU, you shall include a report that identifies:

* * * * *

■ 15. Section 63.10031 is amended by revising paragraphs (a)(4), (c)(5) introductory text, (f)(2), (i), and (k) to read as follows:

§ 63.10031 What reports must I submit and when?

(a) * * *

(4) Before July 6, 2027, if you elect to demonstrate continuous compliance using a PM CPMS, you must meet the electronic reporting requirements of appendix D to this subpart. Except for IGCC units, on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations. Electronic reporting of the hourly PM CPMS output shall begin with the later of the first operating hour on or after January 1, 2024; or the first operating hour after completion of the initial performance stack test that establishes the operating limit for the PM CPMS.

(c) * * *

(5) Should you choose to rely on paragraph (2) of the definition of ''startup'' in § 63.10042 for your EGU (only allowed before January 2, 2025), for each instance of startup or shutdown you shall:

* * * * *

(f) * * *

(2) If, for a particular EGU or a group of EGUs serving a common stack, you have elected to demonstrate compliance using a PM CEMS, an approved HAP metals CMS, or a PM CPMS (on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations, unless it is for an IGCC unit), you must submit quarterly PDF reports in accordance with paragraph (f)(6) of this section, which include all of the 30-boiler operating day rolling average emission rates derived from the CEMS data or the 30-boiler operating day rolling average responses derived from the PM CPMS data (as applicable). The quarterly reports are due within 60 days after the reporting periods ending on March 31st, June 30th, September 30th, and December 31st. Submission of these quarterly reports in PDF files shall end with the report that covers the fourth calendar quarter of 2023. Beginning with the first calendar quarter of 2024, the compliance averages shall no longer be reported separately, but shall be incorporated into the quarterly compliance reports described in paragraph (g) of this section. In addition to the compliance averages for PM CEMS, PM CPMS, and/or HAP metals CMS, the quarterly compliance reports described in paragraph (g) of this section must also include the 30- (or, if applicable 90-) boiler operating day rolling average emission rates for Hg, HCl, HF, and/or SO_2, if you have elected to (or are required to) continuously monitor these pollutants. Further, if your EGU or common stack is in an averaging plan, your quarterly compliance reports must identify all of the EGUs or common stacks in the plan and must include all of the 30- (or 90-) group boiler operating day rolling weighted average emission rates (WAERs) for the averaging group.

* * * * *

(i) If you have elected to use paragraph (2) of the definition of ''startup'' in 40 CFR 63.10042 (only allowed before January 2, 2025), then, for startup and shutdown incidents that occur on or prior to December 31, 2023, you must include the information in 40 CFR 63.10031(c)(5) in the semiannual compliance report, in a PDF file. If you have elected to use paragraph (2) of the definition of ''startup'' in 40 CFR 63.10042, then, for startup and shutdown event(s) that occur on or after January 1, 2024, you must use the ECMPS Client Tool to submit the information in 40 CFR 63.10031(c)(5) and 40 CFR 63.10020(e) along with each quarterly compliance report, in a PDF file, starting with a report for the first calendar quarter of 2024. The applicable data elements in paragraphs (f)(6)(i) through (xii) of this section must be entered into ECMPS with each startup and shutdown report.

* * * * *

(k) If you elect to demonstrate compliance using a PM CPMS (on or after July 6, 2027 you may not demonstrate compliance with filterable PM emissions limits using a PM CPMS, unless it is for an IGCC unit) or an approved HAP metals CMS, you must submit quarterly reports of your QA/QC activities (*e.g.,* calibration checks, performance audits), in a PDF file, beginning with a report for the first quarter of 2024, if the PM CPMS or HAP metals CMS is used for the compliance demonstration in that quarter. Otherwise, submit a report for the first calendar quarter in which the PM CPMS or HAP metals CMS is used to demonstrate compliance. These reports are due no later than 60 days after the end of each calendar quarter. The applicable data elements in paragraph (f)(6)(i) through (xii) of this section must be entered into ECMPS with the PDF report.

■ 16. Section 63.10032 is amended by revising paragraphs (a) introductory text and (f)(2) introductory text to read as follows:

§ 63.10032 What records must I keep?

(a) You must keep records according to paragraphs (a)(1) and (2) of this section. If you are required to (or elect to) continuously monitor Hg and/or HCl and/or HF and/or PM emissions, or if you elect to use a PM CPMS (unless it is for an IGCC unit, you may only use PM CPMS before July 6, 2027), you must keep the records required under appendix A and/or appendix B and/or appendix C and/or appendix D to this subpart. If you elect to conduct periodic (*e.g.,* quarterly or annual) performance stack tests, then, for each test completed on or after January 1, 2024, you must keep records of the applicable data elements under 40 CFR 63.7(g). You must also keep records of all data elements and other information in appendix E to this subpart that apply to your compliance strategy.

* * * * *

(f) * * *

(2) Should you choose to rely on paragraph (2) of the definition of ''startup'' in § 63.10042 for your EGU (on or after January 2, 2025 you may not use paragraph (2) of the definition of startup in § 63.10042), you must keep records of:

* * * * *

■ 17. Section 63.10042 is amended by revising the definition ''Startup'' to read as follows:

§ 63.10042 What definitions apply to this subpart?

* * * * *

Startup means:

(1) The first-ever firing of fuel in a boiler for the purpose of producing

electricity, or the firing of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on-site use). Any fraction of an hour in which startup occurs constitutes a full hour of startup.

(2) Alternatively, prior to January 2, 2025, the period in which operation of an EGU is initiated for any purpose. Startup begins with either the firing of any fuel in an EGU for the purpose of producing electricity or useful thermal energy (such as heat or steam) for industrial, commercial, heating, or cooling purposes (other than the first-ever firing of fuel in a boiler following construction of the boiler) or for any other purpose after a shutdown event. Startup ends 4 hours after the EGU generates electricity that is sold or used for any other purpose (including on site use), or 4 hours after the EGU makes useful thermal energy (such as heat or steam) for industrial, commercial, heating, or cooling purposes (16 U.S.C. 796(18)(A) and 18 CFR 292.202(c)), whichever is earlier. Any fraction of an hour in which startup occurs constitutes a full hour of startup.

* * * * *

■ 18. Revise table 1 to subpart UUUUU of part 63 to read as follows:

Table 1 to Subpart UUUUU of Part 63—Emission Limits for New or Reconstructed EGUs

As stated in § 63.9991, you must comply with the following applicable emission limits:

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
1. Coal-fired unit not low rank virgin coal	a. Filterable particulate matter (PM).	9.0E–2 lb/MWh [1]	Collect a minimum catch of 6.0 milligrams or a minimum sample volume of 4 dscm per run.
	OR	OR	
	Total non-Hg HAP metals.	6.0E–2 lb/GWh	Collect a minimum of 4 dscm per run.
	OR	OR	
	Individual HAP metals:.		Collect a minimum of 3 dscm per run.
	Antimony (Sb)	8.0E–3 lb/GWh.	
	Arsenic (As)	3.0E–3 lb/GWh.	
	Beryllium (Be)	6.0E–4 lb/GWh.	
	Cadmium (Cd)	4.0E–4 lb/GWh.	
	Chromium (Cr)	7.0E–3 lb/GWh.	
	Cobalt (Co)	2.0E–3 lb/GWh.	
	Lead (Pb)	2.0E–2 lb/GWh.	
	Manganese (Mn)	4.0E–3 lb/GWh.	
	Nickel (Ni)	4.0E–2 lb/GWh.	
	Selenium (Se)	5.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl).	1.0E–2 lb/MWh	For Method 26A at appendix A–8 to part 60 of this chapter, collect a minimum of 3 dscm per run. For ASTM D6348–03(Reapproved 2010) [2] or Method 320 at appendix A to part 63 of this chapter, sample for a minimum of 1 hour.
	OR		
	Sulfur dioxide (SO_2) [3].	1.0 lb/MWh	SO_2 CEMS.
	c. Mercury (Hg)	3.0E–3 lb/GWh	Hg CEMS or sorbent trap monitoring system only.
2. Coal-fired units low rank virgin coal	a. Filterable particulate matter (PM).	9.0E–2 lb/MWh [1]	Collect a minimum catch of 6.0 milligrams or a minimum sample volume of 4 dscm per run.
	OR	OR	
	Total non-Hg HAP metals.	6.0E–2 lb/GWh	Collect a minimum of 4 dscm per run.
	OR	OR	
	Individual HAP metals:.		Collect a minimum of 3 dscm per run.
	Antimony (Sb)	8.0E–3 lb/GWh.	
	Arsenic (As)	3.0E–3 lb/GWh.	
	Beryllium (Be)	6.0E–4 lb/GWh.	
	Cadmium (Cd)	4.0E–4 lb/GWh.	
	Chromium (Cr)	7.0E–3 lb/GWh.	
	Cobalt (Co)	2.0E–3 lb/GWh.	
	Lead (Pb)	2.0E–2 lb/GWh.	
	Manganese (Mn)	4.0E–3 lb/GWh.	
	Nickel (Ni)	4.0E–2 lb/GWh.	
	Selenium (Se)	5.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl).	1.0E–2 lb/MWh	For Method 26A, collect a minimum of 3 dscm per run For ASTM D6348–03(Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
	OR		
	Sulfur dioxide (SO_2) [3].	1.0 lb/MWh	SO_2 CEMS.

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	c. Mercury (Hg)	Before July 8, 2024: 4.0E–2 lb/GWh; On or after July 8, 2024: 1.3E–2 lb/GWh.	Hg CEMS or sorbent trap monitoring system only.
3. IGCC unit	a. Filterable particulate matter (PM).	7.0E–2 lb/MWh [4] 9.0E–2 lb/MWh [5].	Collect a minimum catch of 3.0 milligrams or a minimum sample volume of 2 dscm per run.
	OR	OR	
	Total non-Hg HAP metals.	4.0E–1 lb/GWh	Collect a minimum of 1 dscm per run.
	OR	OR	
	Individual HAP metals:.		Collect a minimum of 2 dscm per run.
	Antimony (Sb)	2.0E–2 lb/GWh.	
	Arsenic (As)	2.0E–2 lb/GWh.	
	Beryllium (Be)	1.0E–3 lb/GWh.	
	Cadmium (Cd)	2.0E–3 lb/GWh.	
	Chromium (Cr)	4.0E–2 lb/GWh.	
	Cobalt (Co)	4.0E–3 lb/GWh.	
	Lead (Pb)	9.0E–3 lb/GWh.	
	Manganese (Mn)	2.0E–2 lb/GWh.	
	Nickel (Ni)	7.0E–2 lb/GWh.	
	Selenium (Se)	3.0E–1 lb/GWh.	
	b. Hydrogen chloride (HCl).	2.0E–3 lb/MWh	For Method 26A, collect a minimum of 1 dscm per run; for Method 26 at appendix A–8 to part 60 of this chapter, collect a minimum of 120 liters per run. For ASTM D6348–03(Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
	OR		
	Sulfur dioxide (SO_2) [3].	4.0E–1 lb/MWh	SO_2 CEMS.
	c. Mercury (Hg)	3.0E–3 lb/GWh	Hg CEMS or sorbent trap monitoring system only.
4. Liquid oil-fired unit—continental (excluding limited-use liquid oil-fired subcategory units).	a. Filterable particulate matter (PM).	3.0E–1 lb/MWh [1]	Collect a minimum of 1 dscm per run.
	OR	OR	
	Total HAP metals	2.0E–4 lb/MWh	Collect a minimum of 2 dscm per run.
	OR	OR	
	Individual HAP metals:.		Collect a minimum of 2 dscm per run.
	Antimony (Sb)	1.0E–2 lb/GWh.	
	Arsenic (As)	3.0E–3 lb/GWh.	
	Beryllium (Be)	5.0E–4 lb/GWh.	
	Cadmium (Cd)	2.0E–4 lb/GWh.	
	Chromium (Cr)	2.0E–2 lb/GWh.	
	Cobalt (Co)	3.0E–2 lb/GWh.	
	Lead (Pb)	8.0E–3 lb/GWh.	
	Manganese (Mn)	2.0E–2 lb/GWh.	
	Nickel (Ni)	9.0E–2 lb/GWh.	
	Selenium (Se)	2.0E–2 lb/GWh.	
	Mercury (Hg)	1.0E–4 lb/GWh	For Method 30B at appendix A–8 to part 60 of this chapter sample volume determination (Section 8.2.4), the estimated Hg concentration should nominally be <½ the standard.
	b. Hydrogen chloride (HCl).	4.0E–4 lb/MWh	For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03(Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
	c. Hydrogen fluoride (HF).	4.0E–4 lb/MWh	For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03 (Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
5. Liquid oil-fired unit—non-continental (excluding limited-use liquid oil-fired subcategory units).	a. Filterable particulate matter (PM).	2.0E–1 lb/MWh [1]	Collect a minimum of 1 dscm per run.
	OR	OR	
	Total HAP metals	7.0E–3 lb/MWh	Collect a minimum of 1 dscm per run.
	OR	OR	
	Individual HAP metals:.		Collect a minimum of 3 dscm per run.
	Antimony (Sb)	8.0E–3 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Arsenic (As)	6.0E–2 lb/GWh.	
	Beryllium (Be)	2.0E–3 lb/GWh.	
	Cadmium (Cd)	2.0E–3 lb/GWh.	
	Chromium (Cr)	2.0E–2 lb/GWh.	
	Cobalt (Co)	3.0E–1 lb/GWh.	
	Lead (Pb)	3.0E–2 lb/GWh.	
	Manganese (Mn)	1.0E–1 lb/GWh.	
	Nickel (Ni)	4.1E0 lb/GWh.	
	Selenium (Se)	2.0E–2 lb/GWh.	
	Mercury (Hg)	4.0E–4 lb/GWh	For Method 30B sample volume determination (Section 8.2.4), the estimated Hg concentration should nominally be <½ the standard.
	b. Hydrogen chloride (HCl).	2.0E–3 lb/MWh	For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
	c. Hydrogen fluoride (HF).	5.0E–4 lb/MWh	For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03 (Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
6. Solid oil-derived fuel-fired unit	a. Filterable particulate matter (PM).	3.0E–2 lb/MWh [1]	Collect a minimum of 1 dscm per run.
	OR	OR	
	Total non-Hg HAP metals.	6.0E–1 lb/GWh	Collect a minimum of 1 dscm per run.
	OR	OR	
	Individual HAP metals:.		Collect a minimum of 3 dscm per run.
	Antimony (Sb)	8.0E–3 lb/GWh.	
	Arsenic (As)	3.0E–3 lb/GWh.	
	Beryllium (Be)	6.0E–4 lb/GWh.	
	Cadmium (Cd)	7.0E–4 lb/GWh.	
	Chromium (Cr)	6.0E–3 lb/GWh.	
	Cobalt (Co)	2.0E–3 lb/GWh.	
	Lead (Pb)	2.0E–2 lb/GWh.	
	Manganese (Mn)	7.0E–3 lb/GWh.	
	Nickel (Ni)	4.0E–2 lb/GWh.	
	Selenium (Se)	6.0E–3 lb/GWh.	
	b. Hydrogen chloride (HCl).	4.0E–4 lb/MWh	For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03 (Reapproved 2010) [2] or Method 320, sample for a minimum of 1 hour.
	OR		
	Sulfur dioxide (SO_2) [3].	1.0 lb/MWh	SO_2 CEMS.
	c. Mercury (Hg)	2.0E–3 lb/GWh	Hg CEMS or Sorbent trap monitoring system only.

[1] Gross output.
[2] Incorporated by reference, see § 63.14.
[3] You may not use the alternate SO_2 limit if your EGU does not have some form of FGD system (or, in the case of IGCC EGUs, some other acid gas removal system either upstream or downstream of the combined cycle block) and SO_2 CEMS installed.
[4] Duct burners on syngas; gross output.
[5] Duct burners on natural gas; gross output.

■ 19. Revise table 2 to subpart UUUUU of part 63 to read as follows:

Table 2 to Subpart UUUUU of Part 63—Emission Limits for Existing EGUs

As stated in § 63.9991, you must comply with the following applicable emission limits: [1]

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
1. Coal-fired unit not low rank virgin coal	a. Filterable particulate matter (PM).	Before July 6, 2027: 3.0E–2 lb/MMBtu or 3.0E–1 lb/MWh [2].	Before July 6, 2027: Collect a minimum of 1 dscm per run.

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
		On or after July 6, 2027: 1.0E–2 lb/MMBtu or 1.0E–1 lb/MWh [2].	On or after July 6, 2027: Collect a minimum catch of 6.0 milligrams or a minimum sample volume of 4 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following total non-Hg HAP metals emission limit if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Total non-Hg HAP metals.	Before July 6, 2027: 5.0E–5 lb/MMBtu or 5.0E–1 lb/GWh. On or after July 6, 2027: 1.7E–5 lb/MMBtu or 1.7E–1 lb/GWh.	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following individual HAP metals emissions limits if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Individual HAP metals:.	....	Collect a minimum of 3 dscm per run.
	Antimony (Sb)	Before July 6, 2027: 8.0E–1 lb/TBtu or 8.0E–3 lb/GWh. On or after July 6, 2027: 2.7E–1 lb/TBtu or 2.7E–3 lb/GWh.	
	Arsenic (As)	Before July 6, 2027: 1.1E0 lb/TBtu or 2.0E–2 lb/GWh. On or after July 6, 2027: 3.7E–1 lb/TBtu or 6.7E–3 lb/GWh.	
	Beryllium (Be)	Before July 6, 2027: 2.0E–1 lb/TBtu or 2.0E–3 lb/GWh. On or after July 6, 2027: 6.7E–2 lb/TBtu or 6.7E–4 lb/GWh.	
	Cadmium (Cd)	Before July 6, 2027: 3.0E–1 lb/TBtu or 3.0E–3 lb/GWh. On or after July 6, 2027: 1.0E–1 lb/TBtu or 1.0E–3 lb/GWh.	
	Chromium (Cr)	Before July 6, 2027: 2.8E0 lb/TBtu or 3.0E–2 lb/GWh. On or after July 6, 2027: 9.3E–1 lb/TBtu or 1.0E–2 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Cobalt (Co)	Before July 6, 2027: 8.0E–1 lb/TBtu or 8.0E–3 lb/GWh. On or after July 6, 2027: 2.7E–1 lb/TBtu or 2.7E–3 lb/GWh.	
	Lead (Pb)	Before July 6, 2027: 1.2E0 lb/TBtu or 2.0E–2 lb/GWh. On or after July 6, 2027: 4.0E–1 lb/TBtu or 6.7E–3 lb/GWh.	
	Manganese (Mn)	Before July 6, 2027: 4.0E0 lb/TBtu or 5.0E–2 lb/GWh. On or after July 6, 2027: 1.3E0 lb/TBtu or 1.7E–2 lb/GWh.	
	Nickel (Ni)	Before July 6, 2027: 3.5E0 lb/TBtu or 4.0E–2 lb/GWh. On or after July 6, 2027: 1.2E0 lb/TBtu or 1.3E–2 lb/GWh.	
	Selenium (Se)	Before July 6, 2027: 5.0E0 lb/TBtu or 6.0E–2 lb/GWh. On or after July 6, 2027: 1.7E0 lb/TBtu or 2.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl).	2.0E–3 lb/MMBtu or 2.0E–2 lb/MWh.	For Method 26A at appendix A–8 to part 60 of this chapter, collect a minimum of 0.75 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010) [3] or Method 320 at appendix A to part 63 of this chapter, sample for a minimum of 1 hour.
	OR		
	Sulfur dioxide (SO_2) [4].	2.0E–1 lb/MMBtu or 1.5E0 lb/MWh.	SO_2 CEMS.
	c. Mercury (Hg)	1.2E0 lb/TBtu or 1.3E–2 lb/GWh.	LEE Testing for 30 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B at appendix A–8 to part 60 of this chapter run or Hg CEMS or sorbent trap monitoring system only.
		OR	
		1.0E0 lb/TBtu or 1.1E–2 lb/GWh.	LEE Testing for 90 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B run or Hg CEMS or sorbent trap monitoring system only.
2. Coal-fired unit low rank virgin coal	a. Filterable particulate matter (PM).	Before July 6, 2027: 3.0E–2 lb/MMBtu or 3.0E–1 lb/MWh [2]. On or after July 6, 2027: 1.0E–2 lb/MMBtu or 1.0E–1 lb/MWh [2].	Before July 6, 2027: Collect a minimum of 1 dscm per run. On or after July 6, 2027: Collect a minimum catch of 6.0 milligrams or a minimum sample volume of 4 dscm per run.

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following total non-Hg HAP metals emission limit if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Total non-Hg HAP metals.	Before July 6, 2027: 5.0E–5 lb/MMBtu or 5.0E–1 lb/GWh. On or after July 6, 2027: 1.7E–5 lb/MMBtu or 1.7E–1 lb/GWh.	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following individual HAP metals emissions limits if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Individual HAP metals:.	....	Collect a minimum of 3 dscm per run.
	Antimony (Sb)	Before July 6, 2027: 8.0E–1 lb/TBtu or 8.0E–3 lb/GWh. On or after July 6, 2027: 2.7E–1 lb/TBtu or 2.7E–3 lb/GWh.	
	Arsenic (As)	Before July 6, 2027: 1.1E0 lb/TBtu or 2.0E–2 lb/GWh. On or after July 6, 2027: 3.7E–1 lb/TBtu or 6.7E–3 lb/GWh.	
	Beryllium (Be)	Before July 6, 2027: 2.0E–1 lb/TBtu or 2.0E–3 lb/GWh. On or after July 6, 2027: 6.7E–2 lb/TBtu or 6.7E–4 lb/GWh.	
	Cadmium (Cd)	Before July 6, 2027: 3.0E–1 lb/TBtu or 3.0E–3 lb/GWh. On or after July 6, 2027: 1.0E–1 lb/TBtu or 1.0E–3 lb/GWh.	
	Chromium (Cr)	Before July 6, 2027: 2.8E0 lb/TBtu or 3.0E–2 lb/GWh. On or after July 6, 2027: 9.3E–1 lb/TBtu or 1.0E–2 lb/GWh.	
	Cobalt (Co)	Before July 6, 2027: 8.0E–1 lb/TBtu or 8.0E–3 lb/GWh. On or after July 6, 2027: 2.7E–1 lb/TBtu or 2.7E–3 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Lead (Pb)	Before July 6, 2027: 1.2E0 lb/TBtu or 2.0E–2 lb/GWh. On or after July 6, 2027: 4.0E–1 lb/TBtu or 6.7E–3 lb/GWh.	
	Manganese (Mn)	Before July 6, 2027: 4.0E0 lb/TBtu or 5.0E–2 lb/GWh. On or after July 6, 2027: 1.3E0 lb/TBtu or 1.7E–2 lb/GWh.	
	Nickel (Ni)	Before July 6, 2027: 3.5E0 lb/TBtu or 4.0E–2 lb/GWh. On or after July 6, 2027: 1.2E0 lb/TBtu or 1.3E–2 lb/GWh.	
	Selenium (Se)	Before July 6, 2027: 5.0E0 lb/TBtu or 6.0E–2 lb/GWh. On or after July 6, 2027: 1.7E0 lb/TBtu or 2.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl).	2.0E–3 lb/MMBtu or 2.0E–2 lb/MWh.	For Method 26A, collect a minimum of 0.75 dscm per run; for Method 26 at appendix A–8 to part 60 of this chapter, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010) [3] or Method 320, sample for a minimum of 1 hour.
	OR	OR	
	Sulfur dioxide (SO_2) [4].	2.0E–1 lb/MMBtu or 1.5E0 lb/MWh.	SO_2 CEMS.
	c. Mercury (Hg)	Before July 6, 2027: 4.0E0 lb/TBtu or 4.0E–2 lb/GWh. On or after July 6, 2027: 1.2E0 lb/TBtu or 1.3E–2 lb/GWh.	LEE Testing for 30 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B run or Hg CEMS or sorbent trap monitoring system only.
3. IGCC unit	a. Filterable particulate matter (PM).	4.0E–2 lb/MMBtu or 4.0E–1 lb/MWh [2].	Before July 6, 2027: Collect a minimum of 1 dscm per run. On or after July 6, 2027: Collect a minimum catch of 3.0 milligrams or a minimum sample volume of 2 dscm per run.
	OR	OR	
	Total non-Hg HAP metals.	6.0E–5 lb/MMBtu or 5.0E–1 lb/GWh.	Collect a minimum of 1 dscm per run.
	OR	OR	
	Individual HAP metals:.	....	Collect a minimum of 2 dscm per run.
	Antimony (Sb)	1.4E0 lb/TBtu or 2.0E–2 lb/GWh.	
	Arsenic (As)	1.5E0 lb/TBtu or 2.0E–2 lb/GWh.	
	Beryllium (Be)	1.0E–1 lb/TBtu or 1.0E–3 lb/GWh.	
	Cadmium (Cd)	1.5E–1 lb/TBtu or 2.0E–3 lb/GWh.	
	Chromium (Cr)	2.9E0 lb/TBtu or 3.0E–2 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Cobalt (Co)	1.2E0 lb/TBtu or 2.0E–2 lb/GWh.	
	Lead (Pb)	1.9E+2 lb/TBtu or 1.8E0 lb/GWh.	
	Manganese (Mn)	2.5E0 lb/TBtu or 3.0E–2 lb/GWh.	
	Nickel (Ni)	6.5E0 lb/TBtu or 7.0E–2 lb/GWh.	
	Selenium (Se)	2.2E+1 lb/TBtu or 3.0E–1 lb/GWh.	
	b. Hydrogen chloride (HCl).	5.0E–4 lb/MMBtu or 5.0E–3 lb/MWh.	For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010) [3] or Method 320, sample for a minimum of 1 hour.
	c. Mercury (Hg)	2.5E0 lb/TBtu or 3.0E–2 lb/GWh.	LEE Testing for 30 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B run or Hg CEMS or sorbent trap monitoring system only.
4. Liquid oil-fired unit—continental (excluding limited-use liquid oil-fired subcategory units).	a. Filterable particulate matter (PM).	3.0E–2 lb/MMBtu or 3.0E–1 lb/MWh [2].	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following total non-Hg HAP metals emission limit if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Total HAP metals	8.0E–4 lb/MMBtu or 8.0E–3 lb/MWh.	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following individual HAP metals emissions limits if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Individual HAP metals:.	....	Collect a minimum of 1 dscm per run.
	Antimony (Sb)	1.3E+1 lb/TBtu or 2.0E–1 lb/GWh.	
	Arsenic (As)	2.8E0 lb/TBtu or 3.0E–2 lb/GWh.	
	Beryllium (Be)	2.0E–1 lb/TBtu or 2.0E–3 lb/GWh.	
	Cadmium (Cd)	3.0E–1 lb/TBtu or 2.0E–3 lb/GWh.	
	Chromium (Cr)	5.5E0 lb/TBtu or 6.0E–2 lb/GWh.	
	Cobalt (Co)	2.1E+1 lb/TBtu or 3.0E–1 lb/GWh.	
	Lead (Pb)	8.1E0 lb/TBtu or 8.0E–2 lb/GWh.	
	Manganese (Mn)	2.2E+1 lb/TBtu or 3.0E–1 lb/GWh.	
	Nickel (Ni)	1.1E+2 lb/TBtu or 1.1E0 lb/GWh.	
	Selenium (Se)	3.3E0 lb/TBtu or 4.0E–2 lb/GWh.	
	Mercury (Hg)	2.0E–1 lb/TBtu or 2.0E–3 lb/GWh.	For Method 30B sample volume determination (Section 8.2.4), the estimated Hg concentration should nominally be <½ the standard.
	b. Hydrogen chloride (HCl).	2.0E–3 lb/MMBtu or 1.0E–2 lb/MWh.	For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010) [3] or Method 320, sample for a minimum of 1 hour.
	c. Hydrogen fluoride (HF).	4.0E–4 lb/MMBtu or 4.0E–3 lb/MWh.	For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010) [3] or Method 320, sample for a minimum of 1 hour.
5. Liquid oil-fired unit—non-continental (excluding limited-use liquid oil-fired subcategory units).	a. Filterable particulate matter (PM).	3.0E–2 lb/MMBtu or 3.0E–1 lb/MWh [2].	Collect a minimum of 1 dscm per run.

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following total non-Hg HAP metals emission limit if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Total HAP metals ..	6.0E–4 lb/MMBtu or 7.0E–3 lb/MWh.	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following individual HAP metals emissions limits if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Individual HAP metals:.	....	Collect a minimum of 2 dscm per run.
	Antimony (Sb)	2.2E0 lb/TBtu or 2.0E–2 lb/GWh.	
	Arsenic (As)	4.3E0 lb/TBtu or 8.0E–2 lb/GWh.	
	Beryllium (Be)	6.0E–1 lb/TBtu or 3.0E–3 lb/GWh.	
	Cadmium (Cd)	3.0E–1 lb/TBtu or 3.0E–3 lb/GWh.	
	Chromium (Cr)	3.1E+1 lb/TBtu or 3.0E–1 lb/GWh.	
	Cobalt (Co)	1.1E+2 lb/TBtu or 1.4E0 lb/GWh.	
	Lead (Pb)	4.9E0 lb/TBtu or 8.0E–2 lb/GWh.	
	Manganese (Mn) ...	2.0E+1 lb/TBtu or 3.0E–1 lb/GWh.	
	Nickel (Ni)	4.7E+2 lb/TBtu or 4.1E0 lb/GWh.	
	Selenium (Se)	9.8E0 lb/TBtu or 2.0E–1 lb/GWh.	
	Mercury (Hg)	4.0E–2 lb/TBtu or 4.0E–4 lb/GWh.	For Method 30B sample volume determination (Section 8.2.4), the estimated Hg concentration should nominally be <½ the standard.
	b. Hydrogen chloride (HCl).	2.0E–4 lb/MMBtu or 2.0E–3 lb/MWh.	For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010)[3] or Method 320, sample for a minimum of 2 hours.
	c. Hydrogen fluoride (HF).	6.0E–5 lb/MMBtu or 5.0E–4 lb/MWh.	For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03 (Reapproved 2010)[3] or Method 320, sample for a minimum of 2 hours.
6. Solid oil-derived fuel-fired unit	a. Filterable particulate matter (PM).	8.0E–3 lb/MMBtu or 9.0E–2 lb/MWh[2].	Before July 6, 2027: Collect a minimum of 1 dscm per run. On or after July 6, 2027: Collect a minimum catch of 6.0 milligrams or a minimum sample volume of 4 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following total non-Hg HAP metals emission limit if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Total non-Hg HAP metals.	4.0E–5 lb/MMBtu or 6.0E–1 lb/GWh.	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following individual HAP metals emissions limits if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Individual HAP metals:.	....	Collect a minimum of 3 dscm per run.
	Antimony (Sb)	8.0E–1 lb/TBtu or 7.0E–3 lb/GWh.	
	Arsenic (As)	3.0E–1 lb/TBtu or 5.0E–3 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Beryllium (Be)	6.0E–2 lb/TBtu or 5.0E–4 lb/GWh.	
	Cadmium (Cd)	3.0E–1 lb/TBtu or 4.0E–3 lb/GWh.	
	Chromium (Cr)	8.0E–1 lb/TBtu or 2.0E–2 lb/GWh.	
	Cobalt (Co)	1.1E0 lb/TBtu or 2.0E–2 lb/GWh.	
	Lead (Pb)	8.0E–1 lb/TBtu or 2.0E–2 lb/GWh.	
	Manganese (Mn)	2.3E0 lb/TBtu or 4.0E–2 lb/GWh.	
	Nickel (Ni)	9.0E0 lb/TBtu or 2.0E–1 lb/GWh.	
	Selenium (Se)	1.2E0 lb/TBtu or 2.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl).	5.0E–3 lb/MMBtu or 8.0E–2 lb/MWh.	For Method 26A, collect a minimum of 0.75 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010)[3] or Method 320, sample for a minimum of 1 hour.
	OR	OR	
	Sulfur dioxide (SO_2)[4].	3.0E–1 lb/MMBtu or 2.0E0 lb/MWh.	SO_2 CEMS.
	c. Mercury (Hg)	2.0E–1 lb/TBtu or 2.0E–3 lb/GWh.	LEE Testing for 30 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B run or Hg CEMS or sorbent trap monitoring system only.
7. Eastern Bituminous Coal Refuse (EBCR)-fired unit.	a. Filterable particulate matter (PM).	Before July 6, 2027: 3.0E–2 lb/MMBtu or 3.0E–1 lb/MWh[2]. On or after July 6, 2027: 1.0E–2 lb/MMBtu or 1.0E–1 lb/MWh[2].	Before July 6, 2027: Collect a minimum of 1 dscm per run. On or after July 6, 2027: Collect a minimum catch of 6.0 milligrams or a minimum sample volume of 4 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following total non-Hg HAP metals emission limit if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Total non-Hg HAP metals.	Before July 6, 2027: 5.0E–5 lb/MMBtu or 5.0E–1 lb/GWh. On or after July 6, 2027: 1.7E–5 lb/MMBtu or 1.7E–1 lb/GWh.	Collect a minimum of 1 dscm per run.
	OR	OR	On or after July 6, 2027 you may only demonstrate compliance with the following individual HAP metals emissions limits if you request and receive approval for the use of a non-Hg HAP metals CMS under 40 CFR 63.7(f).
	Individual HAP metals:.	....	Collect a minimum of 3 dscm per run.
	Antimony (Sb)	Before July 6, 2027: 8.0E–1 lb/TBtu or 8.0E–3 lb/GWh. On or after July 6, 2027: 2.7E–1 lb/TBtu or 2.7E–3 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Arsenic (As)	Before July 6, 2027: 1.1E0 lb/TBtu or 2.0E–2 lb/GWh. On or after July 6, 2027: 3.7E–1 lb/TBtu or 6.7E–3 lb/GWh.	
	Beryllium (Be)	Before July 6, 2027: 2.0E–1 lb/TBtu or 2.0E–3 lb/GWh. On or after July 6, 2027: 6.7E–2 lb/TBtu or 6.7E–4 lb/GWh.	
	Cadmium (Cd)	Before July 6, 2027: 3.0E–1 lb/TBtu or 3.0E–3 lb/GWh. On or after July 6, 2027: 1.0E–1 lb/TBtu or 1.0E–3 lb/GWh.	
	Chromium (Cr)	Before July 6, 2027: 2.8E0 lb/TBtu or 3.0E–2 lb/GWh. On or after July 6, 2027: 9.3E–1 lb/TBtu or 1.0E–2 lb/GWh.	
	Cobalt (Co)	Before July 6, 2027: 8.0E–1 lb/TBtu or 8.0E–3 lb/GWh. On or after July 6, 2027: 2.7E–1 lb/TBtu or 2.7E–3 lb/GWh.	
	Lead (Pb)	Before July 6, 2027: 1.2E0 lb/TBtu or 2.0E–2 lb/GWh. On or after July 6, 2027: 4.0E–1 lb/TBtu or 6.7E–3 lb/GWh.	
	Manganese (Mn)	Before July 6, 2027: 4.0E0 lb/TBtu or 5.0E–2 lb/GWh. On or after July 6, 2027: 1.3E0 lb/TBtu or 1.7E–2 lb/GWh.	
	Nickel (Ni)	Before July 6, 2027: 3.5E0 lb/TBtu or 4.0E–2 lb/GWh. On or after July 6, 2027: 1.2E0 lb/TBtu or 1.3E–2 lb/GWh.	

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (*e.g.,* specified sampling volume or test run duration) and limitations with the test methods in Table 5 to this Subpart . . .
	Selenium (Se)	Before July 6, 2027: 5.0E0 lb/TBtu or 6.0E–2 lb/GWh. On or after July 6, 2027: 1.7E0 lb/TBtu or 2.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl).	4.0E–2 lb/MMBtu or 4.0E–1 lb/MWh.	For Method 26A at appendix A–8 to part 60 of this chapter, collect a minimum of 0.75 dscm per run; for Method 26, collect a minimum of 120 liters per run. For ASTM D6348–03 (Reapproved 2010)[3] or Method 320 at appendix A to part 63 of this chapter, sample for a minimum of 1 hour.
	OR		
	Sulfur dioxide (SO_2)[4].	6E–1 lb/MMBtu or 9E0 lb/MWh.	SO_2 CEMS.
	c. Mercury (Hg)	1.2E0 lb/TBtu or 1.3E–2 lb/GWh.	LEE Testing for 30 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B at appendix A–8 to part 60 of this chapter run or Hg CEMS or sorbent trap monitoring system only.
	OR		
		1.0E0 lb/TBtu or 1.1E–2 lb/GWh.	LEE Testing for 90 days with a sampling period consistent with that given in section 5.2.1 of appendix A to this subpart per Method 30B run or Hg CEMS or sorbent trap monitoring system only.

[1] For LEE emissions testing for total PM, total HAP metals, individual HAP metals, HCl, and HF, the required minimum sampling volume must be increased nominally by a factor of 2. With the exception of IGCC units, on or after July 6, 2027 you may not pursue the LEE option for filterable PM, total non-Hg metals, and individual HAP metals and you may not comply with the total non-Hg HAP metals or individual HAP metals emissions limits for all existing EGU subcategories unless you request and receive approval for the use of a HAP metals CMS under § 63.7(f).

[2] Gross output.

[3] Incorporated by reference, *see* § 63.14.

[4] You may not use the alternate SO_2 limit if your EGU does not have some form of FGD system and SO_2 CEMS installed.

■ 20. Revise table 3 to subpart UUUUU of part 63 to read as follows:

Table 3 to Subpart UUUUU of Part 63—Work Practice Standards

As stated in § 63.9991, you must comply with the following applicable work practice standards:

If your EGU is . . .	You must meet the following . . .
1. An existing EGU	Conduct a tune-up of the EGU burner and combustion controls at least each 36 calendar months, or each 48 calendar months if neural network combustion optimization software is employed, as specified in § 63.10021(e).
2. A new or reconstructed EGU	Conduct a tune-up of the EGU burner and combustion controls at least each 36 calendar months, or each 48 calendar months if neural network combustion optimization software is employed, as specified in § 63.10021(e).
3. A coal-fired, liquid oil-fired (excluding limited-use liquid oil-fired subcategory units), or solid oil-derived fuel-fired EGU during startup.	a. Before January 2, 2025 you have the option of complying using either of the following work practice standards in paragraphs (1) and (2). On or after January 2, 2025 you may not choose to use paragraph (2) of the definition of startup in § 63.10042 and the following associated work practice standards in paragraph (2).

If your EGU is . . .	You must meet the following . . .
	(1) If you choose to comply using paragraph (1) of the definition of "startup" in § 63.10042, you must operate all CMS during startup. Startup means either the first-ever firing of fuel in a boiler for the purpose of producing electricity, or the firing of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on site use). For startup of a unit, you must use clean fuels as defined in § 63.10042 for ignition. Once you convert to firing coal, residual oil, or solid oil-derived fuel, you must engage all of the applicable control technologies except dry scrubber and SCR. You must start your dry scrubber and SCR systems, if present, appropriately to comply with relevant standards applicable during normal operation. You must comply with all applicable emissions limits at all times except for periods that meet the applicable definitions of startup and shutdown in this subpart. You must keep records during startup periods. You must provide reports concerning activities and startup periods, as specified in § 63.10011(g) and § 63.10021(h) and (i). If you elect to use paragraph (2) of the definition of startup in 40 CFR 63.10042, you must report the applicable information in 40 CFR 63.10031(c)(5) concerning startup periods as follows: For startup periods that occur on or prior to December 31, 2023, in PDF files in the semiannual compliance report; for startup periods that occur on or after January 1, 2024, quarterly, in PDF files, according to 40 CFR 63.10031(i). (2) If you choose to comply using paragraph (2) of the definition of "startup" in § 63.10042, you must operate all CMS during startup. You must also collect appropriate data, and you must calculate the pollutant emission rate for each hour of startup. For startup of an EGU, you must use one or a combination of the clean fuels defined in § 63.10042 to the maximum extent possible, taking into account considerations such as boiler or control device integrity, throughout the startup period. You must have sufficient clean fuel capacity to engage and operate your PM control device within one hour of adding coal, residual oil, or solid oil-derived fuel to the unit. You must meet the startup period work practice requirements as identified in § 63.10020(e). Once you start firing coal, residual oil, or solid oil-derived fuel, you must vent emissions to the main stack(s). You must comply with the applicable emission limits beginning with the hour after startup ends. You must engage and operate your PM control(s) within 1 hour of first firing of coal, residual oil, or solid oil-derived fuel. You must start all other applicable control devices as expeditiously as possible, considering safety and manufacturer/supplier recommendations, but, in any case, when necessary to comply with other standards made applicable to the EGU by a permit limit or a rule other than this subpart that require operation of the control devices. b. Relative to the syngas not fired in the combustion turbine of an IGCC EGU during startup, you must either: (1) Flare the syngas, or (2) route the syngas to duct burners, which may need to be installed, and route the flue gas from the duct burners to the heat recovery steam generator. c. If you choose to use just one set of sorbent traps to demonstrate compliance with the applicable Hg emission limit, you must comply with the limit at all times; otherwise, you must comply with the applicable emission limit at all times except for startup and shutdown periods. d. You must collect monitoring data during startup periods, as specified in § 63.10020(a) and (e). You must keep records during startup periods, as provided in §§ 63.10021(h) and 63.10032. You must provide reports concerning activities and startup periods, as specified in §§ 63.10011(g), 63.10021(i), and 63.10031. Before January 2, 2025, if you elect to use paragraph (2) of the definition of startup in 40 CFR 63.10042, you must report the applicable information in 40 CFR 63.10031(c)(5) concerning startup periods as follows: For startup periods that occur on or prior to December 31, 2023, in PDF files in the semiannual compliance report; for startup periods that occur on or after January 1, 2024, quarterly, in PDF files, according to 40 CFR 63.10031(i). On or after January 2, 2025 you may not use paragraph (2) of the definition of startup in § 63.10042.
4. A coal-fired, liquid oil-fired (excluding limited-use liquid oil-fired subcategory units), or solid oil-derived fuel-fired EGU during shutdown.	You must operate all CMS during shutdown. You must also collect appropriate data, and you must calculate the pollutant emission rate for each hour of shutdown for those pollutants for which a CMS is used. While firing coal, residual oil, or solid oil-derived fuel during shutdown, you must vent emissions to the main stack(s) and operate all applicable control devices and continue to operate those control devices after the cessation of coal, residual oil, or solid oil-derived fuel being fed into the EGU and for as long as possible thereafter considering operational and safety concerns. In any case, you must operate your controls when necessary to comply with other standards made applicable to the EGU by a permit limit or a rule other than this subpart and that require operation of the control devices. If, in addition to the fuel used prior to initiation of shutdown, another fuel must be used to support the shutdown process, that additional fuel must be one or a combination of the clean fuels defined in § 63.10042 and must be used to the maximum extent possible, taking into account considerations such as not compromising boiler or control device integrity. Relative to the syngas not fired in the combustion turbine of an IGCC EGU during shutdown, you must either: (1) Flare the syngas, or (2) route the syngas to duct burners, which may need to be installed, and route the flue gas from the duct burners to the heat recovery steam generator.

If your EGU is . . .	You must meet the following . . .
	You must comply with all applicable emission limits at all times except during startup periods and shutdown periods at which time you must meet this work practice. You must collect monitoring data during shutdown periods, as specified in § 63.10020(a). You must keep records during shutdown periods, as provided in §§ 63.10032 and 63.10021(h). Any fraction of an hour in which shutdown occurs constitutes a full hour of shutdown. You must provide reports concerning activities and shutdown periods, as specified in §§ 63.10011(g), 63.10021(i), and 63.10031. Before January 2, 2025, if you elect to use paragraph (2) of the definition of startup in 40 CFR 63.10042, you must report the applicable information in 40 CFR 63.10031(c)(5) concerning shutdown periods as follows: For shutdown periods that occur on or prior to December 31, 2023, in PDF files in the semiannual compliance report; for shutdown periods that occur on or after January 1, 2024, quarterly, in PDF files, according to 40 CFR 63.10031(i). On or after January 2, 2025 you may not use paragraph (2) of the definition of startup in § 63.10042.

■ 21. Revise table 4 to subpart UUUUU of part 63 to read as follows:

Table 4 to Subpart UUUUU of Part 63—Operating Limits for EGUs

Before July 6, 2027, as stated in § 63.9991, you must comply with the applicable operating limits in table 4. However, on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations, unless it is for an IGCC unit.

If you demonstrate compliance using . . .	You must meet these operating limits . . .
PM CPMS	Maintain the 30-boiler operating day rolling average PM CPMS output determined in accordance with the requirements of § 63.10023(b)(2) and obtained during the most recent performance test run demonstrating compliance with the filterable PM, total non-mercury HAP metals (total HAP metals, for liquid oil-fired units), or individual non-mercury HAP metals (individual HAP metals including Hg, for liquid oil-fired units) emissions limitation(s).

■ 22. Revise table 5 to subpart UUUUU of part 63 to read as follows:

Table 5 to Subpart UUUUU of Part 63—Performance Testing Requirements

As stated in § 63.10007, you must comply with the following requirements for performance testing for existing, new or reconstructed affected sources:[1]

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To conduct a performance test for the following pollutant . . .	Using . . .	You must perform the following activities, as applicable to your input- or output-based emission limit . . .	Using . . .[2]
1. Filterable Particulate matter (PM)	Emissions Testing	a. Select sampling ports location and the number of traverse points	Method 1 at appendix A-1 to part 60 of this chapter.
		b. Determine velocity and volumetric flow-rate of the stack gas	Method 2, 2A, 2C, 2F, 2G or 2H at appendix A-1 or A-2 to part 60 of this chapter.
		c. Determine oxygen and carbon dioxide concentrations of the stack gas	Method 3A or 3B at appendix A-2 to part 60 of this chapter, or ANSI/ASME PTC 19.10-1981.[3]
		d. Measure the moisture content of the stack gas	Method 4 at appendix A-3 to part 60 of this chapter.
		e. Measure the filterable PM concentration	Methods 5 and 5I at appendix A-3 to part 60 of this chapter. For positive pressure fabric filters, Method 5D at appendix A-3 to part 60 of this chapter for filterable PM emissions. Note that the Method 5 or 5I front half temperature shall be 160° ±14 °C (320° ±25 °F).
		f. Convert emissions concentration to lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
	OR	OR	
	PM CEMS	a. Install, certify, operate, and	Performance Specification 11 at appendix B to part 60 of this chapter and Procedure 2 at appendix F to part 60 of this chapter.

		maintain the PM CEMS	
		b. Install, certify, operate, and maintain the diluent gas, flow rate, and/or moisture monitoring systems	Part 75 of this chapter and § 63.10010(a), (b), (c), and (d).
		c. Convert hourly emissions concentrations to 30 boiler operating day rolling average lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
2. Total or individual non-Hg HAP metals	Emissions Testing	a. Select sampling ports location and the number of traverse points	Method 1 at appendix A-1 to part 60 of this chapter.
		b. Determine velocity and volumetric flow-rate of the stack gas	Method 2, 2A, 2C, 2F, 2G or 2H at appendix A-1 or A-2 to part 60 of this chapter.
		c. Determine oxygen and carbon dioxide concentrations of the stack gas	Method 3A or 3B at appendix A-2 to part 60 of this chapter, or ANSI/ASME PTC 19.10-1981.[3]
		d. Measure the moisture content of the stack gas	Method 4 at appendix A-3 to part 60 of this chapter.
		e. Measure the HAP metals emissions concentrations and determine	Method 29 at appendix A-8 to part 60 of this chapter. For liquid oil-fired units, Hg is included in HAP metals and you may use Method 29, Method 30B at appendix A-8 to part 60 of this chapter; for Method 29, you must

		each individual HAP metals emissions concentration, as well as the total filterable HAP metals emissions concentration and total HAP metals emissions concentration	report the front half and back half results separately. When using Method 29, report metals matrix spike and recovery levels.
		f. Convert emissions concentrations (individual HAP metals, total filterable HAP metals, and total HAP metals) to lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
3. Hydrogen chloride (HCl) and hydrogen fluoride (HF)	Emissions Testing	a. Select sampling ports location and the number of traverse points	Method 1 at appendix A-1 to part 60 of this chapter.
		b. Determine velocity and volumetric flow-rate of the stack gas	Method 2, 2A, 2C, 2F, 2G or 2H at appendix A-1 or A-2 to part 60 of this chapter.
		c. Determine oxygen and carbon dioxide concentrations of the stack gas	Method 3A or 3B at appendix A-2 to part 60 of this chapter, or ANSI/ASME PTC 19.10-1981.[3]
		d. Measure the moisture content of the stack gas	Method 4 at appendix A-3 to part 60 of this chapter.
		e. Measure the HCl and HF	Method 26 or Method 26A at appendix A-8 to part 60 of this chapter or Method 320 at

		emissions concentrations	appendix A to part 63 of this chapter or ASTM D6348-03 Reapproved 2010[3] with
			(1) the following conditions when using ASTM D6348-03 Reapproved 2010:
			(A) The test plan preparation and implementation in the Annexes to ASTM D6348-03 Reapproved 2010, Sections A1 through A8 are mandatory;
			(B) For ASTM D6348-03 Reapproved 2010 Annex A5 (Analyte Spiking Technique), the percent (%) R must be determined for each target analyte (see Equation A5.5);
			(C) For the ASTM D6348-03 Reapproved 2010 test data to be acceptable for a target analyte, %R must be 70% ≥R ≤130%; and
			(D) The %R value for each compound must be reported in the test report and all field measurements corrected with the calculated %R value for that compound using the following equation: $\text{Reported Result} = \frac{(\text{Measured Concentration in Stack})}{\%R} x\ 100$
			(2) spiking levels nominally no greater than two times the level corresponding to the applicable emission limit.
			Method 26A must be used if there are entrained water droplets in the exhaust stream.
		f. Convert emissions concentration to lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
	OR	OR	
	HCl and/or HF CEMS	a. Install, certify, operate, and maintain the HCl or HF CEMS	Appendix B of this subpart.
		b. Install, certify, operate, and maintain the diluent gas, flow rate, and/or moisture	Part 75 of this chapter and § 63.10010(a), (b), (c), and (d).

		monitoring systems	
		c. Convert hourly emissions concentrations to 30 boiler operating day rolling average lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
4. Mercury (Hg)	Emissions Testing	a. Select sampling ports location and the number of traverse points	Method 1 at appendix A-1 to part 60 of this chapter or Method 30B at Appendix A-8 for Method 30B point selection.
		b. Determine velocity and volumetric flow-rate of the stack gas	Method 2, 2A, 2C, 2F, 2G or 2H at appendix A-1 or A-2 to part 60 of this chapter.
		c. Determine oxygen and carbon dioxide concentrations of the stack gas	Method 3A or 3B at appendix A-1 to part 60 of this chapter, or ANSI/ASME PTC 19.10-1981.[3]
		d. Measure the moisture content of the stack gas	Method 4 at appendix A-3 to part 60 of this chapter.
		e. Measure the Hg emission concentration	Method 30B at appendix A-8 to part 60 of this chapter, ASTM D6784,[3] or Method 29 at appendix A-8 to part 60 of this chapter; for Method 29, you must report the front half and back half results separately.
		f. Convert emissions concentration to lb/TBtu or lb/GWh emission rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
	OR	OR	
	Hg CEMS	a. Install, certify, operate, and	Sections 3.2.1 and 5.1 of appendix A of this subpart.

		maintain the CEMS	
		b. Install, certify, operate, and maintain the diluent gas, flow rate, and/or moisture monitoring systems	Part 75 of this chapter and § 63.10010(a), (b), (c), and (d).
		c. Convert hourly emissions concentrations to 30 boiler operating day rolling average lb/TBtu or lb/GWh emissions rates	Section 6 of appendix A to this subpart.
	OR	OR	
	Sorbent trap monitoring system	a. Install, certify, operate, and maintain the sorbent trap monitoring system	Sections 3.2.2 and 5.2 of appendix A to this subpart.
		b. Install, operate, and maintain the diluent gas, flow rate, and/or moisture monitoring systems	Part 75 of this chapter and § 63.10010(a), (b), (c), and (d).
		c. Convert emissions concentrations to 30 boiler operating day rolling average lb/TBtu or lb/GWh	Section 6 of appendix A to this subpart.

		emissions rates	
	OR	OR	
	LEE testing	a. Select sampling ports location and the number of traverse points	Single point located at the 10% centroidal area of the duct at a port location per Method 1 at appendix A-1 to part 60 of this chapter or Method 30B at Appendix A-8 for Method 30B point selection.
		b. Determine velocity and volumetric flow-rate of the stack gas	Method 2, 2A, 2C, 2F, 2G, or 2H at appendix A-1 or A-2 to part 60 of this chapter or flow monitoring system certified per appendix A of this subpart.
		c. Determine oxygen and carbon dioxide concentrations of the stack gas	Method 3A or 3B at appendix A-1 to part 60 of this chapter, or ANSI/ASME PTC 19.10-1981,[3] or diluent gas monitoring systems certified according to part 75 of this chapter.
		d. Measure the moisture content of the stack gas	Method 4 at appendix A-3 to part 60 of this chapter, or moisture monitoring systems certified according to part 75 of this chapter.
		e. Measure the Hg emission concentration	Method 30B at appendix A-8 to part 60 of this chapter; perform a 30 operating day test, with a maximum of 10 operating days per run (*i.e.,* per pair of sorbent traps) or sorbent trap monitoring system or Hg CEMS certified per appendix A of this subpart.
		f. Convert emissions concentrations from the LEE test to lb/TBtu or lb/GWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).
		g. Convert average lb/TBtu or lb/GWh Hg emission rate to lb/year, if you are attempting to meet the 29.0 lb/year threshold	Potential maximum annual heat input in TBtu or potential maximum electricity generated in GWh.

5. Sulfur dioxide (SO_2)	SO_2 CEMS	a. Install, certify, operate, and maintain the CEMS	Part 75 of this chapter and § 63.10010(a) and (f).
		b. Install, operate, and maintain the diluent gas, flow rate, and/or moisture monitoring systems	Part 75 of this chapter and § 63.10010(a), (b), (c), and (d).
		c. Convert hourly emissions concentrations to 30 boiler operating day rolling average lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and gross output data (see § 63.10007(e)).

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[1] Regarding emissions data collected during periods of startup or shutdown, see §§ 63.10020(b) and (c) and 63.10021(h). With the exception of IGCC units, on or after July 6, 2027: You may not use quarterly performance emissions testing to demonstrate compliance with the filterable PM emissions standards and for existing EGUs you may not choose to comply with the total or individual HAP metals emissions limits unless you request and receive approval for the use of a HAP metals CMS under § 63.7(f).

[2] See tables 1 and 2 to this subpart for required sample volumes and/or sampling run times.

[3] Incorporated by reference, see § 63.14.

■ 23. Revise table 6 to subpart UUUUU of part 63 to read as follows:

Table 6 to Subpart UUUUU of Part 63—Establishing PM CPMS Operating Limits

Before July 6, 2027, as stated in § 63.10007, you must comply with the following requirements for establishing operating limits in table 6. However, on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations, unless it is for an IGCC unit.

If you have an applicable emission limit for . . .	And you choose to establish PM CPMS operating limits, you must . . .	And . . .	Using . . .	According to the following procedures . . .
Filterable Particulate matter (PM), total non-mercury HAP metals, individual non-mercury HAP metals, total HAP metals, or individual HAP metals for an EGU.	Install, certify, maintain, and operate a PM CPMS for monitoring emissions discharged to the atmosphere according to § 63.10010(h)(1).	Establish a site-specific operating limit in units of PM CPMS output signal (*e.g.,* milliamps, mg/acm, or other raw signal).	Data from the PM CPMS and the PM or HAP metals performance tests.	1. Collect PM CPMS output data during the entire period of the performance tests. 2. Record the average hourly PM CPMS output for each test run in the performance test. 3. Determine the PM CPMS operating limit in accordance with the requirements of § 63.10023(b)(2) from data obtained during the performance test demonstrating compliance with the filterable PM or HAP metals emissions limitations.

■ 24. Revise table 7 to subpart UUUUU of part 63 to read as follows:

Table 7 to Subpart UUUUU of Part 63—Demonstrating Continuous Compliance

As stated in § 63.10021, you must show continuous compliance with the emission limitations for affected sources according to the following:

If you use one of the following to meet applicable emissions limits, operating limits, or work practice standards . . .	You demonstrate continuous compliance by . . .
1. CEMS to measure filterable PM, SO_2, HCl, HF, or Hg emissions, or using a sorbent trap monitoring system to measure Hg.	Calculating the 30- (or 90-) boiler operating day rolling arithmetic average emissions rate in units of the applicable emissions standard basis at the end of each boiler operating day using all of the quality assured hourly average CEMS or sorbent trap data for the previous 30- (or 90-) boiler operating days, excluding data recorded during periods of startup or shutdown.
2. PM CPMS to measure compliance with a parametric operating limit. (On or after July 6, 2027 you may not use PM CPMS for compliance demonstrations, unless it is for an IGCC unit.).	Calculating the 30- (or 90-) boiler operating day rolling arithmetic average of all of the quality assured hourly average PM CPMS output data (*e.g.,* milliamps, PM concentration, raw data signal) collected for all operating hours for the previous 30- (or 90-) boiler operating days, excluding data recorded during periods of startup or shutdown.
3. Site-specific monitoring using CMS for liquid oil-fired EGUs for HCl and HF emission limit monitoring.	If applicable, by conducting the monitoring in accordance with an approved site-specific monitoring plan.
4. Quarterly performance testing for coal-fired, solid oil derived fired, or liquid oil-fired EGUs to measure compliance with one or more non-PM (or its alternative emission limits) applicable emissions limit in Table 1 or 2, or PM (or its alternative emission limits) applicable emissions limit in Table 2. (On or after July 6, 2027 you may not use quarterly performance testing for filterable PM compliance demonstrations, unless it is for an IGCC unit.).	Calculating the results of the testing in units of the applicable emissions standard.
5. Conducting periodic performance tune-ups of your EGU(s)	Conducting periodic performance tune-ups of your EGU(s), as specified in § 63.10021(e).
6. Work practice standards for coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGUs during startup.	Operating in accordance with Table 3.
7. Work practice standards for coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGUs during shutdown.	Operating in accordance with Table 3.

■ 25. Revise table 8 to subpart UUUUU of part 63 to read as follows:

Table 8 to Subpart UUUUU of Part 63—Reporting Requirements

[In accordance with 40 CFR 63.10031, you must meet the following reporting requirements, as they apply to your compliance strategy]

You must submit the following reports . . .
1. The electronic reports required under 40 CFR 63.10031 (a)(1), if you continuously monitor Hg emissions.
2. The electronic reports required under 40 CFR 63.10031 (a)(2), if you continuously monitor HCl and/or HF emissions.
Where applicable, these reports are due no later than 30 days after the end of each calendar quarter.
3. The electronic reports required under 40 CFR 63.10031(a)(3), if you continuously monitor PM emissions.
Reporting of hourly PM emissions data using ECMPS shall begin with the first operating hour after: January 1, 2024, or the hour of completion of the initial PM CEMS correlation test, whichever is later.
Where applicable, these reports are due no later than 30 days after the end of each calendar quarter.
4. The electronic reports required under 40 CFR 63.10031(a)(4), if you elect to use a PM CPMS (on or after July 6, 2027 you may not use PM CPMS for compliance demonstrations, unless it is for an IGCC unit).
Reporting of hourly PM CPMS response data using ECMPS shall begin with the first operating hour after January 1, 2024, or the first operating hour after completion of the initial performance stack test that establishes the operating limit for the PM CPMS, whichever is later.
Where applicable, these reports are due no later than 30 days after the end of each calendar quarter.
5. The electronic reports required under 40 CFR 63.10031(a)(5), if you continuously monitor SO_2 emissions.
Where applicable, these reports are due no later than 30 days after the end of each calendar quarter.
6. PDF reports for all performance stack tests completed prior to January 1, 2024 (including 30- or 90-boiler operating day Hg LEE test reports and PM test reports to set operating limits for PM CPMS), according to the introductory text of 40 CFR 63.10031(f) and 40 CFR 63.10031(f)(6).
For each test, submit the PDF report no later than 60 days after the date on which testing is completed.
For a PM test that is used to set an operating limit for a PM CPMS, the report must also include the information in 40 CFR 63.10023(b)(2)(vi).
For each performance stack test completed on or after January 1, 2024, submit the test results in the relevant quarterly compliance report under 40 CFR 63.10031(g), together with the applicable reference method information in sections 17 through 31 of appendix E to this subpart.
7. PDF reports for all RATAs of Hg, HCl, HF, and/or SO_2 monitoring systems completed prior to January 1, 2024, and for correlation tests, RRAs and/or RCAs of PM CEMS completed prior to January 1, 2024, according to 40 CFR 63.10031(f)(1) and (6).
For each test, submit the PDF report no later than 60 days after the date on which testing is completed.
For each SO_2 or Hg system RATA completed on or after January 1, 2024, submit the electronic test summary required by appendix A to this subpart or part 75 of this chapter (as applicable) together with the applicable reference method information in sections 17 through 30 of appendix E to this subpart, either prior to or concurrent with the relevant quarterly emissions report.

You must submit the following reports . . .
For each HCl or HF system RATA, and for each correlation test, RRA, and RCA of a PM CEMS completed on or after January 1, 2024, submit the electronic test summary in accordance with section 11.4 of appendix B to this subpart or section 7.2.4 of appendix C to this part, as applicable, together with the applicable reference method information in sections 17 through 30 of appendix E to this subpart.
8. Quarterly reports, in PDF files, that include all 30-boiler operating day rolling averages in the reporting period derived from your PM CEMS, approved HAP metals CMS, and/or PM CPMS (on or after July 6, 2027 you may not use PM CPMS, unless it is for an IGCC unit), according to 40 CFR 63.10031(f)(2) and (6). These reports are due no later than 60 days after the end of each calendar quarter.
The final quarterly rolling averages report in PDF files shall cover the fourth calendar quarter of 2023.
Starting with the first quarter of 2024, you must report all 30-boiler operating day rolling averages for PM CEMS, approved HAP metals CMS, PM CPMS, Hg CEMS, Hg sorbent trap systems, HCl CEMS, HF CEMS, and/or SO_2 CEMS (or 90-boiler operating day rolling averages for Hg systems), in XML format, in the quarterly compliance reports required under 40 CFR 63.10031(g).
If your EGU or common stack is in an averaging plan, each quarterly compliance report must identify the EGUs in the plan and include all of the 30- or 90-group boiler operating day WAERs for the averaging group.
The quarterly compliance reports must be submitted no later than 60 days after the end of each calendar quarter.
9. The semiannual compliance reports described in 40 CFR 63.10031(c) and (d), in PDF files, according to 40 CFR 63.10031(f)(4) and (6). The due dates for these reports are specified in 40 CFR 63.10031(b).
The final semiannual compliance report shall cover the period from July 1, 2023, through December 31, 2023.
10. Notifications of compliance status, in PDF files, according to 40 CFR 63.10031(f)(4) and (6) until December 31, 2023, and according to 40 CFR 63.10031(h) thereafter.
11. Quarterly electronic compliance reports, in accordance with 40 CFR 63.10031(g), starting with a report for the first calendar quarter of 2024. The reports must be in XML format and must include the applicable data elements in sections 2 through 13 of appendix E to this subpart.
These reports are due no later than 60 days after the end of each calendar quarter.
12. Quarterly reports, in PDF files, that include the applicable information in 40 CFR 63.10031(c)(5)(ii) and 40 CFR 63.10020(e) pertaining to startup and shutdown events, starting with a report for the first calendar quarter of 2024, if you have elected to use paragraph 2 of the definition of startup in 40 CFR 63.10042 (see 40 CFR 63.10031(i)). On or after January 2, 2025 you may not use paragraph 2 of the definition of startup in 40 CFR 63.10042.
These PDF reports shall be submitted no later than 60 days after the end of each calendar quarter, along with the quarterly compliance reports required under 40 CFR 63.10031(g).
13. A test report for the PS 11 correlation test of your PM CEMS, in accordance with 40 CFR 63.10031(j).
If, prior to November 9, 2020, you have begun using a certified PM CEMS to demonstrate compliance with this subpart, use the ECMPS Client Tool to submit the report, in a PDF file, no later than 60 days after that date.
For correlation tests completed on or after November 9, 2020, but prior to January 1, 2024, submit the report, in a PDF file, no later than 60 days after the date on which the test is completed.
For correlation tests completed on or after January 1, 2024, submit the test results electronically, according to section 7.2.4 of appendix C to this subpart, together with the applicable reference method data in sections 17 through 31 of appendix E to this subpart.
14. Quarterly reports that include the QA/QC activities for your PM CPMS (on or after July 6, 2027 you may not use PM CPMS, unless it is for an IGCC unit) or approved HAP metals CMS (as applicable), in PDF files, according to 40 CFR 63.10031(k).
The first report shall cover the first calendar quarter of 2024, if the PM CPMS or HAP metals CMS is in use during that quarter. Otherwise, reporting begins with the first calendar quarter in which the PM CPMS or HAP metals CMS is used to demonstrate compliance.
These reports are due no later than 60 days after the end of each calendar quarter.

■ 26. In appendix C to subpart UUUUU:

■ a. Revise sections 1.2, 1.3, 4.1, and 4.1.1.

■ b. Add sections 4.1.1.1 and 4.2.3.

■ c. Revise sections 5.1.1, 5.1.4, and the section heading for section 6.

The revisions and additions read as follows:

Appendix C to Subpart UUUUU of Part 63—PM Monitoring Provisions

1. General Provisions

* * * * *

1.2 *Initial Certification and Recertification Procedures.* You, as the owner or operator of an affected EGU that uses a PM CEMS to demonstrate compliance with a filterable PM emissions limit in Table 1 or 2 to this subpart must certify and, if applicable, recertify the CEMS according to Performance Specification 11 (PS–11) in appendix B to part 60 of this chapter. Beginning on July 6, 2027, when determining if your PM CEMS meets the acceptance criteria in PS–11, the value of 0.015 lb/MMBtu is to be used in place of the applicable emission standard, or emission limit, in the calculations.

1.3 *Quality Assurance and Quality Control Requirements.* You must meet the applicable quality assurance requirements of Procedure 2 in appendix F to part 60 of this chapter. Beginning on July 6, 2027, when determining if your PM CEMS meets the acceptance criteria in Procedure 2, the value of 0.015 lb/MMBtu is to be used in place of the applicable emission standard, or emission limit, in the calculations.

* * * * *

4. Certification and Recertification Requirements

4.1 *Certification Requirements.* You must certify your PM CEMS and the other CMS used to determine compliance with the applicable emissions standard before the PM CEMS can be used to provide data under this subpart. However, if you have developed and are using a correlation curve, you may continue to use that curve, provided it continues to meet the acceptance criteria in PS–11 and Procedure 2 as discussed below. Redundant backup monitoring systems (if used) are subject to the same certification requirements as the primary systems.

4.1.1 PM CEMS. You must certify your PM CEMS according to PS–11 in appendix B to part 60 of this chapter. A PM CEMS that has been installed and certified according to PS–11 as a result of another state or federal regulatory requirement or consent decree prior to the effective date of this subpart shall be considered certified for this subpart if you can demonstrate that your PM CEMS meets the acceptance criteria in PS–11 and Procedure 2 in appendix F to part 60 of this chapter.

4.1.1.1 Beginning on July 6, 2027, when determining if your PM CEMS meets the acceptance criteria in PS–11 and Procedure 2 the value of 0.015 lb/MMBtu is to be used in place of the applicable emission standard, or emission limit, in the calculations.

* * * * *

4.2 Recertification.

* * * * *

4.2.3 Beginning on July 6, 2027 you must use the value of 0.015 lb/MMBtu in place of the applicable emission standard, or emission limit, in the calculations when determining if your PM CEMS meets the acceptance criteria in PS–11 and Procedure 2.

* * * * *

5. Ongoing Quality Assurance (QA) and Data Validation

* * * * *

5.1.1 Required QA Tests. Following initial certification, you must conduct periodic QA testing of each primary and (if applicable) redundant backup PM CEMS. The required QA tests and the criteria that must be met are found in Procedure 2 of appendix F to part 60 of this chapter

(Procedure 2). Except as otherwise provided in section 5.1.2 of this appendix, the QA tests shall be done at the frequency specified in Procedure 2.

* * * * *

5.1.4 RCA and RRA Acceptability. The results of your RRA or RCA are considered acceptable provided that the criteria in section 10.4(5) of Procedure 2 in appendix F to part 60 of this chapter are met for an RCA or section 10.4(6) of Procedure 2 in appendix F to part 60 of this chapter are met for an RRA. However, beginning on July 6, 2027 a value of 0.015 lb/MMBtu is to be used in place of the applicable emission standard, or emission limit, when determining whether the RCA and RRA are acceptable.

* * * * *

6. Data Reduction and Calculations

* * * * *

■ 27. Appendix D to subpart UUUUU of part 63 is amended by adding introductory text to the appendix to read as follows:

Appendix D to Subpart UUUUU of Part 63—PM CPMS Monitoring Provisions

On or after July 6, 2027 you may not use PM CPMS for compliance demonstrations with the applicable filterable PM emissions limits, unless it is for an IGCC unit.

* * * * *

[FR Doc. 2024–09148 Filed 5–6–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 89 Tuesday,

No. 89 May 7, 2024

Part V

Department of Agriculture

Animal and Plant Health Inspection Service

7 CFR Part 354

User Fees for Agricultural Quarantine and Inspection Services; Final Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 354

[Docket No. APHIS–2022–0023]

RIN 0579–AE71

User Fees for Agricultural Quarantine and Inspection Services

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the user fee regulations associated with the agricultural quarantine and inspection (AQI) program. Specifically, we are adjusting the fees for certain AQI services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers arriving at ports in the customs territory of the United States or precleared or preinspected at a site outside the customs territory of the United States; adjusting the caps on prepaid fees associated with commercial trucks and commercial railroad cars; and removing certain fee exemptions that are no longer justifiable based upon pathway analyses of risk. We are also revising requirements pertaining to remittances and statements. Specifically, we will require monthly rather than quarterly remittances for the commercial aircraft fee, international air passenger fee, and international cruise passenger fee, clarify our requirements, and provide for electronic payments and statements. We are also including in the regulations information on agents responsible for ensuring compliance with paying the user fees and the requirement for entities to notify the Animal and Plant Health Inspection Service in the event they have a change in personnel responsible for fee payments. These changes are necessary to recover the costs of the current level of AQI activity, to account for actual and projected increases in the cost of doing business, to increase fee payer accountability, and to more accurately align fees with the costs associated with each fee service.

DATES: This rule is effective October 1, 2024, except for the removal of section § 354.3(e)(2)(iv), which is effective on April 1, 2025.

FOR FURTHER INFORMATION CONTACT: Mr. George Balady, Senior Regulatory Policy Specialist, PPQ, APHIS, 4700 River Road, Unit 36, Riverdale, MD 20737; (301) 851–2338; *aqi.user.fees@usda.gov.*

SUPPLEMENTARY INFORMATION:

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Background

Section 2509(a) of the Food, Agriculture, Conservation, and Trade (FACT) Act of 1990 (21 U.S.C. 136a) authorizes the Animal and Plant Health Inspection Service (APHIS) to prescribe and collect user fees for agricultural quarantine and inspection (AQI) services. Congress amended the FACT Act on April 4, 1996, and May 13, 2002.

The FACT Act, as amended, authorizes APHIS to prescribe and collect user fees for AQI services provided in connection with the arrival, at a port in the customs territory of the United States, of certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers. According to the FACT Act, as amended, these user fees should be ''sufficient'' ''to cover the cost of'':

- Providing AQI services ''in connection with the arrival at a port in the customs territory of the United States'' of the conveyances and the passengers listed above;
- Providing ''preclearance or preinspection at a site outside the customs territory of the United States'' to the conveyances and the passengers listed above; and
- Administering 21 U.S.C. 136a, concerning the ''collection of fees for inspection services.''

In addition, the FACT Act, as amended, contains the following requirements:

- The amount of the fees shall be ''commensurate with the costs of [AQI] services with respect to the class of persons or entities paying the fees.''
- The cost of AQI services ''with respect to passengers as a class'' shall ''include the cost of related inspections of the aircraft or other vehicle.''

The user fees for the AQI activities described above are contained in 7 CFR 354.3, ''User fees for certain international services.'' APHIS' regulations regarding user fees relating to imports and exports, as well as overtime services, are found in 7 CFR part 354.

On August 11, 2023, we published in the **Federal Register** (88 FR 54796–54827, Docket No. APHIS–2022–0023) a proposal[1] to amend the user fee regulations by adjusting the fees for certain AQI services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers arriving at ports in the customs territory of the United States; adjusting the caps on prepaid fees associated with commercial trucks and commercial railroad cars; removing certain fee exemptions that are no longer justifiable based upon pathway analyses of risk; and restructuring the treatment monitoring fee.

We also proposed to revise requirements pertaining to remittances and statements. Specifically, we proposed to require monthly rather than quarterly remittances for the commercial aircraft fee, international air passenger fee, and international cruise passenger fee, clarify our requirements, and provide for electronic payments and statements. We also proposed to include in the regulations information on agents responsible for ensuring compliance with paying the user fees and the requirement for entities to notify APHIS in the event they have a change in personnel responsible for fee payments.

We proposed these changes to recover the costs of the current level of AQI activity, to account for actual and projected increases in the cost of doing business, to increase fee payer accountability, and to more accurately align fees with the costs associated with each fee service.

We solicited comments concerning our proposal for 60 days ending October 10, 2023. We received 70 comments by that date. They were from airlines, shipping companies, treatment providers, industry associations, and private citizens. Eighteen commenters generally supported the proposed rule, while 15 generally opposed it. The remaining commenters, while commenting on the provisions of the

[1] To view the proposed rule, supporting documents, and the comments we received, go to *www.regulations.gov.* Enter APHIS–2022–0023 in the Search field.

proposed rule, did not articulate a position in favor or against it. The comments are discussed below by topic.

Based on the comments that we received, we have made the following modifications to the proposed rule in this final rule:

- We have lowered the fees for commercial vessels, commercial aircraft, and international air passengers based on our determination that, while aggregate cost was correct (the numerator for the fee rate), there were more instances in which AQI services were provided in these modes (the denominator for the fee rate) than we had initially calculated.
- We have established a commercial vessel fee specific to commercial vessels operating within the Great Lakes or in the region along the coastline from Alaska to Oregon, provided that certain conditions are met.
- We have decided not to revise our regulations governing the treatment monitoring fee at this time.
- We have decided not to specify the method by which airlines and cruise ships must refund passenger user fees assessed for trips not taken.

General Issues

Several commenters who supported the proposed rule agreed with the proposed rule that additional personnel were needed at ports of entry to reduce workload on individual employees. One of these commenters stated that port personnel at certain ports of entry currently routinely must work overtime to conduct inspections.

As we stated in the proposed rule, the increased fees will provide for additional staffing at ports of entry.

One of these commenters also said that APHIS' regulations governing reimbursable overtime also needed to be updated.

Changes to APHIS' regulations governing reimbursable overtime are outside of the scope of this rulemaking. However, we do note that our user fee model did consider staffing at ports in order to address the staffing shortages highlighted by the commenter and reduce the need for individual employees to work overtime to conduct inspections. We discuss the staffing model at greater length below.

Several commenters, while supportive of the proposed rule, took the view that the regulations imposed a protective tariff on imports. Similarly, several other commenters stated that they were domestic producers who supported the proposal and construed the regulations as a mechanism to reduce import volume.

User fees are not tariffs, nor are they intended as a mechanism to reduce import volume. Although the AQI user fees pertain to international trade, user fees are a cost-recovery mechanism employed more broadly than just in the international trade context. They are a fee that a party charges to an entity receiving a service in order to recover the costs associated with providing the service. User fees are often imposed by a government, but not always. For example, a toll collected on a privately owned toll road would fit the definition of a user fee. As we highlighted in the preamble of the proposed rule (88 FR 54799, August 11, 2023), user fees are currently used throughout the Federal Government to recover the costs of many Federal services, both international and domestic.

Several domestic producers stated that the services funded by the fees are necessary in order to keep plant pests, noxious weeds, and pests and diseases of livestock from being introduced into or further disseminated within the United States. We agree. AQI services are essential to protect American agriculture and natural resources from the introduction or further dissemination of plant pests, noxious weeds, and pests and diseases of livestock. Furthermore, as we mentioned in the proposed rule, programs to control or eradicate pests once they become established in the United States can be costly for the Agency to administer.

One commenter construed the proposed rule to include a notice-based process by which the fees would be adjusted after October 1, 2028. We did not propose to establish a notice-based process to adjust the fees in the proposed rule. We did state in the proposed rule that we intend to initiate a separate rulemaking to propose notice-based adjustments to the fees to be implemented after October 1, 2028.

One commenter stated that the exact language of paragraph (a)(1)(A) of the FACT Act provides authority to recover the cost of AQI services provided to ''an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car,'' while our proposed rule stated that it provided authority to recover the cost of services provided to commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers. The commenter argued that the word ''international'' in the FACT Act could be read to apply to all the commercial means of conveyance listed, and not just passengers.

Insofar as the services are provided to the listed means of conveyance that are entering the United States from outside the United States, the services are provided to the listed means of conveyance that are operating ''internationally'' in the standard dictionary definition of that term. (Merriam-Webster's online dictionary, for example, defines ''international'' to mean, among other things, ''of, relating to, or affecting two or more nations.'')[2] Accordingly, whether or not the term ''international'' in the FACT Act is read restrictively to refer solely to passengers or more generally to apply to both passengers and the listed means of conveyance *does not change the approach in this final rule.*

The same commenter stated that inspection of animals, animal products, plants, and plant products that enter the United States from Canada may violate trade agreements between the two countries. The commenter did not specify which trade agreements it considered to be violated.

APHIS is unaware of any trade agreement that precludes either the United States or Canada from conducting sanitary or phytosanitary inspection and quarantine services. To the contrary, the U.S.-Mexico-Canada Agreement, or USMCA, allows for inspection of imported commodities among the three nations.

Several commenters stated that our proposed implementation date of January 1, 2024, would be difficult or impossible for their businesses to absorb, and requested more time to allow for adequate budget planning and adjustment of contracts with customers. Two commenters suggested that, regardless of what fiscal year is chosen for implementation, the implementation date should be within the June to November timeframe to minimize disruption to service contracts for that year.

Because the publication of this final rule occurred after January 1, 2024, we have elected to set October 1, 2024, as our implementation date. In the proposed rule, this was the date that the second phase of the increased fees was scheduled to take effect. The October 1 date corresponds to the beginning of APHIS' fiscal year (FY), and it occurs within the June to November timeframe requested by the commenters. In general, on October 1, 2024, we will revise the fees to set them at the level specified in the proposed rule beginning on that date. That is, for most fee classes, we are starting at phase 2 of the

[2] *https://www.merriam-webster.com/dictionary/international.*

proposed fees, but otherwise finalizing them as proposed. However, for reasons discussed below, the user fees for commercial vessels, commercial aircraft, international air passengers, and treatment monitoring will differ from those proposed.

The same commenters who asked that the implementation date be within the June to November time frame asked for at least a 1-year delay in the implementation of this rulemaking to allow for budget planning.

As noted in the proposed rule, the AQI program ran an average deficit of over $166 million annually for FY 2017 through FY 2019. During the COVID–19 pandemic, decreased international travel further exacerbated these deficits, and the program had to rely on emergency appropriated supplemental funds to cover program costs. Even in a post-pandemic environment, current revenue projections indicate that the fees must be raised by the outset of FY 2025 to avoid possible disruptions to program delivery due to insufficient funds. Due to these exigencies, we cannot delay the implementation of the new fees for such a prolonged period. We note, however, that we have elected to have a later effective date of April 1, 2025, for the removal of a provision exempting commercial aircraft with 64 or fewer seats meeting certain conditions from paying the user fee for their mode of conveyance. We have determined that this later effective date can be implemented without disruption to program delivery.

Two commenters stated that the fee increases should be phased in over a 5-to-10-year period.

We note that we are phasing in the fee increases; the final fee increase will occur more than 4 years after the issuance of this final rule. A more prolonged phase-in schedule would adversely impact cost recovery and is not feasible to sustain program operations.

Commenters stated that the proposed increases are not warranted in the current inflation/recession prone environment and associated impacts to industry.

The fee increases are necessary to help achieve full cost recovery for the AQI services provided to the parties subject to the fees. AQI user fee-funded activities operated at a substantial deficit before the COVID–19 pandemic, and the pandemic exacerbated this deficit to the extent that emergency supplemental appropriations were needed to cover program costs. Moreover, APHIS notes that the AQI program is subject to the same inflationary pressures as other sectors of the economy. Costs associated with AQI personnel compensation and benefits, equipment and materials, rents, leases, utilities, contracts, and other direct and indirect costs have all increased since APHIS last adjusted the AQI user fees in December 2015. Since December 2015, the consumer price index for all urban consumers has increased over 30 percent,[3] and the AQI program is unsustainable at the current fee rates. Finally, we note that a commenter, a small business owner, indicated that businesses routinely factor the impact of compliance with Federal, State, and local laws and regulations into their business models, and take into account changes in compliance costs. The commenter's contention that this is a common business practice was supported by several commenters who represented regulated entities and indicated they would need to adjust billing and contracts depending on the implementation date of a final rule.

Several commenters stated that instead of raising user fees, APHIS should find alternate funding sources (for example, appropriated funds) for AQI activities.

As we explained in the proposed rule, the FACT Act of 1990 was passed by Congress and signed by the President for the express purpose of the AQI program becoming self-funding through the prescription and collection of user fees. While emergency appropriated supplemental funds were provided during the COVID–19 pandemic to mitigate low balances in the accounts, Congress indicated in the appropriations bills that they were to address pandemic-related exigencies, and we cannot depend on appropriations to cover the cost of AQI activities on a routine and ongoing basis.

Many commenters asked accounting questions relating to how the fees were developed. We will address specific comments below by topic. In general, these questions are answered in the APHIS AQI cost model data that was cited in the proposed rule and made available on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.* This data was comprehensive; for example, the FY 2017 commercial aircraft rollup report contains over 190,000 lines of highly detailed cost data. To that end, we also provided a dedicated AQI cost model video instructing the public on how to properly read the data; these video instructions were also available at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.* APHIS also referenced the data in stakeholder webinars conducted during the comment period; information about the dates and subjects of these webinars is available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-userfee-proposed-rule-webinars* as are links to recordings of the webinars. The data availability and link also were provided via stakeholder announcement and, as previously mentioned, further explained via a dedicated AQI cost model video and corresponding stakeholder announcement. APHIS web analytics showed an increase in AQI cost model data web traffic following each of the above engagements.

Several commenters stated that APHIS should have discussed any cost-cutting measures we had identified or considered in addition to the proposed fee increases.

To address the current challenges, the AQI program has implemented ways to increase efficiency. These efficiencies reduced AQI program costs, and these cost savings were realized in the FY 2017 through FY 2019 period. As a result, the cost data that APHIS used to develop the AQI user fee rates in this rulemaking, and which serve as the ''baseline,'' include these program cost savings. The most significant way we have increased inspection efficiency is by using Risk Based Sampling (RBS). RBS is an advanced statistical approach that adapts to increase inspection rates of higher risk products and reduce inspection rates of proven lower risk products. Table 1 below shows the time savings for our trade and U.S. Customs and Border Protection (CBP) inspectors across all monitored pathways, without compromising agriculture safeguarding efforts. APHIS and CBP redirect this saved time to intensive activities with greater phytosanitary risk, such as physical inspections and regulated garbage monitoring.

[3] The CPI Inflation Calculator is available on the Bureau of Labor Statistics website at *https://www.bls.gov/.*

Table 1: Estimated RBS Time Savings

Commodity	Trade	CBP
Celery	26%	23%
Avocado	93%	77%
Broccoli	58%	52%
Date	38%	34%
Papaya	85%	73%
Mushroom	85%	81%
Carrot	88%	76%
Overall	77%	67%

The AQI program has identified other ways to increase efficiency in recent years. For example, CBP, through various initiatives, has increased its targeting efficiency rates to approximately 63 percent. In doing so, CBP deployed new approaches that significantly improved their ability to identify and inspect non-compliant material compared to random selection. APHIS and CBP have also facilitated more timely clearance of agricultural cargo by improving our processes to grant authority to inspectors and pest identifiers to make regulatory decisions at ports, rather than by national specialists in other locations. We also implemented advanced digital imaging to expedite pest identifications that in the past would have required physically shipping specimens, shaving days off of the pest identification process.

APHIS also increased its electronic capacity to process cargo. Of all the government agencies that set import requirements, APHIS had the greatest number of forms and documents required to clear cargo. APHIS joined CBP's Automated Commercial Environment single window initiative, making it easier for importers to electronically provide information critical for AQI clearance prior to importation, reducing expense and clearance time. Additionally, we have structured regulatory requirements into an advanced database, and automated permit issuance to reduce the processing time for most Plants and Plant Products permits from 5 to 7 days to 1 day or less. APHIS eFile issues up to 85 percent of the Plants and Plant Products permits to applicants in less than 1 minute.

Program and process efficiencies are just one aspect of the AQI program's efforts to become more effective and efficient at a lower cost. Personnel compensation and benefits are the single largest cost in the AQI program, and so effective use of personnel time is essential to keep costs down without compromising the mission. CBP found that their Agriculture Specialists were increasingly spending time on administrative activities, taking them away from core inspection and regulatory functions. To address this, CBP piloted using technicians (full performance level GS–08) to free Agriculture Specialists (full performance level GS–12) to spend more time on inspection-related activities. CBP's staffing and workload analysis found that adding one technician frees up 1.49 CBP Agriculture Specialists. The 731 Technicians in CBP's staffing plan free up the equivalent of 1,089 Agriculture Specialists, resulting in a cost savings of nearly $81 million per year.

Despite these efforts to increase efficiencies, anticipated AQI operational costs would far surpass AQI anticipated revenue unless the fees are raised in the manner specified in this final rule.

A commenter stated that APHIS should provide greater transparency for capital costs. The commenter expressed concerns over what was included in the capital costs, the allocation of those costs, and capital costs associated with non-AQI programs. The commenter stated that the proposed rule should have explained how capital costs were factored into fee calculations.

We disagree with the commenter. As we explained in the proposed rule, there is no reserve component in the fee rates in this proposed rule. Rather, the fee rates in the proposed rule were set at levels intended only to result in fee collections that cover the cost of providing agricultural quarantine and inspection services and the costs of administering the program, and personnel and capital planning cost components have been added to the cost model.[4] Adding these cost components to the model ensures that the program can be fully staffed in future years and ensures that future-looking capital costs can be offset as they are actualized, without recourse to use of a general-purpose reserve to pay for these costs. In the AQI cost model that accompanied the proposed rule, we included capital costs in the cost model at level 26 for APHIS and level 27 for CBP, all cost objects with an identification code starting with "26" or "27" are planned capital spending costs. Likewise, we note that an overall summary of planned capital spending costs could also be found in the supporting document at *https://www.regulations.gov/document/APHIS-2022-0023-0035* that was made available during the comment period. As an additional measure, APHIS has included the planned capital expenditure costs in a series of summary tables in this document.

Capital costs include items such as facility design, development and maintenance costs; new information technology and equipment costs, and AQI program outreach expansion and

[4] The programmatic need and legal basis for the application of fees to capital costs was discussed in further detail in the proposed rule, the relevant sections of which the agency incorporates by reference here. See 88 FR 54797–98, 54800–801.

improvement costs. The AQI Program's top 10 capital projects are:

1. Design and construct two new plant inspection stations;
2. Design and construct a new multi-function laboratory and containment facility;
3. Upgrades and updates to the eFile system;
4. Beltsville facility infrastructure improvements;
5. Design and construct new plant pathogen diagnostic methods lab;
6. Design and construct new national plant germplasm greenhouse;
7. Design and construct new identification laboratory;
8. New Preclearance and Offshore Programs IT System;
9. Engage in an outreach campaign, Clean Clears Quicker, to emphasize the importance of regulatory compliance; and
10. Establish Federal oversight of the existing Don't Pack A Pest outreach campaign.

APHIS has treated capital costs as an overhead cost and allocated capital costs according to frontline Full Time Equivalent (FTE) hours because any capital projects would support the AQI program proportionately to frontline AQI FTEs. With respect to shared facilities, that is, facilities which house or support both AQI and non-AQI functions—the planned capital costs in the AQI activity-based cost model only include those costs attributable to the AQI program. Moreover, a portion of those costs are allocated to non-fee areas. Non-fee areas are those AQI activities for which there is no fee. The largest non-fee areas are privately owned vehicle (POV) and POV passenger clearance, and pedestrians. The AQI program allocates costs to non-fee areas for the express purpose of ensuring that the payers of AQI user fees do not pay for the costs associated with non-fee areas. Rollup reports associated with non-fee areas are available to the public on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports* alongside the rollup reports for the fee areas. CBP's appropriation covers CBP's costs associated with AQI activities in non-fee areas. The rest are covered by trust funds that we have entered into pursuant to regulations issued under authority of the Plant Protection Act (7 U.S.C. 7711 *et seq.*), such as those in 7 CFR 319.37–22 for plants for planting and those in 7 CFR 319.56–6 for fruits and vegetables, or are part of other APHIS programs and appropriations and are not included in costs factored into the AQI User Fees.

We note, additionally, that the commenter assumed that the AQI program is fully funded and staffed currently, which is not the case.

A commenter stated that they worked with CBP personnel who were underused at a port of entry, and questioned whether additional CBP staffing was warranted in light of their experience. While not directly challenging the validity of this claim, several other commenters asserted that, at other ports of entry, throughput is substantial and CBP employees often work overtime to ensure timely delivery of services. One commenter stated that some ports of entry only currently employ a single inspector to conduct AQI inspections.

Our data does not support the commenter's anecdotal experience that CBP personnel are underused. CBP's staffing models, which are addressed at greater length directly below, evaluated workload and throughputs at ports of entry throughout the United States. CBP's staffing models underscore that many ports of entry have workload demands that currently exceed regular FTE hours.

Several commenters noted that a significant amount of each fee would go to staffing. The commenters stated that it was not clear from the proposed rule how the additional staffing levels needed were arrived at, and how they would be used in providing AQI services.

Additional staffing costs were included in the AQI cost model at level 35 and level 451 for APHIS and level 452 for CBP; all cost objects with an identification code starting with ''35'' or ''45'' are additional staffing costs. We summarized CBP's additional staffing requirements by fee area in table 1 of the proposed rule, which we have reproduced as table 2 below.

Table 2. CBP Staffing

CBP FTEs			
Pathway/Conveyance	Total FTEs as of FY 2019	Additional FTEs Required	Total Projected FY 2028 FTE
Air Passengers	1,324	341	1,665
Commercial Aircraft	819	438	1,257
Commercial Vessel	356	247	603
Commercial Truck	155	258	413
Commercial Rail	33	74	107
Cruise Vessel Passenger	22	6	28
Other (Non-Fee Areas)	362	70	432
Totals	3,071	1,434	4,505

CBP uses two statistical workload models to determine AQI staffing needs by environment. The Agriculture Specialist Resource Allocation Model [5] (AgRAM) calculates staffing needs for CBP Agriculture Specialists, and the Mission Operations Support Resource Allocation Model (MOSRAM) calculates the staffing needs for support positions such as CBP Agriculture Technicians and other support positions.

CBP's staffing models calculated additional personnel needs based on estimated throughput as calculated in light of actual workload, in order to ensure that bottlenecks do not occur in port operations. APHIS summarized its additional personnel needs by fee area in table 2 of the proposed rule, which we have reproduced as table 3 below. The bulk of additional APHIS personnel are field positions, including botany, entomology and plant pathology identifiers, veterinary medical officers, and plant health safeguarding specialists. Increased frontline staffing also requires additional support staff to accommodate additional workload in areas such as human resources, financial management, and employee training. Finally, some additional policy and operational personnel will also be needed to accommodate the additional throughput. Our data in tables 2 and 3 account for these factors.

Table 3. APHIS Staffing

APHIS FTEs			
Pathway/Conveyance	Total FTEs as of FY 2019	Additional FTEs Required	Total Projected FY 2028 FTE
Commercial Aircraft	392	200	592
Commercial Vessel	208	91	299
Air Passengers	193	93	286
Commercial Truck	153	62	215
Treatments	57	55	112
Commercial Rail	34	14	48
Cruise Vessel Passenger	6	4	10
Other (AQI Non-Fee Areas)	43	25	68
Totals	1,086	544	1,630

A commenter noted that the proposed rule was based on cost data from FY 2017 through FY 2019 and asked how budget shortfalls or surpluses in FY 2013 through FY 2016 and FY 2020 through FY 2022 may have impacted the setting of the AQI user fees.

APHIS does not set AQI user fees based upon prior year shortfalls or surpluses. Under an activity-based costing methodology, APHIS uses actual program costs per fiscal year plus anticipated costs for capital planning and additional staffing allocated to each fee and non-fee area, then takes the total costs in each fee area and divides that total cost by the number of projected units (a unit being a commercial vessel, commercial truck, commercial railroad car, commercial aircraft, an international air or cruise passenger, or a treatment). The unit costs for 3 consecutive fiscal years are adjusted for inflation to today's dollars (in this rulemaking, June 2022), and then these adjusted unit costs are averaged. Finally, APHIS adjusted the average unit cost (that is, June 2022 dollars) for projected inflation, (that is, future dollars) for FY 2025 through FY 2028.[6] As we explained above, non-fee areas are those AQI activities for which there is no fee. The largest non-fee areas are privately owned vehicle (POV) and POV passenger clearance, and pedestrians. The AQI program allocates costs to non-fee areas for the express purpose of ensuring that the payers of AQI user fees do not pay for the costs associated with non-fee areas. Rollup reports associated with non-fee areas are available to the public on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports* alongside the rollup reports for the fee areas. CBP's appropriation covers most of the costs associated with non-fee areas.

The same commenter stated that it appeared that cost data from FY 2014 through FY 2016 and FY 2020 through FY 2022 had a role in the proposed fees, although it was difficult to discern exactly to what degree.

APHIS did not use cost data from FY 2014 through FY 2016 for the proposed rule because we had newer cost data on which to rely. APHIS also did not use cost data for FY 2020 through FY 2022 because, as we suggested in the proposed rule, these fiscal years were not a period of normal operations.

A commenter stated that the proposed fees did not appear to follow the inflation rate since the fees were last updated. The commenter stated that, were the fees calculated in such a manner, they would be significantly lower than proposed.

The fees were not calculated solely by applying intervening inflation. APHIS used actual cost data for FY 2017 through FY 2019 by user class, future costs for planned capital expenditures, and additional staffing, and divided that by the number of users per fiscal year to arrive at a unit cost. We then adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation.

[5] This model is described in the document "Agriculture Resource Optimization: Fiscal Year 2020 Report to Congress" available on CBP's website at *https://www.dhs.gov/sites/default/files/publications/cbp_-_agriculture_resource_optimization_0.pdf.*

[6] See the document titled "Projected Fees for Agricultural Quarantine Inspections, FY 2024–2028" which we made available with the proposed rule at *https://www.regulations.gov/document/APHIS-2022-0023-0010.*

We made comprehensive rollup reports for the cost components of each fee available as supplemental documents for the proposed rule. The reports are available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.* In addition, we have included summary tables for each fee area below as a quick visual reference regarding fee development.

A commenter stated that all AQI user fees should be capped.

Capping all AQI user fees would undermine full cost recovery, one of the aims of the FACT Act. As we indicated in the proposed rule, while we cap fees for two AQI modes, prepaid commercial railroad cars and prepaid commercial truck crossings (transponder), this is due to their unique operational exigencies. For example, we pointed out that in the absence of a commercial truck transponder, CBP personnel would have to collect the fee at border crossings 11 million times annually, which is operationally untenable.

Several commenters suggested that APHIS should tier user fees based on the sanitary and phytosanitary risk presented by different modes of conveyance (*e.g.,* commercial aircraft versus commercial vessel) or different conveyance types within that mode (*e.g.,* containerized ship versus non-containerized ship).

APHIS' current user fee structure does charge different fees based on the mode of conveyance. This is done to preclude cross-subsidization, and to ensure that the fees correlate to the AQI services that each mode receives.

We generally do not consider it possible to tier fees within a mode of conveyance. This is because it is not usually possible to assign a particular level of sanitary and phytosanitary risk, and corresponding AQI services, to a conveyance type that is unique to the type. To use an example within the commercial vessel mode, while agricultural cargo is often carried in containerized ships, certain types of agricultural cargo, such as citrus, bananas, and pineapples, are routinely shipped in break bulk shipments, in which the individual boxes are placed within a commercial vessel's cargo hull, rather than in containers. In both instances, CBP personnel need to offload and inspect the cargo for plant pests, noxious weeds, and overall compliance with APHIS' regulations. Likewise, a containerized ship may carry cargo with a low sanitary and phytosanitary risk during one shipment, and a higher sanitary and phytosanitary risk in a later shipment. The climates of different ports of export can be unique, and a vessel departing from one port of export during a particular shipment may face exposure risks to hitchhiking pests that it does not experience when departing from a different port. For a similar reason, the route chosen and the time of year during which the shipment takes place may also contribute to exposure risks.

In instances in which we have determined that the level of sanitary and phytosanitary risk is such that AQI services are not warranted for a particular conveyance type, we can and do exempt certain conveyance types from our user fees. For example, while we charge commercial railroad cars a user fee, the regulations have exempted and will continue to exempt locomotives and cabooses from the railroad car fee. Likewise, we do not charge a commercial vessel fee for vessels of less than 100 net tons.

Finally, we do note that CBP's staffing model accounts for sanitary and phytosanitary risk, so ports of entry that routinely inspect means of conveyance and cargo with a high phytosanitary and sanitary risk are assigned more personnel than ports of entry that do not.

Several commenters suggested that APHIS could establish different user fee tiers for methods of conveyance that carry agricultural cargo versus those that do not; while other commenters suggested a base fee, plus additional fees for extended service based on cargo carried.

The current method by which APHIS calculates the AQI user fees, in which aggregate costs of providing AQI services are divided by number of instances in which those services are provided, generally does not currently allow for such a distinction between conveyances carrying agricultural cargo and those that do not carry agricultural cargo. To that end, we note that sanitary and phytosanitary inspections are not only conducted of the cargo carried by a method of conveyance, but also the method of conveyance itself. We also note that non-agricultural cargo may present sanitary and phytosanitary risks; for example, gypsy moth (*Lymantria dispar,* also known commonly as spongy moth) is known to infest stone and quarry products.

As noted above, cargo is not the sole factor contributing to the sanitary and phytosanitary risk associated with a particular means of conveyance, and the AQI services required for that means of conveyance. Port of export, route, and time of year of the shipment may also all contribute to increased risk and extend the AQI services required. As a result, if we were to establish a base fee, with additional surcharges based on cargo carried, this would not take all these risk factors into consideration.

A commenter suggested that fees should be tiered based on handling volume at a particular port of entry.

The commenter provided no information regarding why handling volume, that is, the number of instances in which AQI services were provided at the port, should be considered indicative of the level of AQI services provided to individual arrivals and would provide a better basis for setting fees than the basis articulated in the proposed rule. A single, huge container shipment of cargo that has a significant sanitary or phytosanitary risk may take as long to inspect, if not longer, as several smaller shipments of low-risk cargo. We also note that variances throughout the year in handling volume at particular ports would require the fee rate to be dynamic, which would lead to unpredictability in terms of what fee would be assessed from arrival to arrival, as well as concomitant unpredictability in APHIS and CBP's revenue stream. It also could lead to staffing and resource allocation issues at ports of entry, particularly if owners and operators began to seek out ports with the lowest current fee.

A commenter asked how APHIS will monitor expenditures to ensure the increased fees are used appropriately.

APHIS employs multiple safeguards to ensure user fee funds are used appropriately. For example, from an operational perspective, APHIS maintains all AQI fees we collect in distinct accounts, carefully monitors the balances in these accounts, and only uses these funds to pay for our actual costs for providing these distinct services. In addition, APHIS will continue to maintain, evaluate, and ensure that our internal controls, which include our expenditure-related accounts and processes, are operating properly and in compliance with Office of Management and Budget (OMB) Circular A–123, Management's Responsibility for Enterprise Risk Management and Internal Control requirements. Examples of APHIS internal controls include verifications, reconciliations, authorizations and approvals, and supervisory control activities. APHIS also complies with Federal audit requirements which include audit of expenditure-related processes and accounts under the Chief Financial Officers Act of 1990 (CFO Act) (Pub. L. 101–576), as amended, the Government Management Reform Act of 1994 (GMRA) (Pub. L. 103–356), as amended, and the Federal Financial

Management Improvement Act of 1996 (FFMIA) (Pub. L. 104–208, title VIII), as amended.

A commenter stated that APHIS should amend the regulations to assess a penalty on airlines and cruise lines that is equivalent to the amount airlines and cruise lines have failed to lawfully remit to passengers.

APHIS has no statutory authority to assess such penalties, nor is this request within the scope of this rulemaking.

One commenter asked how airline passengers can assess that their fee was appropriately set by APHIS when they are greeted and inspected not by APHIS, but by CBP.

The Homeland Security Act of 2002 created the Department of Homeland Security and transferred the function for AQI clearance of international passengers and certain other AQI functions from APHIS to CBP.[7] CBP Officers review passenger manifests, passenger documentation and interview arriving international passengers. CBP Officers also refer passengers of interest to the AQI program to CBP Agriculture Specialists who are funded by AQI user fees for secondary inspection. As stated previously, rollup reports from the activity-based cost model are available for public review on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.* For example, there are over 92,000 lines of highly detailed cost data in the FY 2017 international air passenger rollup report.

Finally, several commenters requested that APHIS extend the comment period for the proposed rule.

One of these commenters posed a series of questions that, the commenter asserted, APHIS needed to respond to for the public to provide informed comments on the proposed rule. These included questions about whether there were budget shortfalls or surpluses in the years 2013–2016 and 2020–2022, if such shortfalls or surpluses were factored into the cost-benefit analysis for the rulemaking, and whether adjustments for inflation would have resulted in shortfalls or surpluses in the years 2016 to the present. The commenter also asked why the aircraft fee is increasing if the number of aircraft arrivals has not changed and if there was a breakdown of how APHIS estimated the costs of capital costs and staffing and how capital costs were allocated in airport or non-airport environments.

We disagree with the commenter that APHIS' responses to the commenter's questions were necessary to evaluate the merits of the proposed rule. APHIS provided all information necessary to evaluate the proposed rule to the public in the proposed rule itself and its supporting documentation. This included, for example, documentation regarding how the fee model was selected and why it was appropriate, the cost components that led to the proposed fees using that model, the rationale for revising particular fee caps, and the basis for our proposed removal of exemptions. We note that, between September 12, 2023, and September 18, 2023, APHIS hosted webinars for the industries affected by the rulemaking. During the webinars, we allowed for a question-and-answer period. We also recorded the webinars and made them publicly available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-userfee-proposed-rule-webinars.* During the webinar for the commercial aircraft fee, which the commenter attended, we responded to each of the commenter's questions.

Two commenters who requested extension of the comment period stated that APHIS provided no information regarding how the fees were calculated.

We made comprehensive rollup reports for the cost components of each fee available as supplemental documents for the proposed rule. They were and are available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.*

One commenter who requested extension of the comment period stated that APHIS provided no indication of how the fees would be used.

We disagree. The proposed rule discussed at length the direct and indirect costs associated with providing the AQI services funded by the user fees.

Economic Comments

Commenters raised several issues concerning the Regulatory Impact Analysis that accompanied the proposed rule. These are addressed in the final Regulatory Impact Analysis that accompanies this final rule.

Revisions to Regulatory Definitions

We proposed to revise some existing definitions and to add new ones to § 354.3(a). Specifically, we proposed to amend the definitions for *commercial railroad car* and *commercial truck;* to replace the definition of *Customs* with one for a definition for *Customs and Border Protection (CBP);* and to add definitions for the terms *passenger, reconditioning,* and *restacking.* We received no comments on these revisions and additions and will adopt most of them accordingly. However, as discussed below, we have decided not to finalize proposed revisions to our AQI treatment monitoring fee that would have, among other things, charged parties for restacking and reconditioning services provided in connection with AQI treatment services. Because the terms *restacking* and *reconditioning* will not appear in the regulations as a result of this decision, there is no longer a need to define these terms and we have not done so in this final rule.

Additionally, for reasons that we discuss below under the section heading ''Commercial Vessels,'' we are adding two definitions to the regulations in this final rule, for the terms *Great Lakes* and *Cascadia.* The revisions to the commercial vessel fee described below removed the term *barge* from the regulations; as a result, we no longer need a regulatory definition for the term and are removing it accordingly.

Commercial Vessels

The AQI program inspects, with some exceptions, commercial vessels of 100 net tons or more arriving at ports of entry into the customs territory of the United States. AQI user fees for inspection of commercial vessels are listed in § 354.3(b)(1). We proposed to increase the user fee per arrival.

We also proposed to eliminate the exemption for barges from Canada; the exemption is currently found in § 354.3(b)(2)(vi). As discussed in the pathway analysis that accompanied the proposed rule, we determined that barges entering the United States from Canada pose a phytosanitary risk similar to barges entering the United States from origins other than Canada and to other types of vessels entering from Canada. Barges from origins other than Canada and other types of vessels from Canada are not exempt from AQI user fees. Other vessels from Canada are required to pay user fees even when travelling the same routes and carrying the same cargo as exempt barges.

Finally, we proposed that the commercial vessel fee would also not apply to commercial cruise (passenger) vessels that carry passengers paying the international passenger fees under § 354.3(f), because the cost of inspecting the entirety of the vessel is included in the international cruise passenger fee. That broad proposed exemption would replace the existing limited exemption in § 354.3(b)(2)(i) for certain foreign passenger vessels. In this respect, the treatment of commercial vessels is

[7] 6 U.S.C. 231.

distinct from that of international aircraft carrying passengers, which are not exempt from the commercial aircraft user fee.

We received 28 comments on these proposed changes to the commercial vessel fee. All the commenters were generally opposed to the proposed changes.

Most commenters noted that we proposed to increase the commercial vessel fee from the current fee of $825 to $3,557.18 in 2028, which was a higher percent increase than any other fee.

Several of the commenters stated that they would support the fee if it was correlated to service received. The commenters asserted that the fees appeared higher than the level of AQI services they received at ports of entry.

As we discussed in the proposed rule, our revised cost model for the proposed fees was based on aggregate full-time equivalent (FTE) hours spent providing services, such as inspections, for a particular user fee class.

Similarly, a commenter suggested that APHIS should begin to analyze FTE hours worked by vessel type and revise the commercial vessel fee based on these findings before issuing a final rule to revise the commercial vessel fee.

As we noted above, vessel type is not necessarily a reliable indicator of the level of effort needed to provide AQI services. Cargo, port of departure, route, time of the year in which the shipment occurs, and port of arrival all play a contributing role to determining the sanitary and phytosanitary risk associated with the vessel and the commensurate level of services warranted. Because these can vary significantly from shipment to shipment, if we were to conduct such an assessment, it would be difficult to extrapolate generalized, defensible conclusions about different vessel types from our current data set, which is limited to aggregate hours worked providing AQI services for the commercial vessel user fee class as a whole and number of instances of providing those services. Our current data is therefore insufficiently granular to observe those variances. Moreover, as we mentioned in the proposed rule, cargo from commercial vessels is routinely offloaded into a joint holding area, and inspected en masse. We mention this in order to underscore that the assessment requested by the commenter would need to be conducted *de novo,* and cannot be extracted from the existing data used to calculate the fee rates, and that it would require a fundamental reorientation in the manner in which cargo inspections are conducted. It is impracticable to conduct such an assessment at this time, particularly in light of resource constraints (as noted above, overtime is common at some ports of entry just to meet core inspection functions) and the economic exigencies facing the AQI program. To execute the sort of assessment requested by the commenter, we would need to hire additional port-specific analytical and billing support, which requires raising the fees to support the additional personnel.

One commenter stated that, based on data that the commenter obtained, APHIS had appeared to undercount the number of arrivals of commercial vessels. The commenter requested that APHIS use a data set from CBP that they considered to be more accurate in terms of characterizing arrivals.

APHIS used the same CBP data set as the commenter to calculate the commercial vessel fee. In reviewing the commenter's concerns, however, we realized that coastwise arrivals had been inadvertently filtered out of the data set. Coastwise arrivals refer to arrivals of the same vessel at a different port of entry, for which AQI services are provided; for example, a commercial vessel offloading cargo at the port of Philadelphia, then subsequently offloading at the port of Wilmington, Delaware, would be making coastwise arrivals. CBP's vessel arrival fee is set out in their regulations at 19 CFR 24.22(b). That fee is collected from vessels of 100 net tons or more for each arrival regardless of the number of arrivals taking place in the course of a single voyage, with a cap currently set at $5,955 per calendar year. Because AQI services are provided at each port of entry, an AQI user fee is charged for each coastwise arrival, though we do not have a cap on those fees. APHIS charges AQI user fees for each arrival because a sizable component of the fees is the inspection of the cargo, usually after it has been offloaded and is in a joint inspection area. Some vessels offload large volumes of cargo at multiple ports-of-entry during a single voyage. If the AQI vessel fee were charged on first arrival only, we would need to increase the fee even more to recover costs. We charge at each arrival to be more equitable to single port-of-entry arrivals versus multiple port-of-entry arrival voyages.

Accordingly, the proposed user fees should have been calculated by including coastwise arrivals within total arrivals. Total program costs, however, were accurate. When these costs are divided by the updated arrivals (including coastwise arrivals), the user fee is correspondingly lower; the numerator (costs) has not changed while the denominator (number of arrivals) has. Accordingly, in this final rule, the commercial vessel fee has been lowered as shown in table 4 below.

Table 4: Commercial Vessel Fee

FY 2025	FY 2026	FY 2027	FY 2028
$2,903.73	$2,981.17	$3,059.61	$3,139.06

This discovery led APHIS to evaluate all other data sets in the proposed rule to ensure that all instances in which the fee had been assessed were accurate. We discovered that, for two other proposed fee increases, those for commercial aircraft and those for international air passengers, filtering had also occurred to remove inspections that occur during preclearance. We discuss this below, in the relevant sections of the preamble for those fees.

Several commenters opposed the fee increase because it would have a disproportionate impact on vessels that are not ultra large container vessels.[8]

We acknowledge that the fees may often have a greater impact on smaller vessels than larger vessels, but we disagree that smaller vessels merit a lower fee just because they are smaller. Furthermore, we disagree that the existence of smaller vessels did not factor into the fee calculation. The commenters often stated as an assumption that ultra large container vessels necessitate more intensive AQI services than commercial vessels that are not ultra large container vessels. While this is sometimes the case, size of vessel is not the sole determinant of the level of AQI services warranted for a particular vessel. As we noted above, cargo, port of departure, route, time of the year in which the shipment occurs,

[8] See the graph for Container Ship Fleet Categories at *https://agtransport.usda.gov/stories/s/Ocean-Container-Fleet-Dashboard/pjaw-nxa9.*

and port of arrival all play a contributing role to determining the sanitary and phytosanitary risk associated with the vessel and the commensurate level of services warranted. APHIS also notes that the rise of ultra large container vessels was not the sole factor contributing to this fee increase. The change in cost allocation methodology from number of arrivals to FTE hours was also a significant factor. As discussed above, APHIS develops fees using the average unit cost across 3 fiscal years. In the case of the commercial vessel fee, the unit cost is the arrival of a vessel in foreign trade, including coastwise arrivals, during a single voyage. The arrivals of vessels in foreign trade that were not ultra large container vessels brought this average cost per arrival down to the rates in this final rule. If APHIS had based the new vessel fee rates exclusively on ultra large container vessel arrivals, the commercial vessel fee would have been considerably higher.

Summary tables 5 and 6 for commercial vessel fee calculation below show that APHIS used actual cost data for FY 2017 through FY 2019 for commercial vessels, future costs for planned capital expenditures, and additional staffing, divided by number of users per fiscal year to arrive at a unit cost. We then adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation. The discussion of fee rates relative to other costs of doing business was to illustrate relative economic impact of the fee, and not to serve as the basis for fee development.

We included the summary tables to be used as a quick reference regarding fee development. For more comprehensive cost data information please see the full rollup reports from the APHIS AQI activity-based cost model. As we explained above, these questions are answered in the APHIS AQI cost model data that was cited in the proposed rule and made available on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.*

For October 1, 2024, October 1, 2025, October 1, 2026, fee rates, APHIS subtracted the January 1, 2024 rate from the October 1, 2027 rate, and divided by 4. This amount became the per phase increase. The per phase increase was then added to the previous phase amount until reaching the October 1, 2027 rate.

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Table 5: AQI Commercial Vessel Fee Calculation – January 1, 2024 Phase Development ($2,827.29 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs	-	-	208
Total APHIS AQI Program Cost (Level 501)	$62,107,626.02	$47,594,065.97	$43,940,334.81
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$10,224,343.40	$7,989,045.86	$7,049,512.01
APHIS Additional Staffing Future Costs (Levels 35 and 451)	$0.00	$0.00	$0.00
CBP AQI FTEs	-	-	356
Total CBP AQI Program Cost (Level 502)	$100,832,988.90	$100,046,141.73	$107,973,913.16
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$1,175,843.82	$840,341.95	$647,978.82
CBP Additional Staffing Future Costs (Level 452)	$0.00	$0.00	$0.00
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$162,940,614.92	$147,640,207.69	$151,914,247.96
Number of Commercial Vessels	61,417	63,521	61,745
Calculated Unit Cost (Total AQI Costs divided by Number of Commercial Vessels)	$2,653.02	$2,324.27	$2,460.35
Unit Cost inflated to June 2022 dollars[2]	$2,984.65	$2,567.35	$2,672.55
Average of Unit Costs in June 2022 dollars (fee basis)	$2,741.52	-	-
Inflation Projected to FY 2024 dollars	$2,827.29	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.

[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

Table 6: AQI Commercial Vessel Fee Calculation – October 1, 2027 Phase Development ($3,139.06 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs + Additional FTEs required by FY 2028	-	-	299
Total APHIS AQI Program Cost (Level 501)	$60,364,906.55	$60,565,653.83	$64,170,544.01
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$6,914,630.65	$7,023,455.57	$7,207,822.32
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$4,924,381.32	$5,063,832.52	$5,217,115.69
CBP AQI FTEs	-	-	603
Total CBP AQI Program Cost (Level 502)	$93,959,909.17	$97,907,047.01	$107,864,763.34
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$765,983.90	$776,039.26	$786,094.63
CBP Additional Staffing Future Costs (Level 452) included above	$13,378,307.63	$13,553,929.83	$13,729,552.04
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$154,324,815.72	$158,472,700.84	$172,035,307.35
Number of Commercial Vessels	61,417	63,521	61,745
Calculated Unit Cost (Total AQI Costs divided by Number of Commercial Vessels)	$2,512.74	$2,494.81	$2,786.22
Unit Cost inflated to June 2022 dollars[2]	$2,826.83	$2,755.72	$3,026.57
Average of Unit Costs in June 2022 dollars (fee basis)	$2,869.70	-	-
Inflation Projected to FY 2028 dollars	$3,139.06	-	-

[1] Within this table, “level” refers to the level in the APHIS AQI Cost Model.
[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

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Notwithstanding the above discussion, we have determined that certain commercial vessels that operate within the Great Lakes, or in the region along the coastline between Alaska and Oregon, are uniquely situated and have created a new commercial vessel fee that is lower than that for other commercial vessels. This will provide a degree of regulatory relief for such vessels that is also aligned with the sanitary and phytosanitary risk that the vessels present. We discuss these changes below.

Several commenters stated that they operated barges or other shipping vessels within the Great Lakes, or in the region along the coastline between Alaska and Oregon. The commenters stated that they were uniquely situated and that assumptions that APHIS articulated in the proposed rule about

the commercial vessel industry as a whole did not apply to them. While we stated in the proposed rule that total cargo capacity of the global fleet expanded by more than 63 percent from 2011 through 2020, the commenters stated that their vessels had not increased in size. In fact, vessel operators within the Great Lakes stated that the average size of vessels operating within the Great Lakes had not increased since the 1970s. Similarly, we stated in the proposed rule that far fewer vessels had arrived internationally from 2011 through 2020 than APHIS had predicted, but the commenters stated that their average number of arrivals per year had remained relatively constant. Further, we stated in the proposed rule that individual vessels now took much longer to inspect than they previously had, but the commenters stated that they had experienced no significant increase in the amount of time inspections took.

Several commenters stated that visual inspection of their vessels was often brief, and a few barge operators stated that CBP had never boarded their vessels. Several commenters also questioned whether the proposed fees significantly exceeded the level of AQI services provided to vessels within the Great Lakes and in the region along the coastline between Alaska and Oregon. Two commenters stated that, at face value, the fee levels appeared to be set significantly above the level of inspection services currently provided, which would be inconsistent with the FACT Act. Several operators stated that they seldom, if ever, carried agricultural cargo. Finally, the commenters stated that, because they operated solely within distinct geographical areas between the United States and Canada, they pose little to no phytosanitary risk. (As discussed in this document, the geographic area covered by the port of departure, the route, and the port of arrival all do contribute to the risk profile associated with a particular commercial vessel. However, they are not the sole factors; for example, the cargo carried may itself present a sanitary or phytosanitary risk.) To that end, several commenters stated that Great Lakes vessels often are too large to fit through the St. Lawrence seaway lock system and cannot leave the Great Lakes; one commenter stated that, even if they could leave the Great Lakes, many Great Lakes vessels are not certified by the United States Coast Guard to enter the ocean.

Commenters proposed multiple options to address these stated differences. One option proposed was to entirely exempt vessels operating within the Great Lakes or in the region along the coastline between Alaska and Oregon from the commercial vessel fee. This exemption would apply to all vessels operating within the regions, including container vessels, break bulk vessels, barges, and all other commercial vessels. A second option proposed was to retain the current exemption for certain Canadian barges. A third option proposed was to apply the fee only to vessels carrying agricultural cargo, and to exempt commercial vessels that did not carry agricultural cargo. A fourth option proposed was to retain the existing commercial vessel fee for vessels operating within the Great Lakes or in the region along the coastline between Alaska and Oregon, provided that the vessels were not currently exempt from paying the fee (*e.g.,* barges), but to add an additional per-container surcharge or otherwise scale it in accordance with ship size. Finally, a fifth option proposed was to retain the existing fee, but to adjust it for intervening inflation. The commenters who provided the fifth option stated that the cost to inspect commercial vessels operating within the Great Lakes or in the region along the coastline between Alaska and Oregon should not have increased above the rate of inflation since the previous fees were put in place.

After reviewing the comments and available information, including data from CBP and the U.S. Army Corps of Engineers, as well as information maintained by the shipping industry in the regions themselves, we agree that the vessels operating within the Great Lakes, or in the region along the coastline between Alaska and Oregon, merit additional consideration. The commenters presented information that they operate in a distinct geographical area that they seldom depart from, and sometimes are not physically able to leave. They also presented information indicating that their departures and arrivals are often more frequent than those of other commercial vessels, and publicly available information indicates that the vessels often take the same or substantially similar routes per shipment and sometimes carry the same or substantially similar cargo per shipment. Based on the risk factors identified above, the risk from these vessels is often, although not always, more well defined. The port of departure, route, and port of arrival are often the same or substantially similar: Many vessels are running out and back trips across the Great Lakes or along the coastline between Alaska and Oregon, sometimes multiple times a week.

However, as we discuss below, we would not say that these vessels are always less risky. Cargo can be a significant risk factor. For example, several areas in Canada are quarantined for European cherry fruit fly. Cherries from such areas could present a phytosanitary risk and vessels carrying such cargo would likewise present a risk. For this reason, we disagree with the first option that proposed to exempt all such vessels entirely from the commercial vessel fee. We currently inspect the vessels for possible sanitary and phytosanitary risks, and such vessels can carry cargo with significant risks. This is true even if the cargo is not agricultural cargo; as noted above, gypsy moth or spongy moth (*Lymantria dispar*) is known to infest stone and quarry products, so quarry products from an area of Canada that is infested with the moth do present a phytosanitary risk. For this reason, the third option also is not viable, because vessels that do not carry agricultural cargo may still merit AQI inspections.

Insofar as barge operators did not provide verifiable, supporting information that they only carry cargo with no sanitary or phytosanitary risk, and do not merit inspection of the vessel itself, and in light of our aim to achieve full cost recovery, we have decided not to retain the barge exemption, the second option proposed by commenters.

We also disagree with the fourth option to assess a per container surcharge; among other things, this option would incentivize the use of break bulk vessels, which do not carry containers, to carry agricultural products between Canada and the United States, because the vessels would be subject to a lower user fee. Because of their agricultural cargo, however, these vessels would still need an equivalent rate of phytosanitary inspection. Accordingly, over time, we consider it likely that this incentivization would compromise full cost recovery.

For a similar reason, we also cannot scale the fee based solely on ship size; a smaller ship containing break bulk agricultural products may pose a higher phytosanitary risk and thus require more intensive inspection services than a larger container ship containing no agricultural products or known host material for plant pests and noxious weeds. (That being said, as we mentioned previously in this document, commercial vessels of less than 100 net tons have been, and will continue to be, exempt from the commercial vessel fee.

This is true regardless of whether they originate from Canada or any other foreign country.)

We see merit in the fifth option, however. The commenters presented significant information suggesting that the commercial vessel fee, as proposed, may not be appropriate for or commensurate with the level of AQI services provided to them. This option would allow APHIS to account for the differences stated by the commenters, and allow APHIS to further assess the appropriate fee in a future rulemaking. In so doing, it would effectively keep the current fee for such vessels, with an allowance, adjustment for inflation, that the commenters suggested and that we agree is appropriate.

However, we do not think this solution can be applied unilaterally to all arrivals within the Great Lakes or in the region along the coastline between Alaska and Oregon, particularly if the vessel carries cargo that may present a significant sanitary or phytosanitary risk.

Accordingly, in this final rule, we are pursuing the fifth option, with appropriate modifications to address the foregoing considerations. Commercial vessels traveling solely between the United States and Canada and either within the Great Lakes or along the coastline between Alaska and Oregon (which we are terming ''Cascadia'' out of recognition of the Cascadian bioregion in which the coastline is located) would be assessed the following fee, provided that certain conditions, set forth below, are met: $837.51 in FY 2025, $850.03 in FY 2026, $862.54 in FY 2027, and $875.06 in FY 2028.

To qualify for the lower fee rate, a vessel must meet the following requirements:

• Is not carrying cargo originating from countries other than the United States or Canada.

• Is not carrying plants or plant products.

• Is not carrying animals or animal products.

• Is not carrying soil or quarry products from areas in Canada listed in 7 CFR 319.77–3 as being infested with gypsy moth. That section of the regulations governs the importation of gypsy moth host material.

• Is not carrying wood packaging material as defined under 7 CFR 319.40–1. In this section of the regulations, ''wood packaging material'' is defined as ''Wood or wood products (excluding paper products) used in supporting, protecting or carrying a commodity (includes dunnage).''

All the above types of cargo may present a sanitary or phytosanitary risk, and, in instances in which a vessel carries such cargo, the level of AQI services provided to address this possible risk would merit the full commercial vessel fee.

To clarify to which vessels the reduced fee could apply, in this final rule, we are adding definitions for *Great Lakes* and *Cascadia* to the regulations. We have also prepared maps depicting the Great Lakes and Cascadia regions and are making them available as supporting documents with this final rule.

We are defining *Great Lakes* as ''the Great Lakes of North America and the waters of the St. Lawrence River west of a rhumb line drawn from Cap de Rosiers to West Point, Anticosti Island, and west of a line along 63° W longitude from Anticosti Island to the north shore of the St. Lawrence River.'' This is consistent with the U.S. Coast Guard definition of the region in their regulations found in 46 CFR 42.05–40.

We are defining *Cascadia* as ''British Columbia and those ports of entry into the United States lying south of 59°26′59.316″ N, north of 43°23′34.152″ N, west of 122°20′31.2″ W, and east of 135°20′2.4″ W.'' CBP's regulations in 19 CFR 101.3 designate United States ports of entry, and the following ports of entry fall within the area we are defining as Cascadia:

• Alaska—Juneau;
• Alaska—Ketchikan;
• Alaska—Sitka;
• Alaska—Skagway;
• Alaska—Wrangell;
• Washington—Aberdeen;
• Washington—Anacortes (Puget Sound);
• Washington—Friday Harbor (Puget Sound);
• Washington—Longview;
• Washington—Port Angeles (Puget Sound);
• Washington—Seattle (Puget Sound);
• Washington—Tacoma (Puget Sound);
• Oregon—Astoria;
• Oregon—Coos Bay;
• Oregon—Newport; and
• Oregon—Portland.

Two commenters stated that they operated container vessels between New Jersey and Bermuda, with the majority of arrivals into the United States being unloaded containers that previously contained cargo. The commenters requested a lower fee for their vessels and similarly situated operators.

The commenters did not provide sufficient information to characterize their operation as uniquely situated or similarly situated to the Great Lakes and Cascadian vessels described above. To cite a few examples, it was not clear whether the containers ever contained agricultural cargo, and, if so, whether the empty containers were cleared of all agricultural debris before return to the United States. The commenters also did not mention whether the routes were direct, and what route was used. Based on the absence of information necessary to evaluate the commenter's claims, we cannot make the determination that a lower vessel fee is appropriate for the commenters operating container vessels between New Jersey and Bermuda. APHIS is, however, open to receiving additional information on this topic and would consider proposing a revision in the future.

Finally, one commenter encouraged APHIS to explore means for electronic remittance of the commercial vessel fee.

CBP collects the commercial vessel fee on APHIS' behalf and offers electronic remittance through its eCBP portal (*e.cbp.dhs.gov*) and its Mobile Receipts and Collections (MCR) solution (*cbp.gov/trade/priority-issues/revenue/revenue-modernization/automation-368-and-1002-receipts/mcr-faq*).

In summary, in response to comments, we have lowered the commercial vessel fee overall to account for coastwise arrivals and have created a separate commercial vessel fee for certain vessels operating within the Great Lakes or along the coast between Alaska and Oregon.

Commercial Trucks

AQI user fees for inspection of commercial trucks entering the customs territory of the United States are listed in § 354.3(c)(1). The current fee had been set at $7.29 per truck arrival, with an option, under paragraph (c)(3), to prepay an amount 40 times the single-arrival fee to obtain a transponder. We proposed to adjust the fees in that paragraph and to set the corresponding prepaid (transponder) user fees at an amount 60 times the unrounded fee rates for each arrival. We further proposed to clarify that prepayments for purchases of transponders may be made at any time during a calendar year. The proposed rule did not provide, however, for prorating of the prepayment cost or allowing credit for individual crossings made prior to prepayment if the operator of the commercial truck elects to prepay during a calendar year. This is consistent with CBP's handling of their truck transponder fee in 19 CFR 24.22(c)(2), and we stated in the proposed rule that the intent of the proposed change was to better align our prepayment requirements with those of CBP.

We also proposed to add a sentence to paragraph (c)(1) stating that the AQI user fee would apply to all commercial trucks, regardless of what they are carrying, including empty trucks and truck cabs. This addition is already codified under the current definition of *commercial truck,* but the existing regulations in paragraph (c)(1) do not state the requirement explicitly; this revision was intended to clarify application of the fee.

We received two comments from one commenter on the proposed changes to the fees for commercial trucks.

In the supporting documentation that accompanied the proposed rule, we indicated that the data that we had obtained from the Department of Transportation (DOT) regarding freight volume per truck between the years 2006 and 2021 suggested a 79 percent increase in the number of tons per truck during that time. The commenter stated that this truck crossing and freight data did not completely match its own data and calculations. Specifically, the commenter indicated that its data indicated lower carrying capacity per truck in 2021 (9.63 tons) and an average of 22,376 more truck crossings per year between 2006 and 2016. Assuming truck crossings to be the denominator by which we determined average freight volume, the commenter stated that its data indicated that average freight volume was in fact lower in 2006 through 2016 than we had presented it to be. While the commenter conceded that carrying capacity per truck had increased between 2006 and 2021, the commenter stated that carrying capacity had not increased to the magnitude presented by APHIS, and that these discrepancies resulted in an overestimation of agricultural risk. The commenter stated that this overestimation of agricultural risk had resulted in CBP erroneously believing that additional personnel were needed to inspect commercial trucks, and that the fee would be lower were it adjusted to reflect actual freight volume.

The commenter did cite data that differs from the data APHIS cited in the supporting documentation that accompanied the proposed rule, and the data in that supporting documentation may have been in error. However, the data the commenter presented does not directly or indirectly impact how the fee was set. Neither the disputed numbers nor the supporting document itself served as the basis for the fee, nor the analysis of fee impacts in the initial economic analysis. The fee for this conveyance is not derived from the performance of the industry, nor did we use cargo capacity as a proxy for the level of effort needed to inspect trucks. As with the other fees, the commercial truck fee results from total AQI commercial truck program costs divided by the number of truck crossings for FY 2017 through FY 2019 to arrive at the base unit cost.

The commenter itself noted that both its data and APHIS' data reported the same number of truck crossings per year from 2017 to 2020. As noted above, the supporting document that the commenter disputed did not serve as a basis for the fee. It was intended only to indicate that the freight volume for commercial trucks had increased since 2006, a contention that the commenter did not dispute in principle, only in degree. The purpose of the supporting document is to contextualize the changes in the carrying capacity in the industry, as well as illustrate the relative size and impact that the fee might have on the conveyance as a whole. To that end, though, we do note that the commenter's data does suggest that commercial trucks may have lower cargo capacity than our supporting documentation suggested. We have evaluated the economic analysis that accompanies this final rule in light of that information but determined that its assumptions and conclusions still hold.

Additionally, this supporting document was not used as the basis for the additional CBP staffing needs. As indicated previously in this document, CBP's staffing models calculated additional personnel needs based on estimated throughput as calculated in light of actual workload, in order to ensure that bottlenecks do not occur in port operations.

The commenter also expressed concerns about the transponder cost increasing from 40 to 60 times the per arrival fee. The commenter asked how we would continue to incentivize transponder use.

As we stated in the proposed rule and the supporting document, APHIS determined that the average truck transponder is used 90 times per year, cross-referencing truck border-crossing data and truck transponder purchase data. Charging 60 times the per crossing fee is still a 33.3 percent discount, compared to average transponder use. We consider a 33.3 percent discount compared to average transponder use a sufficient incentive for transponder use.

The same commenter stated that, because the percentage of increase for the transponder fee would significantly surpass the percentage increase for the individual per-crossing fee, the transponder would no longer be incentivized, and commercial truck operators could abandon the transponder in favor of the single arrival fee.

The CBP Transponder system does not track the individual number of crossings per transponder; instead, it tracks the total number of crossings. Collections for single payer and transponder crossings are separate. The number of single payer crossings is determined by dividing single payer collections by the fee rate. Single payer crossings are subtracted from total crossings to determine transponder crossings. We determined average transponder crossings by dividing total transponder crossings by total transponders purchased (transponder collections divided by transponder fee). Given that APHIS found that the average transponder is used 90 times a year, charging 60 times the per crossing fee still significantly incentivizes the transponder over the per crossing fee for the average commercial truck operator, despite the differences in percent increase between the two fees. It is possible that some truck operators who make fewer than 60 crossings will decide to pay the per crossing fee as a result of this rulemaking; however, we do not foresee the transponder being generally abandoned in the manner suggested by the commenter.

We acknowledge that we proposed to raise both the per arrival commercial truck fee and the multiple that results in the transponder fee. Additionally, while we proposed to phase in the increases to the per arrival fee, we did not propose to phase in the increase to the multiple: We proposed that the multiple would immediately increase from 40 times to 60 times. To help facilitate transponder use in the first year of implementation of the revised fee, we will set the fee at a multiple of 50 times the individual crossing fee for the period between October 1, 2024 and September 30, 2025. We have revised the regulatory text accordingly.

The commenter stated that APHIS should work with our counterparts in Canada and Mexico to develop policies that will mitigate the risk of pest importation or other potential threats while reducing, exempting, or eliminating fees and other regulatory costs impacting North America trade.

APHIS works collaboratively with our colleagues in Canada and Mexico to develop harmonized polices to mitigate the risk of pest importation. For example, APHIS is the United States' representative to the North American Plant Protection Organization, or NAPPO, a regional plant protection organization. Created in 1976, NAPPO coordinates the efforts among the United States, Canada, and Mexico to

protect their plant resources from the entry, establishment, and spread of harmful plant pests, while facilitating safe intra- and inter-regional trade. Through NAPPO, APHIS works closely with its regional counterparts and industries to develop harmonized regional standards and approaches for managing pest threats.

Additionally, outside of the auspices of NAPPO, APHIS works closely with our North American National Plant Protection Organization (NPPO) counterparts, the Canadian Food Inspection Agency (CFIA) and Mexico's Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria, to harmonize our approaches to phytosanitary risk to the extent possible. Examples of this collaboration include the United States-Canada Greenhouse-Grown Plant Certification Program (GCP) and the Netherlands bulb preclearance program. The GCP has been active since 1996 and allows greenhouse-grown indoor houseplants and outdoor bedding plants to move between Canada and the United States using a certification label in lieu of a phytosanitary certificate (PC), provided the plants meet the phytosanitary import requirements of both Canada and the United States. The GCP certification label eliminates the cost of a PC for certified nurseries. For the Netherlands bulb preclearance program, APHIS and CFIA have harmonized our operational workplan for imports since 2008.

Finally, as discussed previously in this document, APHIS has pursued measures to improve efficiencies and reduce costs associated with the AQI program.

However, the commenter's assumption that North American trade presents little or no sanitary and phytosanitary risk that merits AQI services is incorrect; under APHIS' regulations in titles 7 and 9 of the Code of Federal Regulations, there are numerous restrictions on the importation of animals, animal products, plants, and plant products from Canada and Mexico.

We note also that North American trade is no longer exclusively North American; for example, APHIS is aware that 194 countries send United States-bound freight through Canada seaports, and then across the border via truck and rail. The increased risk posed by commodities arriving through our North American trading partners makes it necessary to increase our level of effort to safeguard United States agriculture. This increased effort requires additional personnel, equipment, and facilities and, therefore, incurs additional costs. The AQI program must adjust the fees to recover these costs. In short, the elimination or exemption of AQI user fees for North American trade would significantly adversely impact full cost recovery because we would still need to provide AQI services to address the sanitary and phytosanitary risks posed by such trade.

The commenter stated that the information and data provided by APHIS does not explain how the proposed fee increases were calculated based upon the various services performed by APHIS inspectors. The commenter expressed concern that APHIS did not calculate the proposed fees based upon the current and future needs of the agency, but rather upon what they assume motor carriers can afford according to operating cost data.

The summary tables for the commercial truck fee calculation (tables 7 and 8 below) show that APHIS used actual cost data for fiscal years 2017 through 2019 for commercial truck, future costs for planned capital expenditures, and additional staffing, divided by number of truck arrivals per fiscal year to arrive at a unit cost. We then adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation. The discussion of fee rates relative to other costs of doing business was to illustrate relative economic impact of the fee, and not to serve as the basis for fee development.

The summary tables are intended to be a quick reference regarding fee development. For more comprehensive cost data information please see the full rollup reports from the APHIS AQI activity-based cost model on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.* As we explained above, these questions regarding how the fees were arrived at are answered in the APHIS AQI cost model data that was cited in the proposed rule and made available on the APHIS website at the link above.

For October 1, 2024, October 1, 2025, October 1, 2026, fee rates, APHIS subtracted the January 1, 2024 rate from the October 1, 2027 rate, and divided by 4. This amount became the per phase increase. The per phase increase was then added to the previous phase amount until reaching the October 1, 2027 rate.

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Table 7: AQI Commercial Truck Fee Calculation – January 1, 2024 Phase Development ($11.44 Fee Rate[1])[2]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs	-	-	153
Total APHIS AQI Program Cost (Level 501)	$30,780,440.27	$24,897,674.58	$25,285,000.66
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$5,088,246.91	$4,157,459.56	$4,015,145.86
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$0.00	$0.00	$0.00
CBP AQI FTEs	-	-	155
Total CBP AQI Program Cost (Level 502)	$89,537,890.40	$90,524,826.19	$101,412,832.50
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$442,836.74	$311,476.41	$282,101.10
CBP Additional Staffing Future Costs (Level 452) included above	$0.00	$0.00	$0.00
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$120,318,330.67	$115,422,500.77	$126,697,833.16
Number of Commercial Trucks	11,847,586	12,089,169	12,164,733
Calculated Unit Cost (Total AQI Costs divided by Number of Commercial Trucks)	$10.16	$9.55	$10.42
Unit Cost inflated to June 2022 dollars[3]	$11.42	$10.55	$11.31
Average of Unit Costs in June 2022 dollars (fee basis)	$11.09	-	-
Inflation Projected to FY 2024 dollars	$11.44	-	-

[1] The final single payer fee was rounded down to the next $0.05 (five-cent) increment to facilitate border operations.

[2] Within this table, "level" refers to the level in the APHIS AQI Cost Model.

[3] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

Table 8: AQI Commercial Truck Fee Calculation – October 1, 2027 Phase Development ($15.59 Fee Rate[1])[2]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs + Additional FTEs required by FY 2028	-	-	215
Total APHIS AQI Program Cost (Level 501)	$46,945,077.64	$46,844,072.02	$48,662,846.48
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$5,224,895.94	$5,286,726.10	$5,293,808.19
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$3,565,295.85	$3,585,850.42	$3,529,879.46
CBP AQI FTEs	-	-	413
Total CBP AQI Program Cost (Level 502)	$97,794,153.68	$108,587,662.86	$117,124,406.85
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$575,583.31	$583,139.22	$590,695.12
CBP Additional Staffing Future Costs (Level 452) included above	$11,201,393.37	$11,348,438.38	$11,495,483.39
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$144,739,231.32	$155,431,734.89	$165,787,253.33
Number of Commercial Trucks	11,847,586	12,089,169	12,164,733
Calculated Unit Cost (Total AQI Costs divided by Number of Commercial Trucks)	$12.22	$12.86	$13.63
Unit Cost inflated to June 2022 dollars[3]	$13.74	$14.20	$14.80
Average of Unit Costs in June 2022 dollars (fee basis)	$14.25	-	-
Inflation Projected to FY 2028 dollars	$15.59	-	-

[1] The final single payer fee was rounded down to the next $0.05 (five-cent) increment to facilitate border operations.
[2] Within this table, "level" refers to the level in the APHIS AQI Cost Model.
[3] As described in https://www.regulations.gov/document/APHIS-2022-0023-0010.

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In summary, in response to comments regarding the commercial truck fee, we have lowered the cost of a transponder to 50 times the per arrival fee for the period between October 1, 2024 and September 30, 2025. The fees are otherwise being finalized as proposed.

Commercial Railroad Cars

Fees for inspection of loaded commercial railroad cars arriving at land ports in the United States are listed in current § 354.3(d)(1). The current fee is $2 per loaded railroad car arrival, with an option to prepay an amount 20 times the single-arrival fee for all arrivals of a commercial railroad car during a calendar year. We proposed to increase the user fee per arrival and to set the corresponding prepaid user fees at an amount 48 times the AQI user fee for each arrival.

As noted above, the existing regulations in § 354.3(d)(1) refer to AQI fees for inspection of *loaded* commercial railroad cars. In addition to the fee changes, we proposed to amend § 354.3(d)(1) to remove the references to loaded cars. We proposed this change

because APHIS does not collect AQI user fees for unloaded railroad cars under the current regulations; however, CBP inspects all commercial railroad cars, loaded and unloaded. We received no comments on this proposed change and will adopt it accordingly.

We also proposed to revise paragraph (d)(4) to provide for submission of remittance not only by The Association of American Railroads (AAR), and the National Railroad Passenger Corporation (AMTRAK), as is the case in the current regulations, but by individual railroad companies as well. This revision would more closely align our requirements pertaining to railroad car user fees with those of CBP as set out in 19 CFR 24.22(d).

We received two comments from one commenter on the proposed changes to the fees for commercial railroad cars.

The commenter opposed the proposed fee increases in general and the increase to the prepaid railroad car fee in particular. The commenter noted that, in the economic analysis that accompanied the proposed rule, we indicated that the number of railroad car arrivals has remained relatively steady, averaging approximately 3.5 million from 2014 to 2022. The commenter questioned why the per arrival fee and prepaid fee would increase significantly if arrivals had not commensurately increased.

The per arrival fee was derived by dividing the actual programs costs plus planned capital expenditures and additional staffing costs (adjusted for inflation) associated with providing AQI services for railroad cars by the number of anticipated arrivals. Accordingly, an increase or decrease in the forecasted number of arrivals would not itself have caused the fee to change, if aggregate costs remained correlated with arrivals. However, as stated in the proposed rule, the main reason for the per arrival fee increase for commercial railroad cars is that what falls under the definition of a railroad car as set forth in CBP's regulations in 19 CFR 24.22(d)(1) is now much larger than what the current inspection fee is designed to cover. The fees were designed to cover inspection costs for a railroad car that is essentially a single box on wheels. The typical railroad car in use today, however, consists of a multi-unit chassis with double stacked containers on wheels. This, in turn, has increased the amount of cargo in general arriving into the United States by rail. In sum, although arrivals have remained relatively constant, costs have increased significantly due to the change in size of railroad cars.

With regard to the increased cost of the prepaid fee, as stated in the proposed rule, based upon analysis of collections and arrival data, the average railroad car arrives 48.32 times per year. A prepaid multiple of 48 brings us significantly closer to full cost recovery than the present multiple of 20 times the per arrival fee. APHIS notes, however, that the prepaid railroad car user fee is optional, and, as we noted in the proposed rule, very few railroad companies use the prepaid option. If an entity determines that paying per arrival fee is more advantageous, they may do so.

The commenter stated that it was not clear that the fee increases are directly linked to the need for more resources and staff to inspect railroad cars specifically. The commenter noted that while costs for staffing and capital resources are noted generally, it is not clear if those costs are based on deficits experienced by the agency due to railroad car inspection duties.

APHIS made available a high-level cost summary as a supporting document with the proposed rule,[9] and comprehensive rollup reports directly from the APHIS AQI cost model were available with the proposed rule on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports*.[10] Moreover, the summary tables for commercial railroad car fee calculation (tables 9 and 10 below) show that APHIS used actual cost data for fiscal years 2017 through 2019 for railroad cars, future costs for planned capital expenditures and additional staffing, divided by number of users per fiscal year to arrive at a unit cost. APHIS adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation. The summary tables are intended to be a quick reference regarding fee development. For more comprehensive cost data information please see the full rollup reports from the APHIS AQI activity-based cost model.

For October 1, 2024, October 1, 2025, October 1, 2026, fee rates, APHIS subtracted the January 1, 2024 rate from the October 1, 2027 rate, and divided by 4. This amount became the per phase increase. The per phase increase was then added to the previous phase amount until reaching the October 1, 2027 rate.

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[9] The document, titled ''AQI User Fee Input Costs and Cost Allocation Summary,'' can be accessed online at *https://www.regulations.gov/document/APHIS-2022-0023-0035*.

[10] Due to the size of the files, the rollup reports are available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports*. The rollup reports must be downloaded before viewing.

Table 9: AQI Commercial Railroad Car Fee Calculation – January 1, 2024 Phase Development ($5.81 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs	-	-	34
Total APHIS AQI Program Cost (Level 501)	$5,566,102.63	$5,071,335.27	$4,677,632.67
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$919,065.79	$844,689.11	$739,573.71
APHIS Additional Staffing Future Costs (Levels 35 and 451)	$0.00	$0.00	$0.00
CBP AQI FTEs	-	-	33
Total CBP AQI Program Cost (Level 502)	$13,477,545.16	$14,727,551.87	$11,212,114.53
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$83,588.53	$73,542.13	$60,872.95
CBP Additional Staffing Future Costs (Level 452)	$0.00	$0.00	$0.00
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$19,043,647.79	$19,798,887.14	$15,889,747.20
Number of Commercial Railroad Cars	3,435,666	3,603,205	3,755,351
Calculated Unit Cost (Total AQI Costs divided by Number of Railroad Cars)	$5.54	$5.49	$4.23
Unit Cost inflated to June 2022 dollars[2]	$6.24	$6.07	$4.60
Average of Unit Costs in June 2022 dollars (fee basis)	$5.63	-	-
Inflation Projected to FY 2024 dollars	$5.81	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.
[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

Table 10: AQI Commercial Railroad Car Fee Calculation – October 1, 2027 Phase Development ($8.72 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs + Additional FTEs required by FY 2028	-	-	48
Total APHIS AQI Program Cost (Level 501)	$11,058,967.95	$11,078,453.98	$11,350,202.67
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$1,178,174.68	$1,196,264.07	$1,173,902.31
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$773,900.48	$789,228.11	$772,755.87
CBP AQI FTEs + Additional FTEs required by FY 2028	-	-	107
Total CBP AQI Program Cost (Level 502)	$14,804,044.79	$16,284,542.96	$13,091,366.25
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$153,287.10	$155,299.36	$157,311.62
CBP Additional Staffing Future Costs (Level 452) included above	$2,998,962.09	$3,038,330.62	$3,077,699.15
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$25,863,012.74	$27,362,996.93	$24,441,568.92
Number of Commercial Railroad Cars	3,435,666	3,603,205	3,755,351
Calculated Unit Cost (Total AQI Costs divided by Number of Railroad Cars)	$7.53	$7.59	$6.51
Unit Cost inflated to June 2022 dollars[2]	$8.47	$8.39	$7.07
Average of Unit Costs in June 2022 dollars (fee basis)	$7.98	-	-
Inflation Projected to FY 2028 dollars	$8.72	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.
[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

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The commenter stated that the proposed rule did not appear to consider the use of technology by APHIS to reduce inspection costs, in lieu of raising fees, though the commenter did not specify what kinds of technology APHIS might use to reduce inspection costs.

As we discussed above, the AQI program has made significant efforts to reduce program costs while maintaining a robust agricultural safeguarding program. APHIS also notes that the evaluation, procurement, maintenance, and upgrading of technology also carries a cost, as well as the cost of training personnel or the hiring of new personnel skilled in handling the technology.

In summary, we are finalizing the commercial railroad car fee as proposed.

Commercial Aircraft

APHIS inspects international commercial aircraft arriving at airports in the customs territory of the United

States. These inspections cover commercial aircraft capable of carrying cargo and passengers, regardless of whether cargo or passengers are on a particular flight. AQI user fees for inspection of commercial aircraft per arrival are listed in § 354.3(e)(1). The current fee is $225 per arrival. We proposed to adjust the fee in that paragraph to increase the user fee per arrival.

In addition to the proposed fee changes, we proposed to remove paragraph (e)(2)(iv) to eliminate the current fee exemption for aircraft with 64 or fewer seats.

We also proposed to require monthly, rather than quarterly, remittances for the commercial aircraft fee, clarify our remittance requirements, and provide for electronic payments and statements. We further proposed to include in the regulations information on agents responsible for ensuring compliance with paying the user fees and a requirement for entities to notify APHIS in the event they have a change in personnel responsible for fee payments.

We received five comments on these proposed changes. All the commenters were generally opposed to the proposed changes.

A commenter stated that we needed to disclose the number of aircraft inspected per inspector and number of plant pests or noxious weeds found during these inspections per day, month, or year, in order to validly assess the efficacy of the current inspections and the need for the fee increases.

The number of aircrafts inspected per inspector is materially irrelevant to evaluating the base costs for the proposed fee. In the AQI cost model used to set the proposed fee, we evaluated the aggregate time currently needed to conduct all commercial aircraft inspections, whether they were conducted by one inspector or multiple inspectors at a particular port of entry. We do note, however, that CBP's staffing model indicated that additional staff were needed to inspect aircraft and air cargo to match personnel to throughputs and workload.

As we discussed above, a host of factors can contribute to the sanitary and phytosanitary risk associated with a particular arrival. This includes the cargo, the country of departure, the route chosen, the port of entry, and the time of year when the shipment takes place. Furthermore, the sanitary and phytosanitary risk in foreign regions that ship to the United States is not static and past import history is not necessarily indicative of future trends. A disease or pest of concern not previously known to exist in the country could be introduced; climatic conditions for a particular season could be especially conducive to pest populations (this is becoming increasingly common due to the climatic volatility associated with climate change); industry downturns could reduce monitoring and suppression efforts at places of production; or regime change could downsize the foreign government's sanitary and phytosanitary efforts. Sometimes multiple factors can occur simultaneously.

It is important to note, however, that the introduction and establishment of plant pests within the United States has significant economic consequences both for APHIS and for the affected industries. As we discussed in the proposed rule, APHIS has spent more than $1.3 billion on the eradication and quarantine of wood, tree, and forest pests such as Asian Longhorn Beetle, Emerald Ash Borer, and Spotted Lantern Fly, in addition to the direct and indirect losses experienced by the affected industries themselves. Even plant pest outbreaks in a single State can prove quite costly: APHIS recently had to request $103.5 million in emergency funding to address the effects of fruit fly outbreaks in California.

The same commenter stated that the proposed rule appeared to state that APHIS uses the commercial aircraft fee and international passenger fee to cross-subsidize other fee areas. The commenter specifically cited the following from the preamble of the proposed rule: ''Collections from the air sector (commercial aircraft and commercial air passenger) are a combined annual average of over 85 percent of total AQI collections. If this final rule is adopted as proposed, APHIS estimates that by FY 2028 the combined air sector would account for approximately 68 percent of total collections, assuming future arrivals match average arrivals for FY 2017 through FY 2019.'' The commenter asserted that APHIS failed to explain the anticipated reduction in percentage of total collections paid by the air sector, and whether this indicates that the air sector industry overpaid in FY 2017 through FY 2019 and thus cross-subsidized other user fee areas.

As discussed in the proposed rule, APHIS updated its AQI cost model to allocate certain costs based upon the number of frontline FTE hours. In contrast, in the 2015 rulemaking, the cost model allocated those costs based upon the number of arrivals. Our updated model resulted in more accurate cost allocations based upon level of effort in each area, and the percentage of total collections associated with the air sector shifted accordingly. No cross-subsidization of other modes occurred between FY 2017 and FY 2019. Revenue from other fees will increase more than aircraft and air passenger fees, making the relative revenue from aircraft and air passengers a smaller percentage of total revenue. We disagree with the commenters' interpretation of our statements in the proposed rule.

A commenter stated that APHIS did not recognize fundamental changes since 2020 to CBP's customs clearance process, specifically for e-Commerce-driven parcel processing and de minimis (Entry Type 86) shipments.

APHIS did not propose to charge a fee for individual parcels. We note, however, that entry type has no bearing on sanitary or phytosanitary risk.

A commenter stated that international mail shipments already pay customs fees.

The customs fees mentioned by the commenter are unrelated to AQI services, but rather other customs services provided by CBP. International mail shipments pay specific Customs entry fees to CBP, but those are not for AQI inspections. APHIS does not charge an AQI user fee specifically for international mail shipments. Rather, those costs are allocated to the fee for commercial aircraft. While the AQI program is related to the customs entry process, funds collected by CBP through their various fees do not fund AQI activities. AQI cargo activities are funded through AQI user fees and not CBP fees.

A commenter stated that users were asked to accept the proposed fees at face value without any means to review how APHIS arrived at the proposed user fees outlined in the proposed rule.

We disagree. APHIS AQI has prioritized transparency in this rulemaking and gone to great lengths to make its data available. As we explained above, the APHIS AQI cost model data was cited in the proposed rule and made available on the APHIS website. We also referenced the data in the stakeholder webinars. We also provided the data and link via stakeholder announcement, and we further explained via a dedicated AQI cost model video and corresponding stakeholder announcement. APHIS web analytics showed an increase in AQI cost model data traffic following each of the above engagements. At least one stakeholder specifically referenced the data in their comment, making it clear the data was available and usable by stakeholders for the purpose of notice

and comment. Moreover, the summary tables for commercial aircraft fee calculation (tables 11 and 12 below) show that APHIS used actual cost data for FY 2017 through FY 2019 for commercial aircraft, future costs for planned capital expenditures and additional staffing, divided by number of commercial aircraft arrivals per fiscal year to arrive at a unit cost. APHIS adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation. The summary tables are intended to be a quick reference regarding fee development. For more comprehensive cost data information please see the full rollup reports from the APHIS AQI activity-based cost model available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.*

For October 1, 2024, October 1, 2025, October 1, 2026, fee rates, APHIS subtracted the January 1, 2024 rate from the October 1, 2027 rate, and divided by 4. This amount became the per phase increase. The per phase increase was then added to the previous phase amount until reaching the October 1, 2027 rate.

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Table 11: AQI Commercial Aircraft Fee Calculation – January 1, 2024 Phase Development ($262.45 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs	-	-	392
Total APHIS AQI Program Cost (Level 501)	$54,169,813.81	$75,770,884.37	$89,320,508.50
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$8,945,767.53	$12,786,757.11	$14,342,800.11
APHIS Additional Staffing Future Costs (Levels 35 and 451)	$0.00	$0.00	$0.00
CBP AQI FTEs	-	-	819
Total CBP AQI Program Cost (Level 502)	$127,537,441.52	$147,448,957.58	$170,134,733.75
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$616,838.67	$1,264,559.19	$1,492,905.74
CBP Additional Staffing Future Costs (Level 452)	$0.00	$0.00	$0.00
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$181,707,255.33	$223,219,841.95	$259,455,242.25
Number of Commercial Aircraft	945,067	951,749	978,249
Calculated Unit Cost (Total AQI Costs divided by Number of Commercial Aircraft)	$192.27	$234.54	$265.22
Unit Cost inflated to June 2022 dollars[2]	$216.30	$259.06	$288.10
Average of Unit Costs in June 2022 dollars (fee basis)	$254.49	-	-
Inflation Projected to FY 2024 dollars	$262.45	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.

[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

Table 12: AQI Commercial Aircraft Fee Calculation – October 1, 2027 Phase Development ($340.90 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs + Additional FTEs required by FY 2028	-	-	592
Total APHIS AQI Program Cost (Level 501)	$118,592,631.80	$119,105,226.57	$125,152,433.62
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$13,095,512.29	$13,309,009.17	$13,566,708.69
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$11,047,861.93	$11,330,690.86	$11,445,007.04
CBP AQI FTEs	-	-	1,257
Total CBP AQI Program Cost (Level 502)	$133,882,924.34	$147,270,149.81	$167,745,740.25
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$1,538,329.92	$1,558,524.17	$1,578,718.42
CBP Additional Staffing Future Costs (Level 452) included above	$28,009,694.67	$28,377,388.72	$28,745,082.78
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$252,475,556.14	$266,375,376.38	$292,898,173.87
Number of Commercial Aircraft	945,067	951,749	978,249
Calculated Unit Cost (Total AQI Costs divided by Number of Commercial Aircraft)	$267.15	$279.88	$299.41
Unit Cost inflated to June 2022 dollars[11]	$300.54	$309.15	$325.24
Average of Unit Costs in June 2022 dollars (fee basis)	$311.64	-	-
Inflation Projected to FY 2028 dollars	$340.90	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.

[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

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A commenter stated that APHIS excluded data showing potential AQI program surpluses from 2016 to the present, if AQI fees had been adjusted for inflation in the 2015 rulemaking.

The 2015 rulemaking did not adjust the fees for inflation, and positing a counterfactual scenario in which it did is materially irrelevant to assessing the proposed fees. The fees in this proposed rule were based on actual costs for 3 fiscal years, plus capital planning and future staffing costs, all adjusted for inflation. The fees were developed using Activity Based Costing to support full cost recovery.

A commenter stated that the fee exemption for aircraft with 64 or fewer seats should remain because the commenter claimed that our study was predicated on a misunderstanding of the reason for the exemption. The commenter stated that, in the 1992 rule that had established the exemption, APHIS had cited two bases for the exemption to the fee. The first was that such aircraft required little to no phytosanitary inspection. The second was that such an exemption was predicated on the per-passenger cost differential that made it ''difficult for small commuter airlines to compete with larger airlines for business.'' The commenter further contended that our study had assumed that exempted aircraft had an increased exposure risk to plant pests since the 1992 exemption was established, without identifying the actual increased phytosanitary risk now associated with such aircraft, which the commenter stated could only be substantiated through pest detections on exempted aircraft. Finally, the commenter stated that if AQI services are not being provided for such exempted aircraft, removing the exemption would charge a user fee in the absence of services provided, and thus violate the FACT Act.

[11] As described in: *https://www.regulations.gov/document/APHIS-2022-0023-0010.*

In 1991, when this fee exemption was first established it exempted aircraft with 30 or fewer seats which are not carrying cargo and are not equipped to offer inflight food service. We explained that we exempted those aircraft because we did not provide AQI services to the aircraft (56 FR 37483, August 7, 1991). In 1992, when we proposed to expand the fee exemption to aircraft with 64 or fewer seats, we explained that this was intended to exempt commuter aircraft that require little or no inspection from the per aircraft inspection fee (57 FR 56862, December 1, 1992). In other words, the initial exemption for aircraft with 30 or fewer seats was based on our determination that no AQI services were being provided for such aircraft, and the expansion to 64 or fewer seats was based on an assumption that such aircraft were commuter in nature and would not require such an inspection.

It is worth noting that the 1992 proposed rule did not also predicate the exemption on the per-passenger cost differential between small commuter airlines and larger airlines. The language cited by the commenter was articulated in the section of the preamble that evaluated the economic impacts of the rule pursuant to Executive Order 12291 (since rescinded) and the Regulatory Flexibility Act. We were characterizing the effects of the rulemaking on small entities, not articulating a basis for the rulemaking.

Now, 30 years after that rulemaking, CBP does in fact conduct inspections on aircraft with 64 or fewer seats. These inspections incur costs on the part of the AQI program. The FACT Act specifically authorizes us to prescribe and collect fees sufficient to cover the cost of providing AQI services in connection with the arrival of commercial aircraft at a port in the customs territory of the United States (21 U.S.C. 136a(a)(1)(A)).

To address whether such inspections are warranted, we re-evaluated the sanitary and phytosanitary risks posed by aircraft with 64 or fewer seats and the results of this pathway analysis indicated that aircraft with 64 or fewer seats do pose phytosanitary risk to the United States. Specifically, we found that the variety of aircraft origins worldwide (countries/airports) and destinations in the United States (States/airports) for aircraft with 64 or fewer seats was similar to or slightly higher than those of aircraft with 65 or more seats. For comparison and context, between FY 2016 and FY 2018, aircraft with 65 seats or more averaged 2,272 routes. With an average of 1,224 flight routes from calendar years 2016 to 2018, aircraft with 64 or fewer seats had many risks of exposure to hitchhiking pests, as well as many risks to expose pests to a large variety of environments in the United States. Exposure risk was used in order to characterize sanitary and phytosanitary risk because pest detections on commercial aircraft are not categorized based on whether the aircraft has 65 or more or 64 or fewer seats. In sum, while inspection may not have been necessary based on phytosanitary conditions in 1993, when we originally established the exemption, that is no longer the case today.

A commenter stated that our basis for removing the exemption was to create an additional funding stream for the AQI program.

Our basis for removing the exemption, as articulated in the proposed rule and its supporting documentation, and reiterated above, is to fulfill our agricultural safeguarding mandate and achieve full cost recovery. Our articulated assumptions for the exemption in 1991 and 1992, respectively, are no longer indicative of air travel conducted by planes with 64 or fewer seats, and the current operational dynamics of such travel carry a sanitary and phytosanitary risk that merits AQI services.

In light of the fact that small commercial aircraft have not previously been subject to the fee, APHIS believes that additional time is warranted to allow operators to come into compliance. Accordingly, APHIS is delaying the effective date for removal of the exemption for aircraft with 64 or fewer seats until April 1, 2025.

Two commenters stated that APHIS should not change from quarterly to monthly fee remittances, because it would increase the paperwork burden on airlines. Another commenter stated that monthly remittance would increase the burden on express carriers and would be out of step with other user fees they remit, which are almost all done quarterly.

We do not consider, and the commenters did not provide any evidence, that the revised remittance procedures to be more burdensome than the current procedures. Under the proposed rule, payments would be remitted on a monthly basis after a 90-day grace period—for example, January fees would be remitted to APHIS at the end of April, February fees at the end of May. Nonetheless, monthly remittance itself is necessary. Without the authority to prescribe and collect fees to maintain a reasonable balance in the AQI account, APHIS needs to move to a monthly remittance schedule to ensure smoother and more stable cash flow. In terms of paperwork burden, we expect a negligible difference between quarterly and monthly reporting, because the proposed rule does not change the information required for an individual month. For example, remittance reporting for the month of October is identical regardless of reporting only for October or whether issuing a quarterly report for October, November, and December of any given year.

In addition, we note that the revised procedures should make aspects of reconciliation and remittance easier, rather than harder. For example, the new monthly remittance schedule provides for a 90-day reconciliation period for each month, whereas the current quarterly remittance schedule provides a 90-day reconciliation period for the first month of the quarter, a 60-day reconciliation period for the second month of the quarter, and only a 30-day reconciliation period for the third month of the quarter.

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Table 13: AQI User Fee Remittance/Collection Schedule Changes[1]

AQI User Fee Category	Current Remittance/Collection Schedule (Through September 30, 2024)	New Remittance/Collection Schedule (Beginning October 1, 2024)
Commercial Vessel	Paid on arrival	No change
Commercial Truck	Paid on arrival	No change
Commercial Truck (Transponder)	Prepaid with the purchase of a transponder	No change
Commercial Railroad Car	Due 60 days after the end of each calendar month	Due 90 days after the end of each calendar month (see table 1)
Commercial Railroad Car (Prepaid)	Prepaid for each railroad car for a calendar year	No change
Commercial Aircraft	Due 31 days after the close of the calendar quarter	Due 90 days after the end of each calendar month (see table 1)
International Air Passenger	Due 31 days after the close of the calendar quarter	Due 90 days after the end of each calendar month (see table 1)
International Cruise (Sea) Passenger	Due 31 days after the close of the calendar quarter	Due 90 days after the end of each calendar month (see table 1)
Treatment Monitoring	Due 31 days after the close of the calendar quarter	No change

[1] Refer to 7 CFR 354.3, “User fees for certain international services.” for specific guidance.

Table 14: New Remittance/Collection Schedule (Beginning October 1, 2024) for the Commercial Aircraft, Commercial Railroad Car, International Air Passenger, and International Cruise Passenger Fee Categories

Month of Collection/Arrival/Treatment	Reconciliation Period	Due Date
January	February - April	April 30
February	March - May	May 31
March	April - June	June 30
April	May - July	July 31
May	June - August	August 31
June	July - September	September 30
July	August - October	October 31
August	September - November	November 30
September	October - December	December 31
October	November - January	January 31
November	December - February	February 28
December	January - March	March 31

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Another commenter noted that our proposed rule required the use of remittance worksheets as part of remittance procedures. The commenter expressed opposition to the use of the remittance worksheet as burdensome.

Our intent in proposing to require the use of the worksheet was primarily as a service to regulated entities in order to facilitate remittance; as noted in the proposed rule, entities currently submit remittance in a variety of formats, and some entities submit more information than is necessary. We believed that use of the worksheet would facilitate remittance processes for regulated entities by making them more standardized and streamlined.

Given the comments received that stated that the worksheet could be more burdensome than the status quo, however, we are stating in this final rule that the remittance worksheet is not mandatory. Entities may elect to use it depending on whether or not they find it less burdensome than current remittance practices. However, APHIS again notes that while the worksheet is not mandatory, there is mandatory information that must be provided in remittance statements, and also notes that many entities provide information in their remittance statements that goes beyond APHIS' requirements. For those entities that choose to use existing

remittance statements rather than the worksheet, the remittance worksheet serves as a guide for the remittance statement, even if an entity chooses not to use the worksheet itself.

The same commenter stated that APHIS had not made the remittance worksheet available for review as part of the supporting documents for the proposed rule. Without viewing the worksheet, the commenter stated that they could not ascertain whether it would be less burdensome or more burdensome than the status quo. The commenter also stated that we had an obligation to make the worksheet available during the comment period in order for commenters to provide informed comments on the accuracy of the estimate of burden articulated in the Paperwork Reduction Act section of the proposed rule.

While it is true that APHIS omitted the worksheet from the specific suite of supporting documents associated with the proposed rule, the remittance worksheet has been available on the APHIS website at *https://www.aphis.usda.gov/mrpbs/userfees/remittance-form.pdf* since well before the proposed rule was published and has been used by some entities for more than 15 years.

Nonetheless, as previously stated, in this final rule, use of the remittance worksheet is not mandatory.

Finally, as noted above, in reviewing the data on which the proposed fee increases were based, we noticed that the total costs associated with commercial aircraft were accurate, but the denominator (number of commercial aircraft arrivals) was not accurate, and did not include precleared aircraft. APHIS has corrected this error, resulting in lower commercial aircraft fees than proposed. In this final rule, the commercial aircraft fees are as follows: $281.39 for FY 2025, $300.78 for FY 2026, $320.61 for FY 2027, and $340.90 for FY 2028. As noted above, we also are not requiring the use of a worksheet for the remittance of the fees.

International Passengers Arriving at Airports and Seaports

AQI user fees for inspection of commercial air passengers are listed in § 354.3(f)(1). The current fee is $3.83 per arrival. We proposed to adjust the AQI user fee per arrival for commercial air passengers. The commercial air passenger fee will increase relative to the current fee.

Similarly, the AQI user fee for inspection of commercial cruise vessel passenger fee is also listed in § 354.3(f)(1). The current fee is $1.68 per arrival. We proposed to adjust the AQI user fee for inspection of commercial cruise passengers. The commercial cruise vessel passenger fee will decrease relative to the current fee. The change in the cruise passenger fee owes mainly to the change in allocation criteria from number of inspection events (passengers) to FTE hours.

We also proposed several clarifications in paragraph (f) of § 354.3 related to applicability, payment, and handling of international passenger user fees collected and remitted for trips not taken. In proposed paragraph (f)(1), we added language to clarify that infants, traveling with or without documents, whether in assigned seats or held in an adult passenger's lap, are subject to AQI user fees, as they are subject to the same inspection as other passengers. This harmonizes APHIS regulations with CBP regulations in 19 CFR 24.22(g), and CBP's definition of *passenger* in 19 CFR 24.22(g)(1)(v). As noted above, we also proposed to add a definition of *passenger* to help clarify these requirements.

In proposed changes to paragraphs (f)(5) and (6), we shortened the period for payment of international passenger fees and submission of remittance reports from quarterly to monthly, in order to recover the costs of inspecting international passengers in a timely manner, as discussed above with respect to the commercial aircraft fee. Also as discussed above in relation to paragraph (e) of § 354.3, operators would have 90 days to reconcile their books for each month. Airlines and cruise lines would remit passenger fees to APHIS on a monthly basis (12 times per year) versus the current quarterly basis (four times per year) and would have 90 days to reconcile their books for each month, as opposed to the current 31-day period after the close of the quarter. For example, under this final rule, remittance of fees collected in January of a given year would occur at the end of April of that year (90 days after the close of January); remittance of fees for February of a given year would occur at the end of May of that year; remittance of fees for October of a given year would occur at the end of January of the following year, etc.

We proposed to add new paragraphs (f)(5)(v) and (vi), which would cover the handling of international passenger AQI user fees collected and remitted for trips not taken. Proposed paragraph (f)(5)(v) stated that the entity issuing the ticket or travel document (*e.g.,* air or sea carriers, travel agents, tour wholesalers, or other entities) has a responsibility to make refunds of the international passenger AQI user fees in the original form of payment to the purchaser for trips not taken.

Proposed paragraph (f)(5)(vi) described the process for requesting a credit from APHIS for international passenger AQI user fees collected and remitted prior to refunding a ticket purchaser for an international passenger AQI user fee for a trip that was not taken. In such cases, the ticket issuing entity would have to submit a revised remittance worksheet or written statement. In keeping with other proposed changes to remittance timeframes, the revised remittance worksheet or written statement would be completed and filed for each month during which the ticket or travel document-issuing entity certifies that there was a decrease in the number of passengers and international passenger AQI user fees collected.

We received three comments about the proposed changes to the remittance procedures. The commenters generally opposed the proposed changes.

One commenter agreed with the intent of proposed paragraph (f)(5)(vi), which would allow airlines to request a credit from APHIS. The commenter stated that in such instances, AQI services are not actually provided, so a mechanism of recovering the remitted user fee for those services is warranted. The commenter also noted that the paragraph could be construed to mean that airlines must remit all fees collected to APHIS, and then only subsequently revise the remittance by requesting credit for flights not taken. The commenter stated that in instances when the flight is not taken and a refund occurs before an initial remittance of the fee is due to the Agency, airlines should be authorized to reconcile this in the initial remittance, rather than a subsequent revision.

The commenter strongly objected to proposed paragraph (f)(5)(v), however. In addition to citing numerous logistical obstacles with its implementation, the commenter stated that, in proposing to prescribe the method by which airlines must refund fees to passengers, APHIS had exceeded its statutory authority under the FACT Act.

After reviewing this comment, we acknowledge that the commenter raised points that merit further consideration. APHIS has therefore elected not to finalize paragraph (f)(5)(v).

We will retain the substance of paragraph (f)(5)(vi), though we have renumbered to paragraph (f)(5)(v). We have modified the proposed provisions of that paragraph in order to reflect the fact that the use of a remittance worksheet will be optional. Additionally, we clarify that the provision applies only in instances when an airline requests credit after it

remitted the fee to APHIS. If an airline has reconciled a trip not taken with the customer prior to remittance to APHIS, no subsequent action is needed.

Finally, based on a review of data, the fee for commercial air passengers will be lower than originally proposed. The total costs associated with commercial air passengers was accurate; however, the denominator, that is, the number of air passengers, did not include precleared air passengers at certain ports of departure. APHIS corrected this error, resulting in a lower air passenger fee than proposed. In this final rule, the fees are as follows: $3.71 in FY 2025, $3.84 in FY 2026, $3.98 in FY 2027, and $4.12 in FY 2028.

The summary tables for AQI International Air Passenger Fee Calculation (tables 15 and 16 below) show that APHIS used actual cost data for FY 2017 through FY 2019 international air passengers, future costs for planned capital expenditures and additional staffing, divided by number of international air passengers per fiscal year to arrive at a unit cost. APHIS adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation. The summary tables are intended to be a quick reference regarding fee development. For more comprehensive cost data information please see the full rollup reports from the APHIS AQI activity-based cost model available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.*

For October 1, 2024, October 1, 2025, October 1, 2026, fee rates, APHIS subtracted the January 1, 2024 rate from the October 1, 2027 rate, and divided by 4. This amount became the per phase increase. The per phase increase was then added to the previous phase amount until reaching the October 1, 2027 rate.

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Table 15: AQI International Air Passenger Fee Calculation – January 1, 2024 Phase Development ($3.58 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs	-	-	193
Total APHIS AQI Program Cost (Level 501)	$47,533,932.90	$45,901,895.95	$51,021,447.61
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$7,449,956.65	$7,185,938.07	$7,497,507.88
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$0.00	$0.00	$0.00
CBP AQI FTEs	-	-	1,324
Total CBP AQI Program Cost (Level 502)	$322,657,388.91	$326,636,141.51	$367,144,251.62
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$2,323,907.55	$2,195,730.11	$2,374,865.09
CBP Additional Staffing Future Costs (Level 452) included above	$0.00	$0.00	$0.00
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$370,191,321.81	$372,538,037.46	$418,165,699.22
Number of International Air Passengers	117,800,639	122,963,952	128,371,990
Calculated Unit Cost (Total AQI Costs divided by Number of International Air Passengers)	$3.14	$3.03	$3.26
Unit Cost inflated to June 2022 dollars[2]	$3.54	$3.35	$3.54
Average of Unit Costs in June 2022 dollars (fee basis)	$3.47	-	-
Inflation Projected to FY 2024 dollars	$3.58	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.
[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

Table 16: AQI International Air Passenger Fee Calculation – October 1, 2027 Phase Development ($4.12 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs + Additional FTEs required by FY 2028	-	-	286
Total APHIS AQI Program Cost (Level 501)	$79,715,724.46	$78,930,107.86	$82,324,802.94
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$6,698,395.19	$6,683,707.49	$6,732,920.70
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$5,387,261.41	$5,278,641.28	$5,333,823.77
CBP AQI FTEs	-	-	1,665
Total CBP AQI Program Cost (Level 502)	$322,905,697.99	$326,760,945.10	$366,931,730.67
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$1,876,139.13	$1,900,767.94	$1,925,396.74
CBP Additional Staffing Future Costs (Level 452) included above	$30,823,253.52	$31,227,882.24	$31,632,510.98
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$402,621,422.45	$405,691,052.97	$449,256,533.61
Number of International Air Passengers	117,800,639	122,963,952	128,371,990
Calculated Unit Cost (Total AQI Costs divided by Number of International Air Passengers)	$3.42	$3.30	$3.50
Unit Cost inflated to June 2022 dollars[2]	$3.85	$3.64	$3.80
Average of Unit Costs in June 2022 dollars (fee basis)	$3.76	-	-
Inflation Projected to FY 2024 dollars	$4.12	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.

[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

We received no comments on the AQI cruise vessel passenger fee and are finalizing it as proposed.

The summary tables for AQI Cruise Vessel Passenger Fee Calculation (tables 17 and 18 below) show that APHIS used actual cost data for FY 2017 through FY 2019 by user class, future costs for planned capital expenditures and additional staffing, divided by number of users per fiscal year to arrive at a unit cost. APHIS adjusted those unit costs to June 2022 dollars, averaged the unit costs across the 3 fiscal years, and finally adjusted that average unit cost for projected inflation. The summary tables are intended to be a quick reference regarding fee development. For more comprehensive cost data information please see the full rollup reports from the APHIS AQI activity-based cost model available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports.*

For October 1, 2024, October 1, 2025, October 1, 2026, fee rates, APHIS subtracted the January 1, 2024 rate from the October 1, 2027 rate, and divided by 4. This amount became the per phase increase. The per phase increase was then added to the previous phase amount until reaching the October 1, 2027 rate.

Table 17: AQI Cruise Vessel Passenger Fee Calculation – January 1, 2024 Phase Development ($1.20 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs	-	-	6
Total APHIS AQI Program Cost (Level 501)	$1,375,153.88	$1,372,968.69	$1,451,194.16
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$218,278.05	$220,590.13	$216,558.24
APHIS Additional Staffing Future Costs (Levels 35 and 451)	$0.00	$0.00	$0.00
CBP AQI FTEs	-	-	22
Total CBP AQI Program Cost (Level 502)	$14,068,736.05	$14,579,099.17	$16,296,548.83
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$38,252.81	$33,016.34	$40,232.41
CBP Additional Staffing Future Costs (Level 452)	$0.00	$0.00	$0.00
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$15,443,889.93	$15,952,067.86	$17,747,742.98
Number of Cruise Vessel Passengers	14,156,457	14,782,393	17,931,570
Calculated Unit Cost (Total AQI Costs divided by Number of Cruise Vessel Passengers)	$1.09	$1.08	$0.99
Unit Cost inflated to June 2022 dollars[2]	$1.23	$1.19	$1.08
Average of Unit Costs in June 2022 dollars (fee basis)	$1.16	-	-
Inflation Projected to FY 2024 dollars	$1.20	-	-

[1] Within this table, “level” refers to the level in the APHIS AQI Cost Model.

[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

Table 18: AQI Cruise Vessel Passenger Fee Calculation – October 1, 2027 Phase Development ($1.39 Fee Rate)[1]

	FY 2017	FY 2018	FY 2019
APHIS AQI FTEs + Additional FTEs required by FY 2028	-	-	10
Total APHIS AQI Program Cost (Level 501)	$2,693,514.56	$2,767,017.10	$2,723,363.52
APHIS Capital Planning/Expenditure Future Costs (Level 26) included in total program cost above	$208,436.51	$220,810.87	$201,712.40
APHIS Additional Staffing Future Costs (Levels 35 and 451) included above	$242,055.16	$259,911.22	$229,204.44
CBP AQI FTEs	-	-	28
Total CBP AQI Program Cost (Level 502)	$14,293,361.68	$14,630,815.71	$16,317,674.53
CBP Capital Planning/Expenditure Future Costs (Level 27) included in total program cost above	$31,668.56	$32,084.29	$32,500.01
CBP Additional Staffing Future Costs (Level 452) included above	$1,122,418.65	$1,137,153.07	$1,151,887.50
Total AQI Costs (APHIS AQI Costs + CBP AQI Costs)	$16,986,876.24	$17,397,832.81	$19,041,038.05
Number of Cruise Vessel Passengers	14,156,457	14,782,393	17,931,570
Calculated Unit Cost (Total AQI Costs divided by Number of Cruise Vessel Passengers)	$1.20	$1.18	$1.06
Unit Cost inflated to June 2022 dollars[2]	$1.35	$1.30	$1.15
Average of Unit Costs in June 2022 dollars (fee basis)	$1.27	-	-
Inflation Projected to FY 2028 dollars	$1.39	-	-

[1] Within this table, "level" refers to the level in the APHIS AQI Cost Model.

[2] As described in: https://www.regulations.gov/document/APHIS-2022-0023-0010.

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AQI Treatment Monitoring

AQI treatments are performed on some agricultural goods as a condition of entry, and additional treatments are performed when an actionable pest (*i.e.,* a plant pest that should not be allowed to be introduced into or disseminated within the United States) is detected during a port-of-entry inspection. Currently, these treatments are charged on a per-treatment basis; that is, if two or more consignments are treated together, only a single fee will be charged, and if a single consignment is split or must be retreated, a fee will be charged for each separate treatment conducted. The current fees are set out in § 354.3(h). APHIS reevaluated assessing AQI treatment monitoring fees on a per-enclosure basis, and we proposed an hourly rate instead.

We received seven comments about the proposed changes to the treatment monitoring fee. The commenters generally opposed the proposed changes.

Commenters were generally opposed to this proposed change. They raised a number of concerns about moving to an hourly charge, including the magnitude of the fee increases for certain treatment types, uncertainty over how the hourly rate would be applied given nonuniform standards of service and if new efficiencies (*e.g.,* remote monitoring) could be used. The commenters also stated that the proposed hourly billing process would present challenges in terms of providing customers with timely invoices. The commenters further stated that for certain low-value commodities, the hourly rate would exceed the value of the import.

After reviewing the comments, we agree with the commenters that these issues merit further consideration before making changes to the AQI treatment monitoring fees. We have therefore decided not to proceed with amending § 354.3(h) at this time. We will address the restructuring of the AQI treatment monitoring fees in a future rulemaking. APHIS will keep the per-enclosure fee in place.

However, we received no comments, and are aware of no evidence, that treatment monitoring services are not subject to inflationary forces. Therefore, we are incorporating annual adjustments for projected inflation [12] as follows, using the current fee of $237 per enclosure as the basis:

Table 19: Treatment Monitoring Fee with Projected Inflation Adjustment

	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Treatments (per enclosure)	$240.60	$244.19	$247.79	$251.38

Records Retention

To improve monitoring, compliance, and enforcement of this regulation, we proposed to add a new paragraph (j), which would contain records retention requirements related to AQI user fees. Proposed paragraph (j)(1) provided that entities responsible for collecting and paying the fees and their agents would be responsible for maintaining all records required under § 354.3, as well as legible copies of contracts and other agreements made between responsible persons and their agents. Under proposed paragraph (j)(2), all parties responsible for collecting and paying the fees would have to maintain sufficient documentation for APHIS, CBP, and authorized representatives to verify the accuracy of the fee collections and remittance worksheets or written statements. Such information would have to be made available for inspection upon APHIS and CBP's demand. Such documentation would be required to be maintained in the United States for a period of 5 years from the date of remittance calculation. Each entity covered by this proposed requirement would have to provide to APHIS and CBP the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section and to promptly notify APHIS and CBP of any changes in the identifying information previously submitted. Currently, CBP conducts U.S. Government Accountability Office yellow book standard audits of the commercial aircraft fee and international air passenger fee on APHIS' and CBP's behalf. APHIS seeks to expand this arrangement to include audits of the AQI program's commercial railroad car fee and international cruise passenger fee.

Commenters stated that the proposed 5-year record retention period does not align with current airline industry practice and other Federal agency policies (*e.g.,* FAA requires certain records be retained for 3 years).

This change is being made to harmonize APHIS regulations with CBP's Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) fee regulations in 19 CFR 24.22(g)(7), which require a 5-year retention period. As we explained in the proposed rule, CBP audits the AQI aircraft and international air passenger fee collections on APHIS' behalf. CBP requires the 5-year-retention period because the statute of limitations for litigation purposes is 6 years. The 5-year-retention period gives us the time needed to state what is owed in the event of non-payment as well as time to bring legal action if necessary to collect. APHIS will implement these changes in this final rule.

Severability

We proposed to add a new § 354.3(k), "Severability," to address the possibility that this final rule, or portions of this final rule, may be challenged in litigation. It is APHIS' intent that the individual sections of this final rule be severable from each other, and that if any sections or portions of the regulations are stayed or invalidated, the validity of the remainder of the sections shall not be affected and shall continue to be operative. We received no comments on this proposed addition and will implement it in this final rule.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Orders 12866, 13563, 14094 and Regulatory Flexibility Act

This final rule has been determined to be significant under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, "Modernizing Regulatory Review," and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rulemaking. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, 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 (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also provides a final regulatory flexibility analysis that examines the potential economic effects of this final rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* website (see footnote 1 in this document for a link to *Regulations.gov*) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

The Food, Agriculture, Conservation and Trade (FACT) Act of 1990 (as amended) [21 U.S.C. 136a] authorizes the Secretary of Agriculture to prescribe and collect fees sufficient to cover the cost of providing agricultural quarantine and inspection services in connection with the arrival at a port in the customs territory of the United States, or the preclearance or pre-inspection at a site outside the customs territory of the United States, of an international passenger, commercial vessel, commercial aircraft, commercial truck, or commercial railroad car, and to cover the cost of administering the AQI program. The United States Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) Plant Protection and Quarantine (PPQ) is responsible for developing and setting the Agricultural Quarantine and Inspection (AQI) user fee schedule, and related regulatory policy. Periodically, APHIS updates the schedule of rates paid by users via the rulemaking process. Due to a variety of factors, the current AQI fee schedule results in

[12] As described in: *https://www.regulations.gov/document/APHIS-2022-0023-0010.*

insufficient collections to achieve full cost recovery.

APHIS is making a number of revisions to the regulations that govern the user fee rates, and related regulatory requirements for maritime vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers on airlines and cruise ships. The revisions make adjustments to the cost model that is used to calculate the fees. Those revisions incorporate inflation into the user fees, including the fee for treatment monitoring.

This final rule will also eliminate an exemption from the commercial aircraft fee that currently applies to commercial aircraft with 64 or fewer seats that meet certain regulatory requirements; eliminate an exemption from the commercial vessel fee that currently applies to commercial barges operating between Canada and the United States that meet certain regulatory requirements; increase the ''per arrival'' multiple used to calculate the fee for a multiple-use transponder for commercial trucks; as well as increase the ''per arrival'' multiple used to calculate the prepaid railroad car fee and apply the fee to all arriving railroad cars.

APHIS has decided not to restructure the treatment fee in this final rule. Rather, we are retaining the per-enclosure treatment fee, while incorporating annual inflation adjustments for this fee. Additionally, based on comments received, APHIS has created a reduced user fee rate for commercial vessels operating solely between the United States and Canada and within either the Great Lakes or a region along the coastline between Alaska and Oregon, provided that the vessels meet certain requirements.

This final rule will also update remittance procedures to facilitate timely submission of fees. Finally, we have made editorial revisions in order to clarify intent in the regulations.

The Agricultural Quarantine and Inspection (AQI) Program implements a continuum of exclusion strategies and activities that mitigate the plant and animal health risks associated with the spread of pests and diseases due to global trade, international travel, or the smuggling of prohibited agricultural and related products. APHIS uses an Activity-Based Cost (ABC) Model to calculate the individual user fees. First, costs are allocated to a series of activities. Next, the costs assigned to those activities are allocated to the fee areas based on the level of effort associated with each fee area. For example, the costs associated with the cargo inspection activity (which include the costs of providing the service, as well as the administrative and overhead costs associated with providing the service) are allocated to the commercial vessel, truck, railroad car, and aircraft fees, based on the level of effort in each of those fee areas. This cost allocation approach avoids cross-subsidization (*e.g.,* cargo inspection costs do not get assigned to passengers or treatment users).

When the cost of providing AQI services and the fees paid to fund these services do not align, adjustments are a necessary step in reaching the goal of full cost recovery. Services in the AQI program must be provided, but when the user fee is not covering the costs, the user of the service is not bearing the true cost of providing the service. This final rule will benefit the public by continuing to ensure that the fees received from users for providing necessary AQI services align with the expenditures associated with providing those services.

AQI services protect American agriculture and natural resources from sanitary and phytosanitary risks. The spread of invasive species harms domestic agricultural producers and damages the natural environment. Imported freight constitutes a major phytosanitary risk. The wide diversity of origins and commodities present multiple opportunities for pests to infest a product or wood packing material. AQI services are provided to mitigate such phytosanitary risks. To ensure that the expenditures on AQI services and the fees applied to those services align, adjustments to the fees are necessary. Those most likely to be impacted by this final rule are international air and sea passengers, businesses within the truck, rail, sea, and air transportation sectors, and providers of treatment services. While users of AQI services do incur costs in the form of user fees, these user fees enable the government to recover the costs of providing AQI services. However, the associated revenues do not currently align with the costs of providing these AQI services and administering the AQI program.

Individual importers or passengers may experience some financial burden from the establishment of or increase in user fees (or relief when a fee is reduced), but the AQI services are already being provided and thus are already counted as government costs. The revenue from user fees for services provided are intended to cover the expenditures for those services, a concept known as transfer payments. Examples of transfer payments include fees paid to government agencies for services provided by the agency. Federal regulations with transfer payments are assumed to have a one-to-one effect, balancing benefits and costs.[13] The benefits and costs, as well as the annualized transfer payments are summarized in table A.

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[13] Transfer payments are noted by the Office of Management and Budget to include ''Fees to government agencies for goods or services provided by the agency (monetary transfers from fee payers to the government—the goods and services are already counted as government costs and including them as private costs would entail double counting).'' Federal regulations with transfer payments are assumed to have a one-to-one effect on benefits and costs. See: Regulatory Impact Analysis: A Primer, page 8. *https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf.*

Table A. Accounting statement of costs, benefits, and transfers associated with the rule.

Benefits		
Non-Quantified Benefits	This final rule will better align AQI expenditures and revenues by class. Transfer payments balance the costs and benefits of the program.	
Costs		
Non-Quantified Costs	Realigned AQI user fees are intended to cover the costs of providing AQI services. User fees transfer the cost of those services from the government to the users.	
Transfers		
Annualized Transfers by user class [1,2]	7% discount rate	3% discount rate
Air Passengers	$479,900,000	$480,800,000
Commercial Aircraft	$296,400,000	$297,300,000
Commercial Rail	$27,150,000	$27,270,000
Commercial Truck [3]	$118,300,000	$118,700,000
Commercial Vessel	$187,600,000	$187,800,000
Cruise Vessel Passenger	$20,520,000	$20,560,000
Treatments ($/Hr.)	$8,750,000	$8,760,000
Total [4]	$1,139,000,000	$1,141,000,000

[1] Annualized value of transfers from FY 2025 through FY 2028; discounted at 7 and 3 percent, 2022 dollars.
[2] Estimates of user fee collections (transfers) based on individual fee levels for each year of the implementation schedule (see table B) multiplied by an estimate of the activity level in each fee category. This activity level estimate is based on the average number of each category of arrivals from FY 2017-2019, the 3 years for which clean data are available.
[3] This estimate is based on truck arrivals from FY 2017-2019. To account for the change in both the fee level and transponder cap, the estimate uses a distribution of 1,000,000 single payer crossings and 125,000 transponders.
[4] Totals may not sum due to rounding.

The fee schedule will better reflect the costs of AQI services provided to commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air and sea passengers arriving at U.S. ports (table B).

Table B. Current and scheduled AQI user fee rates (dollars)

Fee Area		AQI User Fee Schedule			
	Current Fee	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Air Passenger	3.83	3.71	3.84	3.98	4.12
Commercial Aircraft[1]	225.00	281.39	300.78	320.61	340.90
Commercial Vessel	825.00	2,903.73	2,981.17	3,059.61	3,139.06
Commercial Vessel-Great Lakes/Cascadia	N/A [2]	837.51	850.03	862.54	875.06
Commercial Truck	7.29	12.40	13.45	14.50	15.55
Commercial Railroad Car	2.00	6.51	7.23	7.97	8.72
Cruise Vessel Passenger	1.68	1.25	1.29	1.34	1.39
Treatment [3]	237	240.60	244.19	247.79	251.38

[1] We are delaying implementation of the commercial aircraft user fee for aircraft with 64 or fewer seats until April 1, 2025.

[2] This geographically limited fee rate does not exist under the current fee schedule; however, certain vessels in this category do currently pay the current commercial vessel fee.

[3] per enclosure

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Air Passengers

The air passenger fee will increase from $3.83 to $4.12 in FY 2028. The total fee increase of $0.29 will be approximately a 7.6 percent increase from current fees, but only a 0.05 percent increase in the average price of an international round-trip airfare.[14] These changes in the effective cost for international air travel are extremely small, and seem unlikely to significantly change consumer purchasing behavior. Limitations in the amount and nature of data available on such small fee changes make it difficult for the agency to draw specific conclusions as to how these small changes in airfare will affect international air travel overall. However, any change in international air travel due to a change of less than one dollar in the price of international airfare is likely to be small.

Commercial Aircraft

The commercial aircraft fee will increase from $225 to $340.90 per arrival in FY 2028. This increase of $115.90 will be about a 51.5 percent increase from the current fees. Between 2013 and 2019 the volume of imports into the United States by air increased by eight percent (82 million kg) and the value increased by 57 percent in constant dollars. Even after the 51.5 percent increase, the commercial aircraft fee is still the equivalent of 0.05 percent of the value of goods being imported by air. In terms of the cargo alone, the 2028 commercial aircraft fee rate under this rulemaking represents approximately $0.069 in dollars-per-kilogram imported by air generally. In addition, the commercial aircraft user fee constitutes a small portion of the expenses associated with commercial aircraft. And moreover, most international arrivals have passenger airfares as a primary revenue source. Even with the commercial aircraft fee increasing by $115.90 by 2028, the commercial aircraft user fee is equivalent to approximately five minutes of operating costs for aircraft.[15] Like all AQI user fees, this fee is based solely on the actual cost of AQI services provided for this mode of conveyance between FY 2017 and FY 2019, plus forecasted staffing and capital costs, adjusted for inflation. The fee for this conveyance is not derived from the financial performance of the industry. Limitations in the internal industry performance data available to the agency make it difficult to develop specific conclusions as to how such a fee change will affect the commercial aircraft industry overall. This information, however, is used to contextualize the scale of the collections and illustrate the relative size and impact that the fee might have on the conveyance as a whole. However, the increase in the AQI commercial aircraft fee is likely to have a limited impact on aircraft operators.

Small Aircraft Exemption

The commercial aircraft user fee is not currently applied to the international arrivals of certain commercial aircraft with 64 or fewer seats. Commercial aircraft with 64 or fewer seats comprised approximately 10 percent of arriving international flights from 2016 to 2018. This final rule will result in the removal of this exemption.

In light of the fact that small commercial aircraft have not previously been subject to the fee, APHIS believes that additional time is warranted to allow operators to come into compliance. Accordingly, APHIS is delaying the effective date for removal of the exemption for aircraft with 64 or fewer seats until April 1, 2025.

The commercial aircraft fee is based on the average cost of clearing commercial aircraft and their cargo. The cost associated with any specific aircraft, whether small or large, also depends on a variety of other factors because the phytosanitary risk posed by a particular aircraft is based upon the country of origin, countries transited, type and volume of cargo, country of origin of the cargo, and environmental conditions at point of origin and final

[14] Damodaran, A., Consumer Airfare Index Report—May 2021. *As travel demand returns and more Americans are vaccinated, what does it mean for airfare prices?* May 18, 2021.

[15] Federal Aviation Administration. Economic Values for Investment and Regulatory Decisions—Chapter 4: Aircraft Operating Costs. March 2021 Update. Retrieved on June 8, 2022, from *https://www.faa.gov/sites/faa.gov/files/regulations_policies/policy_guidance/benefit_cost/econ-value-section-4-op-costs.pdf.*

destination. These costs are not currently borne by all operators of commercial aircraft with fewer than 65 seats arriving internationally.

Domestic flights are not subject to the commercial aircraft fee. For most operators of small commercial aircraft, domestic flights are the greatest portion of their operations and associated revenue. The removal of the exemption only affects international arrivals of aircraft with fewer than 65 seats. The commercial aircraft fee is not derived from the financial performance of the industry. Like all AQI user fees, this fee is based solely on the cost of providing AQI services for this mode of conveyance between FY 2017 and FY 2019, plus forecasted staffing and capital costs, adjusted for inflation. Because we do not have explicit data on the per-flight revenue, profit margins, and competitive landscape affecting international arrivals of commercial aircraft with 64 or fewer seats, we cannot make specific conclusions as to how the collection of this user fee will affect individual businesses. Approximately 7 percent of the flights of the top 5 small aircraft operators, and less than 5 percent of the flights of the top 10 operators, are international arrivals. This provides context for the scale of the collections and illustrates the impact that the fee might have on the affected entities.

Commercial Vessels

The commercial vessel fee will increase from $825 to $3,139.06 by FY 2028. Some vessels operating in the Great Lakes or Cascadia areas will be eligible to pay a reduced commercial vessel fee. A variety of factors contributed to the commercial vessel fee increase. Among these were an increase in the cost of AQI services across the pathway, an expansion of the average ship cargo capacity, and an increase in the level of effort required to inspect the average vessel. Even with the commercial vessel fee increasing by up to 280 percent to $3,139.06 by FY 2028, the commercial vessel fee remains very small relative to other vessel operating expenses. It is equivalent to approximately 2 percent of a single day's fuel consumption for a moderately sized container ship.[16] The fee for this conveyance is not derived from the financial performance of the industry. Like all AQI user fees, this fee is based solely on the costs for providing AQI services for this mode of conveyance between FY 2017 and FY 2019, plus forecasted staffing and capital costs, adjusted for inflation. The change to the commercial vessel fee seems likely to have a limited impact on the operations of commercial vessels.

Canadian Barge Exemption

From 2016 through 2018, an annual average of 1,405 commercial barges arrived from Canada into the United States, most of which are exempt from the current commercial vessel AQI fee. Vessel companies and ports facilitating the movement of currently exempted barge shipments from Canada and the United States will be affected. APHIS has concluded that barges from Canada that are currently exempted do pose a phytosanitary risk and require inspection and payment of the associated fee. Barges operating in the Great Lakes and Cascadia areas also require inspection and a payment of a fee. However, those meeting certain additional conditions will be eligible to pay a reduced fee, provided their cargo meets the requirements. The reduced fee represents approximately $.00025 per kilogram imported by barge. These fees are not derived from the financial performance of the industry. This information provides context for the scale of the collections and illustrates the impact that the fee might have on the affected entities. Because we do not have explicit data on international barge traffic revenue, profit margins, and the competitive landscape affecting arrivals of currently-exempt barges from Canada, we cannot make specific conclusions as to how the collection of this user fee will affect individual entities.

Commercial Trucks

The commercial truck fee will increase from $7.29 to $15.55 [17] by 2028, an increase of $8.26 per truck arrival. In addition, commercial truck operators have the option to prepay for an unlimited number of arrivals (per year) by purchasing a transponder, the price of which will increase from the equivalent of 40 arrivals to 50 arrivals in the period between October 1, 2024 and October 1, 2025, and thereafter to 60 arrivals.[18] Between 2013 and 2019 imports into the United States by truck increased by 397 million kilograms. Even after a 114 percent increase, the user fee of $15.55 in 2028 for a commercial truck entering the U.S. will be the equivalent of 0.034 percent of the average value of goods imported by truck. The user fee in 2028 in dollars-per-kilogram for truck cargo is approximately $0.0014. In addition, this user fee is roughly the equivalent of the operating expenditures of a truck transporting goods about nine miles. The fee for this conveyance is not derived from the financial performance of the industry. Limitations in the internal industry performance data available to the agency make it difficult to develop specific conclusions as to how such a fee change will affect the commercial truck industry overall. This information, however, is used to contextualize the scale of the collections and illustrate the relative size and impact that the fee might have on the conveyance as a whole. The impact of this fee change on the operations of commercial trucks seems likely to be limited. Because of the efficiencies gained by both the program and users of the AQI services, APHIS will also continue to provide an incentive to purchase the transponder in the form of a cap.

Commercial Railroad Cars

The commercial railroad car fee will increase from $2 to $8.72 per arriving railroad car by 2028, a total increase of $6.72. Between 2013 and 2019, imports into the United States by rail remained relatively constant, but technology improvements have allowed for a reduction in the number of railroad cars assessed the commercial railroad car fee. Even after a total increase of approximately 337 percent, the commercial railroad car fee is approximately 0.029 percent of the value of goods being imported on by railroad car. The user fee in 2028 in dollars-per-kilogram for commercial railroad cars generally is approximately $0.0004. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how these fee changes will affect international commercial railroad car arrivals overall. Like all AQI user fees, this fee is based solely on the cost of providing AQI services for this mode of conveyance between FY 2017 and FY 2019, plus forecasted staffing and capital costs, adjusted for inflation.

[16] Global 20 port average VSLFO, first half of 2022. Retrieved 08/11/22 from *https://shipandbunker.com;* Stratiotis, E. Fuel Costs in Ocean Shipping. January 22, 2018. (*https://www.morethanshipping.com/fuel-costs-ocean-shipping*); $3139.06/$900 (per ton of fuel) = 3.5 tons of fuel. Average fuel consumption is 200 tons/day. 3.5 tons/200 tons = 1.75%

[17] $15.59 rounded down to the nearest $0.05 (five-cent) increment. At CBP's request, we rounded down to the next $0.05 (five-cent) increment to facilitate operations at the border. CBP has indicated that making change at the penny level for single-payer trucks would have a negative impact on wait times at the land border.

[18] In addition, commercial truck operators have the option to prepay for an unlimited number of arrivals (per year) by purchasing a transponder, the price of which will increase from the equivalent of 40 arrivals to 50 arrivals in the period between October 1, 2024 and October 1, 2025, and thereafter to 60 arrivals.

Industry information is used to contextualize the scale of the collections and illustrate the relative size and impact that the fee might have on the conveyance as a whole. The change to this user fee seems likely to have a limited impact on commercial railroad car operations.

International Cruise Vessel Passengers

The international cruise vessel passenger fee will decline by 31 percent initially, and still be 21 percent lower than the current fee by 2028, an overall decline of $0.29 per passenger arrival. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how small fee changes will affect international cruise passenger arrivals overall. However, a decrease of $0.29 in the fee represents less than a 0.02 percent decrease in the cost of a 7-day cruise.

Treatment Monitoring

APHIS monitors phytosanitary treatments to ensure that they are conducted as prescribed. APHIS proposed to shift the treatment monitoring fee to an hourly basis rather than a per-enclosure basis, and to make adjustments to the remittance practices for the treatment monitoring fee. Based on the comments received, we have decided not to make that structural revision to our AQI treatment monitoring fee or the remittance practices in this final rule. APHIS will keep the per-enclosure fee in place with annual adjustments for projected inflation, and the remittance practices will remain unchanged at this time.

APHIS estimates the total annualized cost of the paperwork and recordkeeping associated with this final rule to be $70,061. Reporting and recordkeeping requirements associated with this final rule are discussed under the heading ''Paperwork Reduction Act.''

The Small Business Administration has set small-entity standards for the transportation sectors. Small entities make up between 92 percent and 99 percent of each of the regulated industries, though the size data do not distinguish between transportation firms that operate internationally and those firms that only operate within the United States. The impacts of this final rule are likely to be limited for all entities within the affected industries, including small entities. While most businesses that will be affected by this final rule are likely to be small, for the reasons discussed further in the Final Regulatory Flexibility Analysis, we believe that the changes set forth in this final rule satisfactorily accomplish the regulatory objectives while minimizing impact on small entities. The provisions of this final rule are consistent with ensuring a level of AQI services commensurate with that required to safeguard American agriculture and natural resources from sanitary and phytosanitary risks.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The Puyallup Tribe has requested Tribal consultation regarding this final rule. APHIS will coordinate with the Office of Tribal Relations to ensure that meaningful consultation occurs.

Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs determined that this rule meets the criteria set forth in 5 U.S.C. 804(2).

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), some of the reporting and recordkeeping requirements in the proposed rule and this final rule have been submitted for approval to the Office of Management and Budget (OMB) control number 0579–0055, APHIS Credit and User Fee Accounts. The remaining reporting and recordkeeping requirements that were solely associated with this final rule were submitted to OMB as a new information collection and assigned OMB comment-filed number 0579–0489. After approval, this information collection will be merged into 0579–0055 in the future.

New information collection requirements created by the regulations of this final rule include information collection, reporting, and recordkeeping requirements in the form of paper, electronic submissions, and information systems. In conjunction with the changes to provide for cost recovery for services, we have considered each change and their impact(s) on these burdens. These changes concern adjusting fee amounts, adjusting caps on certain prepaid fees, removing exemptions, and providing electronic payments and statement options. Estimates include additional respondents, responses, and burden estimates across all activities affected by this rule.

As described above, APHIS received several public comments on the proposed rule, and the following changes were made to the final rule:

- We have lowered the fees for commercial vessels, commercial aircraft, and international air passengers based on our determination that, while aggregate cost was correct (the numerator for the fee rate), there were more instances in which AQI services were provided in these modes (the denominator for the fee rate) than we had initially calculated.
- We have established a commercial vessel fee specific to commercial vessels operating within the Great Lakes or in the region along the coastline from Alaska to Oregon, provided that certain conditions are met.
- We have decided not to revise our regulations governing the treatment monitoring fee at this time.
- We have decided not to specify the method by which airlines and cruise ships must refund passenger user fees assessed for trips not taken.

With these changes, there are corresponding updates in the related recordkeeping burdens (Applications for Credit Account and Request for Services, User Fees for International Air Passengers—Remittance and Statements, and Fees for Conducting and Monitoring Treatments) between the proposed and final rules. There was no impact on burden assumptions between the proposed and final rules due to the first two bulleted items above. The estimated burden on commercial vessels, commercial aircraft, and international aircraft customers has not changed. In addition, the volumes of payers of the new commercial vessel fee

specific to commercial vessels operating within the Great Lakes or in the region along the coastline from Alaska to Oregon is a subset of the original burdens vessel user fee-related burdens included in the proposed rule, so there is no change in the estimated burden between the proposed and final rules. Because the revisions to the treatment user fees in the proposed rule would have created new burdens, the decision not to revise the regulations governing the treatment monitoring user fees has lowered the assumed burdens between the proposed and this the final rule in four ways:

- The proposed rule assumed there would be 2,844 new treatments (1,190 heat treatments and 1,654 irradiation treatments) with an estimated 5 minutes per treatment burden yielding 237 respondent burden hours per year. With the removal of the treatment fee changes from the final rule, we reduced the burden estimate between the proposed and final rules accordingly.
- The proposed rule included a new billing process for treatment monitoring, and in the proposed rule, we assumed half of the approximate 50 treatment facilities would want to be billed. 25 facilities x 8.4 minutes per facility (the estimated time for a facility to complete an application for an account based on timed trials) = 3.5 respondent burden hours for treatment facilities to manage being billed. With the removal of the treatment fee changes from the final rule, we reduced the burden estimate between the proposed and final rules accordingly.
- The proposed rule included consequences for late payment of AQI treatment monitoring user fees and estimated there would be six treatment facilities incurring an increased time burden of 20 minutes per facility for an estimated increase in respondent burden of 2 hours. We removed these 2 hours from our estimated burden with the removal of the treatment fee changes from the final rule.
- The proposed rule included a reduction in the need for facilities to create new business procedures to hold fees in trust estimating it would save 50 treatment facilities 4.75 hours per year for a total of 237 reduction in respondent burden hours each year for individuals and 237 reduction in respondent burden hours each year for businesses. With the removal of the treatment fee changes from the final rule, the treatment facilities remain holding fee collections in trust. For this change between the proposed rule and final rule, we added 237 respondent burden hours into the total number of respondent burden hours between the proposed and final rules.

In addition, the decision not to specify the method by which airlines and cruise ships must refund passenger user fees assessed for trips not taken has also lowered the assumed burdens between the proposed rule and the final rule. The proposed rule assumed one third of the estimated 331 airlines would be required to submit revised remittance sheets each month. ⅓ of 331 airlines = 110 airlines. We estimated those 110 airlines would be required to submit 12 additional remittances per year taking 3 minutes each at 66 hours of additional burden per year. With the decision not to specify the passenger user fee refund methods, we have reduced the overall respondent burden estimate between the proposed and final rule by this amount.

With the changes to the final rule, the estimated number of respondents has decreased by 392, the estimated number of responses has decreased by 9,881, and the estimated burden has decreased by 781 hours.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance 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. For information pertinent to E-Government Act compliance related to this final rule, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2533.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104.4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, tribal governments, and the private sector. Under section 101 of the UMRA, APHIS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires APHIS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 13132

APHIS has reviewed this rule in accordance with Executive Order 13132 regarding Federalism and has determined that it does not have ''federalism implications.'' The rule does 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.''

List of Subjects in 7 CFR Part 354

Exports, Government employees, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Travel and transportation expenses.

As discussed in the preamble, APHIS is amending 7 CFR part 354 as follows:

PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS; AND USER FEES

■ 1. The authority citation for part 354 continues to read as follows:

Authority: 7 U.S.C. 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 49 U.S.C. 80503; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Revise § 354.3 to read as follows:

§ 354.3 User fees for certain international services.

(a) *Definitions.* Whenever in this section the following terms are used, unless the context otherwise requires, they shall be construed, respectively, to mean:

APHIS. The Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA).

Arrival. Arrival at a port of entry, as listed in 19 CFR 101.3 or as defined by 19 CFR 101.1, in the customs territory of the United States or at any place serviced by any such port of entry.

Calendar year. The period from January 1 to December 31, inclusive, of any particular year.

Cascadia. British Columbia and those ports of entry into the United States lying south of 59°26′59.316″ N, north of 43°23′34.152″ N, west of 122°20′31.2″ W, and east of 135°20′2.4″ W.''

Certificate. Any certificate issued by or on behalf of APHIS describing the condition of a shipment of plants or plant products for export, including but not limited to Phytosanitary Certificate (PPQ Form 577), Export Certificate for Processed Plant Products (PPQ Form 578), and Phytosanitary Certificate for Reexport (PPQ Form 579).

Commercial aircraft. Any aircraft used to transport persons or property for compensation or hire.

Commercial purpose. The intention of receiving compensation or making a gain or profit.

Commercial railroad car. Any carrying vehicle, measured from coupler to coupler and designed to operate on railroad tracks, other than a locomotive or a caboose.

Commercial shipment. A shipment for gain or profit.

Commercial truck. Any self-propelled vehicle, including an empty vehicle or a truck cab without a trailer, which is designed and used for the transportation of commercial merchandise or for the transportation of non-commercial merchandise on a for-hire basis.

Commercial vessel. Any watercraft or other contrivance used or capable of being used as a means of transportation on water to transport property for compensation or hire, with the exception of any aircraft or ferry.

Customs and Border Protection (CBP). U.S. Customs and Border Protection, U.S. Department of Homeland Security.

Customs territory of the United States. The 50 States, the District of Columbia, and Puerto Rico.

Designated State or county inspector. A State or county plant regulatory official designated by the Secretary of Agriculture to inspect and certify to shippers and other interested parties as to the phytosanitary condition of plant products inspected under the Plant Protection Act (7 U.S.C. 7701 *et seq.*).

Great Lakes. The Great Lakes of North America and the waters of the St. Lawrence River west of a rhumb line drawn from Cap de Rosiers to West Point, Anticosti Island, and west of a line along 63° W. longitude from Anticosti Island to the north shore of the St. Lawrence River.

Passenger. A natural person for whom transportation is provided, including infants, whether a separate ticket or travel document is issued for the infant, or the infant or toddler occupies a seat, or the infant or toddler is held or carried by another passenger.

Person. An individual, corporation, partnership, trust, association, or any other public or private entity, or any officer, employee, or agent thereof.

(b) *Fee for inspection of commercial vessels of 100 net tons or more.* (1) Except as provided in paragraphs (b)(2) and (3) of this section, the master, licensed deck officer, or purser of any commercial vessel which is subject to inspection under part 330 of this chapter or 9 CFR chapter I, subchapter D, and which is either required to make entry at the customs house under 19 CFR 4.3 or is a U.S.-flag vessel proceeding coastwise under 19 CFR 4.85, shall, upon arrival, proceed to CBP and pay an agricultural quarantine and inspection (AQI) user fee. The base AQI user fee for each arrival is shown in table 1. The fee will be paid for each arrival regardless of the number of arrivals taking place in the course of a single voyage.

TABLE 1 TO PARAGRAPH (b)(1)—FEE FOR INSPECTION OF COMMERCIAL VESSELS OF 100 NET TONS OR MORE

Effective date	Amount
October 1, 2024	$2,903.73
October 1, 2025	2,981.17
October 1, 2026	3,059.61
October 1, 2027	3,139.06

(2) The following categories of commercial vessels are exempt from paying an AQI user fee:

(i) Commercial cruise vessels carrying passengers paying fees under paragraph (f) of this section;

(ii) Any vessel which, at the time of arrival, is being used solely as a tugboat;

(iii) Vessels used exclusively in the governmental service of the United States or a foreign government, including any agency or political subdivision of the United States or a foreign government, so long as the vessel is not carrying persons or merchandise for commercial purposes;

(iv) Vessels arriving in distress or to take on fuel, sea stores, or ship's stores;

(v) Tugboats towing vessels on the Great Lakes; and

(vi) Vessels returning to the United States after traveling to Canada solely to take on fuel.

(3) If not otherwise exempt from paying the fee, a vessel traveling solely between the United States and Canada and within the Great Lakes or Cascadia may pay the AQI user fee for each arrival as the fee is shown in table 2, provided that the vessel:

(i) Is not carrying cargo originating from countries other than the United States or Canada.

(ii) Is not carrying plants or plant products.

(iii) Is not carrying animals or animal products.

(iv) Is not carrying soil or quarry products from areas in Canada listed in § 319.77–3 of this chapter as being infested with gypsy moth.

(v) Is not carrying wood packaging material as defined under § 319.40–1 of this chapter.

TABLE 2 TO PARAGRAPH (b)(3)—FEE FOR INSPECTION OF COMMERCIAL VESSELS TRAVELING SOLELY BETWEEN THE UNITED STATES AND CANADA AND WITHIN THE GREAT LAKES OR CASCADIA, AND NOT OTHERWISE EXEMPT

Effective date	Amount
October 1, 2024	$837.51
October 1, 2025	850.03
October 1, 2026	862.54
October 1, 2027	875.06

(c) *Fee for inspection of commercial trucks*—(1) *On-arrival payment.* Upon arrival at a CBP port of entry, the driver or other person in charge of a commercial truck that is subject to inspection under part 330 of this chapter or under 9 CFR chapter I, subchapter D, must tender the AQI user fees to CBP, unless they have been prepaid as provided for in paragraph (c)(2) of this section. APHIS strongly encourages electronic remittance of fees. The fee applies to all commercial trucks, regardless of what they are carrying, as well as empty trucks and truck cabs (see table 3).

TABLE 3 TO PARAGRAPH (c)(1)—FEE FOR INSPECTION OF COMMERCIAL TRUCKS

Effective date	Amount (per arrival)	Amount (prepaid annual fees)
October 1, 2024	$12.40	$622.00
October 1, 2025	13.45	808.20
October 1, 2026	14.50	870.60
October 1, 2027	15.55	935.40

Note: The per arrival fee has been rounded down to the next $0.05 (five-cent) increment to facilitate border operations. Additionally, the prepaid fees are set at 50 times the unrounded fee rate of $12.44, and 60 times the unrounded fee rates of $13.47, $14.51, and $15.59, respectively.

(2) *Prepayment.* (i) The owner, their agent, or person in charge of a commercial vehicle may at any time prepay the commercial truck AQI fee as defined in paragraph (c)(1) of this section for all arrivals of that vehicle during a calendar year or any remaining portion of a calendar year. The prepayment transponder fee is set at 50 times the unrounded per arrival fee for the period between October 1, 2024 and September 30, 2025, and 60 times the unrounded per arrival fee thereafter. Prepayment of the AQI fee must be made in accordance with the procedures and payment methods set forth in 19 CFR 24.22. The following information must be provided, together with the prepayment amount for each arrival:

(A) Vehicle make, model, and model year;

(B) Vehicle Identification Number (VIN);

(C) License numbers issued by State, Province, or country; and

(D) Owner's name and address.

(ii) Purchases of transponders may be made at any time during a calendar year; APHIS will not prorate for the portion of the calendar year already elapsed, nor refund single-crossing fees already paid.

(d) *Fee for inspection of commercial railroad cars*—(1) *General requirement.* Except as provided in paragraph (d)(2) of this section, an AQI user fee will be charged for each commercial railroad car (loaded or empty) which is subject to inspection under part 330 of this chapter or under 9 CFR chapter I, subchapter D, upon each arrival, as indicated in table 4. The railroad company receiving a railroad car in interchange at a port of entry or, barring interchange, the company moving a car in line haul service into the customs territory of the United States, will be responsible for payment of the fee. Payment of the fee must be made in accordance with the procedures set forth in paragraph (d)(3) or (4) of this section. For purposes of this paragraph (d), the term "railroad car" means any carrying vehicle, measured from coupler to coupler and designed to operate on railroad tracks. If the AQI user fee is prepaid for all arrivals of a commercial railroad car during a calendar year or any remaining portion of a calendar year, the AQI user fee is an amount 48 times the AQI user fee for each arrival.

TABLE 4 TO PARAGRAPH (d)(1)—FEE FOR INSPECTION OF COMMERCIAL RAILROAD CARS

Effective date	Amount (per arrival)	Amount (prepaid)
October 1, 2024	$6.51	$312.48
October 1, 2025	7.23	347.04
October 1, 2026	7.97	382.56
October 1, 2027	8.72	418.56

(2) *Exemptions.* The following categories of commercial railroad cars are exempt from paying an AQI user fee:

(i) Any commercial railroad car that is part of a train whose journey originates and terminates in Canada, if:

(A) The commercial railroad car is part of the train when the train departs Canada; and

(B) No passengers board or disembark from the commercial railroad car, and no cargo is loaded or unloaded from the commercial railroad car, while the train is within the United States.

(ii) Any commercial railroad car that is part of a train whose journey originates and terminates in the United States, if:

(A) The commercial railroad car is part of the train when the train departs the United States; and

(B) No passengers board or disembark from the commercial railroad car, and no cargo is loaded or unloaded from the commercial railroad car, while the train is within any country other than the United States; and

(iii) Locomotives and cabooses.

(3) *Prepayment.* The owner, agent, or person in charge of a railroad company may at any time prepay the commercial railroad car AQI fee as defined in paragraph (d)(1) of this section for all arrivals of that railroad car during a calendar year or any remaining portion of a calendar. This payment must be remitted in accordance with paragraph (d)(4)(iii) of this section.

(4) *Remittance procedures.* The Association of American Railroads (AAR), the National Railroad Passenger Corporation (AMTRAK), and railroad companies acting individually shall file monthly written statement with USDA, APHIS, FMD, within 90 days after the end of each calendar month. Each written statement shall indicate:

(i) The number of commercial railroad cars entering the customs territory of the United States during the relevant period by railroad company;

(ii) The total monthly AQI user fees due from each railroad company; and

(iii) In the case of prepayments to cover all annual arrivals of certain railroad car(s) in accordance with paragraph (d)(3) of this section; include the number of railroad cars being prepaid for, railroad car number(s) covered by the prepayment and the calendar year to which the prepayment applies.

(iv) Railroad companies may include the written statement with their mailed payment as directed in this paragraph (d)(4). For all other payment types, the companies must email the written

statement to *ABSHelpline@usda.gov.* Individual railroad companies must submit a written statement for periods with no fees collected. Detailed remittance instructions are located at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees.* Questions and correspondence may be directed to *ABSHelpline@usda.gov* or (612) 336–3400 (fax) or (877) 777–2128 (phone).

(5) *Payment procedures.* (i) If the railroad company intends to pay monthly, the owner, agent or person in charge of an individual railroad company shall pay the AQI user fees calculated by the Association of American Railroads (AAR), the National Railroad Passenger Corporation (AMTRAK), or the individual railroad company itself within 90 days after the end of each calendar month in which commercial railroad cars entered the customs territory of the United States.

(ii) If the owner, agent or person in charge of an individual railroad company intends to prepay for railroad car(s) for the entire calendar year, as specified in paragraph (d)(3) of this section, prepayment may be made at any time during a calendar year; APHIS will not prorate for the portion of the calendar year already elapsed, nor refund or credit per arrival fees already paid.

(iii) Written statements as described in paragraph (d)(4) of this section, are required to accompany all payments. Detailed payment instructions are located at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees.* Questions and correspondence may be sent to *ABSHelpline@usda.gov,* fax (612) 336–3400 or phone (877) 777–2128.

(6) *Compliance.* (i) AAR, AMTRAK, and each railroad company responsible for making AQI user fee payments must allow APHIS, CBP, and authorized representatives to verify the accuracy of AQI user fees collected and remitted and otherwise determine compliance with 21 U.S.C. 136a and this paragraph (d). The AAR, AMTRAK, and each railroad company responsible for making AQI user fee payments must advise the USDA, APHIS, FMD of the name, address, and telephone number of an agent or other responsible person who is authorized to verify AQI user fee calculations, collections, and written statements, payments, as well as any changes in the identifying information submitted.

(ii) The agent or other responsible person for a payment remains the agent or responsible person until the railroad company notifies APHIS of a transfer of responsibility. The agent or responsible person must contact APHIS to initiate any transfer by contacting *ABSHelpline@usda.gov.* The new agent or responsible person assumes all responsibilities for ensuring compliance for meeting the requirements of this part.

(e)(1) *Fee for inspection of commercial aircraft.* Except as provided in paragraph (e)(2) of this section, an AQI user fee will be charged for each commercial aircraft which is arriving, or which has arrived and is proceeding from one United States airport to another under a CBP ''Permit to Proceed,'' as specified in 19 CFR 122.81 through 122.85, or an ''Agricultural Clearance or Safeguard Order'' (PPQ Form 250), used pursuant to § 330.400 of this chapter and 9 CFR 94.5, and which is subject to inspection under part 330 of this chapter or 9 CFR chapter I, subchapter D. Each carrier or their agent is responsible for paying the AQI user fee. The AQI user fee for each arrival is shown in table 5:

TABLE 5 TO PARAGRAPH (e)(1)—FEE FOR INSPECTION OF COMMERCIAL AIRCRAFT

Effective date	Amount
October 1, 2024	$281.39
October 1, 2025	300.78
October 1, 2026	320.61
October 1, 2027	340.90

(2) *Exemptions.* The following categories of commercial aircraft are exempt from paying an AQI user fee:

(i) [Reserved]

(ii) Any aircraft used exclusively in the governmental services of the United States or a foreign government, including any Agency or political subdivision of the United States or a foreign government, as long as the aircraft is not carrying persons or merchandise for commercial purposes;

(iii) Any aircraft making an emergency or forced landing when the original destination of the aircraft was a foreign port;

(iv) [Reserved]

(v) Any aircraft moving from the U.S. Virgin Islands to Puerto Rico; and

(vi) Any aircraft making an in-transit stop at a port of entry, during which the aircraft does not proceed through any portion of the Federal clearance process, such as inspection or clearance by APHIS or CBP, no cargo is removed from or placed on the aircraft, no passengers get on or off the aircraft, no crew members get on or off the aircraft, no food is placed on the aircraft, and no garbage is removed from the aircraft.

(3) *Remittance and payment procedures.* (i) The carrier or their agent must pay the appropriate fees for receipt no later than 90 days after the close of the month in which the aircraft arrivals occurred. APHIS strongly encourages electronic payment of fees. To set up electronic payment refer to our detailed instructions at *https://www.aphis.usda.gov/mrpbs/userfees/aqi-payment*-types.pdf or for further information relative to electronic remittance, or for further information relative to electronic remittance, contact *ABSHelpline@usda.gov.* In the event electronic remission is impractical, a check or money order can be mailed to the Agency lock box following detailed payment instructions at *https://www.aphis.usda.gov/mrpbs/userfees/aqi-payment-types.pdf.* Questions and correspondence may be directed to *ABSHelpline@usda.gov* or to (612) 336–3400 (fax) or (877) 777–2128 (phone). For payment information, refer to our detailed payment instructions at *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees.* Late payments will be subject to interest, penalty, and a charge to cover the cost of processing and handling a delinquent claim as provided in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3717).

(ii) The carrier or their agent must provide a written statement each month stating the fees that are due for the month. Carriers or their agents must include a hard copy of the written statement with any mailed payment. For all other payment types, including for months with no fees collected, the carriers must email the written statement to *ABSHelpline@usda.gov.*

(iii) The written statement must include the following information:

(A) Name and address of the person making the payment;

(B) Calendar month covered by the payment;

(C) Amount being paid, or a written statement stating that no fees were collected.

(iv) All fee payments required under this section must be made in U.S. dollars. For all payment types accepted, please visit *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees.*

(4) *Compliance.* Each carrier subject to this section must allow APHIS, CBP, and authorized representatives to verify the accuracy of the AQI user fees paid and to otherwise determine compliance in accordance with this paragraph (e) and 21 U.S.C. 136a. Each carrier must advise USDA, APHIS, FMD, FOB of the name, address, and telephone number of an agent or responsible person who is authorized to verify AQI user fee

calculations, payments, and written statements as well as any changes in the identifying information submitted. The agent or responsible person for a payment remains the agent or responsible person until the carrier notifies APHIS of a transfer of responsibility. The carrier or their agent or responsible person must contact APHIS at *https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts* to initiate any transfer. The new agent or responsible person assumes all responsibilities for ensuring compliance for meeting the requirements of this part.

(5) *Limitations on charges.* (i) Airlines will not be charged reimbursable overtime for inspection of aircraft if the aircraft is subject to the AQI user fee for arriving aircraft as prescribed by this section.

(ii) Airlines will not be charged reimbursable overtime for inspection of cargo from an aircraft if:

(A) The aircraft is subject to the AQI user fee for arriving aircraft as prescribed by this section; and

(B) The cargo is inspected between 8 a.m. and 4:30 p.m., Monday through Friday; or

(C) The cargo is inspected concurrently with the aircraft.

(f)(1) *Fee for inspection of international passengers.* Except as specified in paragraph (f)(2) of this section, each passenger aboard a commercial aircraft or cruise ship who is subject to inspection under part 330 of this chapter or 9 CFR chapter I, subchapter D, upon arrival from a place outside of the customs territory of the United States, must pay an AQI user fee. The fee covers one individual arriving into a port of entry within the customs territory of the United States from a foreign port. Each air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document for transportation into the customs territory of the United States is responsible for collecting from the passenger the applicable fee specified in this section, including the fee applicable to any infants or toddlers traveling without a separate ticket or travel document, whether in assigned seats or held in an adult passenger's lap. In the event that the air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document does not collect the AQI user fee when tickets are sold, the air carrier or cruise line must collect the user fee that is applicable at the time of departure from the passenger upon departure. The AQI user fee will apply to tickets purchased beginning October 1, 2024. The fees are shown in tables 6 and 7:

TABLE 6 TO PARAGRAPH (f)(1)—INTERNATIONAL AIR PASSENGER

Effective date	Amount
October 1, 2024	$3.71
October 1, 2025	3.84
October 1, 2026	3.98
October 1, 2027	4.12

TABLE 7 TO PARAGRAPH (f)(1)—INTERNATIONAL CRUISE (SEA) PASSENGER

Effective date	Amount
October 1, 2024	$1.25
October 1, 2025	1.29
October 1, 2026	1.34
October 1, 2027	1.39

(2) *Exemptions.* The following categories of passengers are exempt from paying an AQI user fee:

(i) Crew members onboard for purposes related to the operation of the vessel;

(ii) Crew members who are on duty on a commercial aircraft;

(iii) Airline employees, including "deadheading" crew members, who are traveling on official airline business;

(iv) Diplomats, except for U.S. diplomats, who can show that their names appear on the accreditation listing maintained by the U.S. Department of State. In lieu of the accreditation listing, an individual diplomat may present appropriate proof of diplomatic status to include possession of a diplomatic passport or visa, or diplomatic identification card issued by a foreign government;

(v) Passengers departing and returning to the United States without having touched a foreign port or place;

(vi) Passengers arriving on any commercial aircraft used exclusively in the governmental service of the United States or a foreign government, including any agency or political subdivision of the United States or a foreign government, so long as the aircraft is not carrying persons or merchandise for commercial purposes. Passengers on commercial aircraft under contract to the U.S. Department of Defense (DOD) are exempted if they have been precleared abroad under the joint DOD/APHIS Military Inspection Program;

(vii) Passengers arriving on an aircraft due to an emergency or forced landing when the original destination of the aircraft was a foreign port;

(viii) Passengers transiting the United States and not subject to inspection; and

(ix) Passengers moving from the U.S. Virgin Islands to Puerto Rico.

(3) *Circumstances of user fee collections.* AQI user fees shall be collected under the following circumstances:

(i) When through tickets or travel documents are issued indicating travel to the customs territory of the United States that originates in any foreign country; and

(ii) When passengers arrive in the customs territory of the United States in transit from a foreign country and are inspected by APHIS or CBP.

(4) *Responsibility for collection of fees.* (i) Any air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document on or after May 13, 1991, is responsible for collecting the AQI user fee from all passengers transported into the customs territory of the United States to whom the AQI user fee applies.

(A) Tickets or travel documents must be marked by the person who collects the AQI user fee to indicate that the required AQI user fee has been collected from the passenger.

(B) If the AQI user fee applies to a passenger departing from the United States and if the passenger's tickets or travel documents were issued on or after May 13, 1991, but do not reflect collection of the AQI user fee at the time of issuance, then the carrier transporting the passenger from the United States must collect the AQI user fee upon departure.

(C) AQI user fees collected from international passengers pursuant to this paragraph (f) shall be held in trust for the United States by the person collecting such fees, by any person holding such fees, or by the person who is ultimately responsible for remittance of such fees to APHIS. AQI user fees collected from international passengers shall be accounted for separately and shall be regarded as trust funds held by the person possessing such fees as agents, for the beneficial interest of the United States. All such user fees held by any person shall be property in which the person holds only a possessory interest and not an equitable interest. As compensation for collecting, handling, and remitting the AQI user fees for international passengers, the person holding such user fees shall be entitled to any interest or other investment return earned on the user fees between the time of collection and the time the user fees are due to be remitted to APHIS under this section. Nothing in this section shall affect APHIS' right to collect interest for late remittance.

(ii) [Reserved]

(5) *Remittance and payment procedures.* (i) The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document or their own non-carrier related tickets or travel documents, must remit collections of AQI user fees from the passengers to APHIS.

(ii) The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must remit the passengers' fees to APHIS no later than 90 days after the close of the calendar month in which the ticket issuer collected the AQI user fees from the passengers. Late payments will be subject to interest, penalties, and a charge to cover the cost of processing and handling a delinquent claim as provided in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3717).

(iii) All fee payments required under this section must be made in U.S. dollars. For payment types accepted please visit *https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees.* APHIS strongly encourages electronic remittance of fees. To set up electronic remittance refer to our detailed payment instructions at *https://www.aphis.usda.gov/mrpbs/userfees/aqi-payment-types.pdf* or for further information relative to electronic remittance, contact *ABSHelpline@usda.gov.* In the event electronic remission is impractical, a check or money order can be mailed to the Agency lock box following detailed payment instructions at *https://www.aphis.usda.gov/sites/default/files/aqi-payment-types.pdf.* Questions and correspondence may be sent to *ABSHelpline@usda.gov* or fax (612) 336–3400 or (877) 777–2128. For payment information, refer to our detailed payment instructions at *https://www.aphis.usda.gov/sites/default/files/aqi-payment-types.pdf.*

(iv) The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must provide a written statement each month stating the passenger fees that are due for the month or stating that no payments are due. The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must include the written statement with their mailed payment. For all other payment types, they must email the written statement separately to *ABSHelpline@usda.gov.* The written statement must include the following information:

(A) Name and address of the person remitting payment;

(B) Calendar month covered by the payment; and

(C) Amount collected and remitted.

(v) Refunds by a remitter of AQI user fees collected in conjunction with unused tickets or travel documents shall be netted against the next subsequent remittance. The ticket or travel document-issuing entity must submit a revised written statement indicating the revised number of passengers and international passenger AQI user fees amount collected. The revised written statement must be completed and filed for each month during which the ticket or travel document-issuing entity certifies that there was a decrease in the number of passengers and international passenger AQI user fees collected.

(6) *Notification.* Carriers contracting with U.S.-based tour wholesalers are responsible for notifying the USDA, APHIS, FMD, FOB at *https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts* of all journeys contracted, the number of spaces contracted for, and the name, address, and taxpayer identification number of the United States-based tour wholesaler, within 90 days after the close of the calendar month in which such a journey occurred; *except that,* carriers are not required to make notification if tickets, marked to show collection of the AQI user fee, are issued for the individual contracted spaces.

(7) *Compliance.* Each carrier, travel agent, U.S.-based tour wholesaler, or other entity subject to this section must allow APHIS, CBP, and authorized representatives to verify the accuracy of the AQI user fees collected and remitted and to otherwise determine compliance with 21 U.S.C. 136a and this paragraph (f). Each carrier, travel agent, U.S.-based tour wholesaler, or other entity must advise USDA, APHIS, FMD, at *https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts* of the name, address, and telephone number of a responsible officer who is authorized to verify AQI user fee calculations, payments, and remittance, as well as any changes in the identifying information submitted. The responsible person for a payment remains the responsible person until the air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document notifies APHIS of a transfer of responsibility. The responsible person must contact APHIS to initiate any transfer. The new responsible person assumes all responsibilities for ensuring compliance for meeting the requirements of this part.

(8) *Limitation on charges.* Airlines and cruise lines will not be charged reimbursable overtime for passenger inspection services required for any aircraft or cruise ship on which a passenger arrived who has paid the international passenger AQI user fee for that flight or cruise.

(g) *Fees for export certification of plants and plant products.* (1) For each certificate issued by APHIS personnel, the recipient must pay the applicable AQI user fee at the time and place the certificate is issued.

(2) When the work necessary for the issuance of a certificate is performed by APHIS personnel on a Sunday or holiday, or at any other time outside the regular tour of duty of the APHIS personnel issuing the certificate, in addition to the applicable user fee, the recipient must pay the applicable overtime rate in accordance with § 354.1.

(3)(i) Each exporter who receives a certificate issued on behalf of APHIS by a designated State or county inspector must pay an administrative user fee, as shown in table 8. The administrative fee can be remitted by the exporter directly to APHIS through the Phytosanitary Certificate Issuance and Tracking System (PCIT), provided that the exporter has a PCIT account and submits the application for the export certificate through the PCIT. If the PCIT is not used, the State or county issuing the certificate is responsible for collecting the fee and remitting it monthly to the U.S. Bank, United States Department of Agriculture, APHIS, AQI, P.O. Box 979043, St. Louis, MO 63197–9000.

TABLE 8 TO PARAGRAPH (g)(3)(i)—ADMINISTRATIVE USER FEE

Effective dates	Amount per shipment	
	PCIT used	PCIT not used
October 1, 2009, through September 30, 2010	$3	$6
October 1, 2010, through September 30, 2011	6	12

TABLE 8 TO PARAGRAPH (g)(3)(i)—ADMINISTRATIVE USER FEE—Continued

Effective dates	Amount per shipment	
	PCIT used	PCIT not used
Beginning October 1, 2011	6	12

(ii) The AQI user fees for an export or reexport certificate for a commercial shipment are shown in table 9.

TABLE 9 TO PARAGRAPH (g)(3)(ii)—EXPORT OR REEXPORT CERTIFICATE FOR COMMERCIAL SHIPMENT

Effective dates	Amount per shipment
October 1, 2009, through September 30, 2010	$77
October 1, 2010, through September 30, 2011	104
Beginning October 1, 2011	106

(iii) The AQI user fees for an export or reexport certificate for a low-value commercial shipment are shown in table 10. A commercial shipment is a low-value commercial shipment if the items being shipped are identical to those identified on the certificate; the shipment is accompanied by an invoice which states that the items being shipped are worth less than $1,250; and the shipper requests that the user fee charged be based on the low value of the shipment.

TABLE 10 TO PARAGRAPH (g)(3)(iii)—EXPORT OR REEXPORT CERTIFICATE FOR LOW-VALUE COMMERCIAL SHIPMENT

Effective dates	Amount per shipment
October 1, 2009, through September 30, 2010	$42
October 1, 2010, through September 30, 2011	60
Beginning October 1, 2011	61

(iv) The AQI user fees for an export or reexport certificate for a noncommercial shipment are shown in table 11.

TABLE 11 TO PARAGRAPH (g)(3)(iv)—EXPORT OR REEXPORT CERTIFICATE FOR NONCOMMERCIAL SHIPMENT

Effective dates	Amount per shipment
October 1, 2009, through September 30, 2010	$42
October 1, 2010, through September 30, 2011	60
Beginning October 1, 2011	61

(v) The AQI user fees for replacing any certificate are shown in table 12.

TABLE 12 TO PARAGRAPH (g)(3)(v)—REPLACEMENT FEE

Effective dates	Amount per certificate
October 1, 2009, through September 30, 2010	$11
October 1, 2010, through September 30, 2011	15
Beginning October 1, 2011	15

(4) If a designated State inspector issues a certificate, the State where the certificate is issued may charge for inspection services provided in that State.

(5) Any State which wishes to charge a fee for services it provides to issue certificates must establish fees in accordance with one of the following guidelines:

(i) *Calculation of a "cost-per-certificate" fee.* The State must:

(A) Estimate the annual number of certificates to be issued;

(B) Determine the total cost of issuing certificates by adding together

delivery, [1] support, [2] and administrative costs; [3] and

(C) Divide the cost of issuing certificates by the estimated number of certificates to be issued to obtain a ''raw'' fee. The State may round the ''raw'' fee up to the nearest quarter, if necessary for ease of calculation, collection, or billing; or

(ii) *Calculation of a ''cost-per-hour'' fee.* The State must:

(A) Estimate the annual number of hours taken to issue certificates by adding together delivery, [4] support, [5] and administrative [6] hours;

(B) Determine the total cost of issuing certificates by adding together delivery,[1] support,[2] and administrative costs; and

(C) Divide the cost of issuing certificates by the estimated number of hours taken to issue certificates to obtain a ''cost-per-hour'' fee. The State may round the ''cost-per-hour'' fee up to the nearest quarter, if necessary for ease of calculation, collection, or billing.

(6) For payment of any of the AQI user fees required in this paragraph (g), we will accept personal checks for amounts less than $100, and checks drawn on commercial accounts, cashier's checks, certified checks, traveler's checks, and money orders for any amount. All payments must be for the exact amount due.

(h)(1) *Fee for conducting and monitoring treatments.* (1) Each importer of a consignment of articles that require treatment upon arrival from a place outside of the customs territory of the United States, either as a preassigned condition of entry or as a remedial measure ordered following the inspection of the consignment, must pay an AQI user fee. The AQI user fee is charged on a per-treatment basis, *i.e.,* if two or more consignments are treated together, only a single fee will be charged, and if a single consignment is split or must be retreated, a fee will be charged for each separate treatment conducted. The AQI user fee for each treatment is shown in table 13:

TABLE 13 TO PARAGRAPH (h)(1)—FEE FOR CONDUCTING AND MONITORING TREATMENTS

Effective date	Amount
October 1, 2024	$240.60
October 1, 2025	244.19
October 1, 2026	247.79
October 1, 2027	251.38

(2) *Treatment provider.* (i) Private entities that provide AQI treatment services to importers are responsible for collecting the AQI treatment user fee from the importer for whom the service is provided. Treatment providers must collect the AQI treatment fee applicable at the time the treatment is applied.

(ii) When AQI treatment services are provided by APHIS, APHIS will collect the AQI treatment fee applicable at the time the treatment is applied from the person receiving the services. Remittances must be made by check or money order, payable in United States dollars, through a United States bank, to ''The Animal and Plant Health Inspection Service.''

(3) *Collection of fees.* (i) In cases where APHIS is not providing the AQI treatment and collecting the associated fee, AQI user fees collected from importers pursuant to this paragraph (h) shall be held in trust for the United States by the person collecting such fees, by any person holding such fees, or by the person who is ultimately responsible for remittance of such fees to APHIS. AQI user fees collected from importers shall be accounted for separately and shall be regarded as trust funds held by the person possessing such fees as agents, for the beneficial interest of the United States. All such user fees held by any person shall be property in which the person holds only a possessory interest and not an equitable interest. As compensation for collecting, handling, and remitting the AQI treatment user fees, the person holding such user fees shall be entitled to any interest or other investment return earned on the user fees between the time of collection and the time the user fees are due to be remitted to APHIS under this section. Nothing in this section shall affect APHIS' right to collect interest from the person holding such user fees for late remittance.

(ii) [Reserved]

(4) *Remittance and statement procedures.* (i) The treatment provider that collects the AQI treatment user fee must remit the fee to USDA, APHIS, AQI, PO Box 979044, St. Louis, MO 63197–9000.

(ii) AQI treatment user fees must be remitted for receipt no later than 31 days after the close of the calendar quarter in which the AQI user fees were collected. Late payments will be subject to interest, penalty, and handling charges as provided in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3717).

(iii) The remitter must mail with the remittance a written statement to USDA, APHIS, AQI, PO Box 979044, St. Louis, MO 63197–9000. The statement must include the following information:

(A) Name and address of the person remitting payment;

(B) Taxpayer identification number of the person remitting payment;

(C) Calendar quarter covered by the payment; and

(D) Amount collected and remitted.

(iv) Remittances must be made by check or money order, payable in United States dollars, through a United States bank, to ''The Animal and Plant Health Inspection Service.''

(i) *Consequences for nonpayment or late payment of user fees*—(1) *Unpaid debt.* In cases of delinquent debts, the government is required to charge and collect interest, penalties, and costs. See 31 U.S.C. 3717(a) (interest); 3717(e)(1) (costs); and 3717(e)(2) (penalties). If any person for whom the service is provided fails to pay when due any debt to APHIS, including any user fee due under chapter I or chapter III of this title, then:

(i) *Subsequent user fee payments.* Payment must be made for subsequent user fees before the service is provided if:

(A) For unbilled fees, the user fee is unpaid 60 days after the date the pertinent regulatory provision indicates payment is due;

[1] Delivery costs are costs such as employee salary and benefits, transportation, per diem, travel, purchase of specialized equipment, and user fee costs associated with maintaining field offices. Delivery hours are similar hours taken by inspectors, including travel time, inspection time, and time taken to complete paperwork.

[2] Support costs are costs at supervisory levels which are similar to delivery costs, and user fee costs such as training, automated data processing, public affairs, enforcement, legal services, communications, postage, budget and accounting services, and payroll, purchasing, billing, and collecting services. Support hours are similar hours taken at supervisory levels, as well as hours taken in training, automated data processing, enforcement, legal services, communication, budgeting and accounting, payroll purchasing, billing, and collecting.

[3] Administrative costs are costs incurred as a direct result of collecting and monitoring Federal phytosanitary certificates. Administrative hours are hours taken as a direct result of collecting and monitoring Federal phytosanitary certificates.

[4] Delivery costs are costs such as employee salary and benefits, transportation, per diem, travel, purchase of specialized equipment, and user fee costs associated with maintaining field offices. Delivery hours are similar hours taken by inspectors, including travel time, inspection time, and time taken to complete paperwork.

[5] Support costs are costs at supervisory levels which are similar to delivery costs, and user fee costs such as training, automated data processing, public affairs, enforcement, legal services, communications, postage, budget and accounting services, and payroll, purchasing, billing, and collecting services. Support hours are similar hours taken at supervisory levels, as well as hours taken in training, automated data processing, enforcement, legal services, communication, budgeting and accounting, payroll purchasing, billing, and collecting.

[6] Administrative costs are costs incurred as a direct result of collecting and monitoring Federal phytosanitary certificates. Administrative hours are hours taken as a direct result of collecting and monitoring Federal phytosanitary certificates.

(B) For billed fees, the user fee is unpaid 60 days after date of bill;

(C) The person for whom the service is provided or the person requesting the service has not paid the late payment penalty charges, interest charges, or charges for the cost of processing and handling the delinquent bill on any delinquent APHIS user fee; or

(D) Payment has been dishonored.

(ii) *Resolution of difference between estimate and actual.* APHIS will estimate the user fee to be paid; any difference between the estimate and the actual amount owed to APHIS will be resolved as soon as reasonably possible following the delivery of the service, with APHIS returning any excess to the payor or billing the payor for the additional amount due.

(iii) *Prepayment form.* The prepayment must be in guaranteed form of payment, such as money order or certified check. Prepayment in guaranteed form will continue until the debtor pays the delinquent debt.

(iv) *Denied service.* Service will be denied until the debt is paid if:

(A) For unbilled fees, the user fee is unpaid 90 days after date the pertinent regulatory provision indicates payment is due;

(B) For billed fees, the user fee is unpaid 90 days after date of bill;

(C) The person for whom the service is provided or the person requesting the service has not paid the late payment penalty charges, interest charges, or charges for the cost of processing and handling the delinquent bill on any delinquent APHIS user fee; or

(D) Payment has been dishonored.

(2) *Unpaid debt during service.* If APHIS is in the process of providing a service for which an APHIS user fee is due, and the user has not paid the fee within the time required, or if the payment offered by the user is inadequate or unacceptable, then APHIS will take the following action: If regulated articles in quarantine at a treatment facility cannot be released from quarantine, APHIS may seize and dispose of them, as determined by the Administrator, and may recover all expenses of handling the articles from persons liable for user fees under paragraph (h)(1) of this section. If regulated articles can be released from quarantine, the articles will be released, and any unpaid debt will be handled in accordance with procedures for unpaid debt in this section.

(3) *Late payments.* If for unbilled user fees, the user fees are unpaid 30 days after the date the pertinent regulatory provisions indicates payment is due, or if billed, are unpaid 30 days after the date of the bill, APHIS will impose late payment penalty charges, interest charges, and charges for the cost of processing and handling the delinquent bill in accordance with 31 U.S.C. 3717.

(4) *Dishonored payment.* User fees paid with dishonored forms of payment, such as a check returned for insufficient funds, will be subject to interest and penalty charges in accordance with 31 U.S.C. 3717. Administrative charges will be assessed at $20.00 per dishonored payment to be paid in addition to the original amount owed. Payment must be in guaranteed form, such as a money order or certified check.

(5) *Debt collection management.* In accordance with applicable debt collection law, the following provisions apply:

(i) *Taxpayer identification number.* APHIS will collect a taxpayer identification number from all persons, other than Federal agencies, who are liable for a user fee.

(ii) *Offset.* APHIS takes appropriate action to collect debts through offset under applicable law, including by notifying the Department of the Treasury of debts that are over 120 days delinquent for the purposes of offset through the Treasury Offset Program. Through the Treasury Offset Program, the Department of the Treasury will offset eligible Federal and State payments to satisfy the debt to APHIS.

(iii) *Cross-servicing.* APHIS will transfer debts that are over 120 days delinquent to the Department of the Treasury's Cross-Servicing program. Through the Cross-Servicing program, the Department of the Treasury will collect debts on behalf of APHIS. Exceptions may be made for debts that meet certain requirements, for example, debts that are already at a collection agency or in payment plans.

(6) *Report delinquent debt.* APHIS will report all unpaid debts to credit reporting bureaus.

(*j*) *Recordkeeping and record retention.* (1) Entities responsible for paying AQI user fees and their agents are required to establish, keep, and make available to APHIS the following records:

(i) Records and reports required under this section, including written statements, if applicable; and

(ii) Legible copies of contracts (including amendments to contracts) between the responsible entity or their agents and agents that conduct activities subject to this part for the responsible entity, and copies of documents relating to agreements made without a written contract.

(2) Responsible entities or their agents must maintain sufficient documentation for APHIS, CBP, and representatives to verify the accuracy of the fee collections and, if applicable, written statements. Such information must be made available for inspection upon APHIS and CBP's demand. Such documentation shall be maintained in the United States for a period of 5 years from the date of remittance calculation, unless a longer retention period is determined to be needed by the Administrator. Each such affected entity shall provide to APHIS and CBP the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section and shall promptly notify APHIS and CBP of any changes in the identifying information previously submitted.

(k) *Severability.* The sections of this part are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the APHIS' intention that the validity of the remainder of those parts shall not be affected, with the remaining sections to continue in effect.

(Approved by the Office of Management and Budget under control numbers 1651–0019, 0579–0052, 0579–0094, and 0579–0489).

Done in Washington, DC, this 25th day of April 2024.

Jennifer Moffitt,

Undersecretary, Marketing and Regulatory Programs.

[FR Doc. 2024–09348 Filed 5–6–24; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL REGISTER

Vol. 89 Tuesday,
No. 89 May 7, 2024

Part VI

Surface Transportation Board

49 CFR Part 1145
Reciprocal Switching for Inadequate Service; Final Rule

SURFACE TRANSPORTATION BOARD

49 CFR Part 1145

[Docket No. EP 711 (Sub-No. 2)]

Reciprocal Switching for Inadequate Service

AGENCY: Surface Transportation Board (the Board or STB).

ACTION: Final rule.

SUMMARY: The Board adopts new regulations that provide for the prescription of reciprocal switching agreements as a means to promote adequate rail service through access to an additional line haul carrier. Under the new regulations, eligibility for prescription of a reciprocal switching agreement will be determined in part using objective performance standards that address reliability in time of arrival, consistency in transit time, and reliability in providing first-mile and last-mile service. The Board will also consider, in determining whether to prescribe a reciprocal switching agreement, certain affirmative defenses and the practicability of a reciprocal switching agreement. To help implement the new regulations, the Board will require all Class I railroads to submit certain service data on an ongoing and standardized basis, which will be generalized and publicly accessible. Railroads will also be required to provide individualized, machine-readable service data to a customer upon a written request from that customer.

DATES: The rule will be effective on September 4, 2024.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 740–5567. If you require accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION:

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Introduction

In a decision served on September 7, 2023, the Board issued a new notice of proposed rulemaking that would provide for the prescription of reciprocal switching agreements with emphasis on how to address inadequate rail service. *Reciprocal Switching for Inadequate Serv.* (*NPRM*), 88 FR 63897 (proposed Sept. 18, 2023).[1] The Board explained that, given the major service problems that occurred subsequent to the 2016 proposal in Docket No. EP 711 (Sub–No. 1) and the history of recurring service problems that continue to plague the industry, it is appropriate, at this time, to focus reciprocal switching reform on service-related issues. *NPRM,* 88 FR at 63899.

As discussed in the *NPRM,* reciprocal switching agreements provide for the transfer of a rail shipment between Class I rail carriers or their affiliated companies within the terminal area in which the shipment begins or ends its journey on the rail system. *Id.* at 63898. In a typical case, the incumbent rail carrier either (1) moves the shipment from the point of origin in the terminal area to a local yard, where an alternate carrier picks up the shipment to provide the line haul; or (2) picks up the shipment at a local yard where an alternate carrier placed the shipment after providing the line haul, for movement to the final destination in the terminal area. *Id.* The alternate carrier might pay the incumbent carrier a fee for providing that service. *Id.* The fee is often incorporated in some manner into the alternate carrier's total rate to the shipper. *Id.* A reciprocal switching agreement thus enables an alternate carrier to offer its own single-line rate or joint-line through rate for line-haul service, even if the alternate carrier's lines do not physically reach the shipper/receiver's facility. *Id.*

The regulations as proposed in the *NPRM* would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver failed to meet one or more objective performance standards and when other conditions to a prescription were met. *Id.* The proposed standards addressed: (1) a rail carrier's failures to meet its original estimated time of arrival (OETA), *i.e.,* to provide sufficiently reliable line-haul service; (2) a deterioration in the time it takes a rail carrier to deliver a shipment (transit time); and (3) a rail carrier's failures to provide local pick-ups or deliveries of cars (also known as first-mile/last-mile service (FMLM)), as measured by the carrier's success in meeting an ''industry spot and pull'' (ISP) standard. *Id.* at 63901. The proposed regulations also addressed regulatory procedures, affirmative defenses, and practicability. *Id.* at 63908–10. In addition to proposing to provide for the prescription of a reciprocal switching agreement when the foregoing conditions were met, the Board sought comment on what methodology the Board should use in setting the fee for switching under a prescribed agreement, in the event that the affected carriers did not reach agreement on compensation within a reasonable time. *Id.* at 63909–10.

The proposed regulations would impose certain data requirements to aid in implementation of those regulations. In part, the proposed regulations would require a Class I carrier to provide to a customer, upon written request, that customer's own individualized service data. In addition, to ensure that the Board would have an informed view of service issues across the network, the proposed regulations would (1) make permanent the filing of certain data that is similar to the data the Board had collected on a temporary basis in *Urgent Issues in Freight Rail Service—Railroad Reporting,* Docket No. EP 770 (Sub–No. 1); and (2) require consistency in reporting that data. *NPRM,* 88 FR at 63910–11.

The Board solicited comments on the *NPRM* by October 23, 2023, and replies by November 21, 2023. *NPRM,* 88 FR at 63897. In response to requests for extensions, these dates were extended to November 7, 2023, and December 20, 2023, respectively. *Reciprocal Switching for Inadequate Serv.*, EP 711 (Sub-No. 2)(STB served Sept. 29, 2023, and Nov. 20, 2023).

The Board received many comments and replies from interested parties, including public officials, railroads, shippers, trade organizations, and others.[2] As discussed below, overall, shippers and their supporting trade organizations strongly favor the Board's proposal, although many seek minor modifications or, in some instances,

[1] The Board also closed a sub-docket involving an earlier notice of proposed rulemaking from 2016. *Reciprocal Switching,* 88 FR 63917 (published Sept. 18, 2023) (closure of Docket No. EP 711 (Sub–No. 1)).

[2] A Table of Commenters with abbreviations the Board uses in the text and citations is provided below.

significant expansions to the scope of the proposed rule. The railroads and their trade organizations generally object to the Board's legal foundation for the proposed regulations and otherwise suggest significant changes to those regulations.

After reviewing the record, the Board is adopting a version of part 1145 that reflects certain modifications to the proposal in the *NPRM.* With respect to the performance standards in part 1145, some of the key modifications are as follows. First, based on numerous shipper comments and the data the Board had been collecting since 2022 in Docket No. EP 770 (Sub-No. 1), the Board is increasing the OETA standard for delivering within 24 hours of the OETA from 60% to 70% and the standard for performing ISP from 80% to 85%. Second, the Board is adopting a proposal whereby railcars that are delivered more than 24 hours before the OETA will count in assessing the rail carrier's performance. Third, the Board is establishing an absolute floor for the service consistency standard and will modify that standard to provide that certain deteriorations in transit time over a three-year period would also count as a failure. Fourth, the Board is withdrawing its proposal to combine lanes; the service reliability standard and the service consistency standard will be applied only to each individual lane of traffic to/from the petitioner's facility. Finally, in response to public comments, the Board makes other modifications to each performance standard. As discussed in the *NPRM,* the performance standards apply only to petitions under part 1145; the standards do not by themselves establish whether a carrier's operations are otherwise appropriate. The Board does not view it as appropriate to apply or draw from the standards when regulating or enforcing the common carrier obligation. *See NPRM,* 88 FR at 63902. Likewise, the performance standards do not define what constitutes adequate rail service. This also means that whether a carrier meets or fails to meet the standards in part 1145 is not determinative of whether a service-related prescription might be justified under part 1144 or part 1147 of the Board's regulations.

The Board is also clarifying issues concerning Class II and Class III rail carriers. Part 1145 pertains to shippers and receivers that have practical physical access to only one Class I rail carrier or its affiliated company. The affiliated company might be a Class II or Class III railroad. Part 1145 otherwise does not apply to Class II and Class III railroads.

As discussed in the *NPRM,* the Board will initiate an ongoing collection of data similar to a subset of the data that it had collected on a temporary basis in Docket No. EP 770 (Sub-No. 1). That data must now be submitted using a standardized template to be developed by the agency. The Board will continue to require Class I railroads to provide data to a customer within seven days of receiving a request, but the Board is providing more clarity and specificity in regard to that requirement, as the original proposal could have impeded carriers' ability to provide timely responses. Based on comments, the Board also clarifies and modifies in certain respects the proposed provisions on affirmative defenses. The Board is also increasing the minimum duration of a prescribed reciprocal switching agreement from two years to three years and the maximum duration of a prescribed reciprocal switching agreement from four years to five years.

With respect to traffic that is or was moved under a transportation contract under 49 U.S.C. 10709, the Board explains that it will not prescribe a reciprocal switching agreement under part 1145 based on performance that occurs during the term of the contract. Concerning exempt commodities, the Board will not consider pre-revocation performance as the basis for a prescription under part 1145 but intends to prioritize petitions for partial revocation filed in furtherance of part 1145 cases in order to resolve expeditiously those petitions for partial revocation. The Board also intends to explore at a later date whether it should partially revoke exemptions on its own initiative to allow for reciprocal switching petitions, as is currently the case for the boxcar exemption. *See* 49 CFR 1039.14(b)(3) (expressly allowing for regulation of reciprocal switching for rail transportation of commodities in boxcars).

These issues, as well as numerous others, are discussed below. After considering the record, the Board hereby adopts the proposed regulations, with modifications as indicated below, as part 1145 of its regulations.

Various entities have asked that the Board take additional steps in this proceeding such as adopting a fourth performance standard that would measure whether the incumbent carrier reasonably met the customer's local operational and service requirements, (PCA Comments 12; *see also* PRFBA Comments 9 n.4; EMA Comments 8–9 n.4; NSSGA Comments 9 n.3; Olin Comments 6), or adopting a performance standard that would apply specifically to grain shippers, (USDA Comments 5–6). USDA and others ask the Board to grant terminal trackage rights based on a carrier's failure to meet the ISP standard, (USDA Comments 8; NGFA Comments 7; NSSGA Comments 9; ACD Comments 5; NMA Comments 6), or to open a new docket concerning terminal trackage rights, (Coal. Ass'ns Comments 8).

Others seek more sweeping reform, including: expanding part 1145 to all bottleneck segments (Coal. Ass'ns Comments 8); overturning the ''anti-competitive conduct'' test in *Midtec Paper Corp.* v. *Chicago & North Western Transportation Co.* (*Midtec*), 3 I.C.C.2d 171 (1986) (Coal. Ass'ns Comments 8; DOT/FRA Comments 3; ILWA Comments 1; FRCA/NCTA Comments 2; Celanese Comments 2; PCA Comments 4–7; Olin Comments 6–8; NMA Comments 4); adopting rules in *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads,* Docket No. EP 768, (NGFA Comments 9); and further delineating the scope of the common carrier obligation, (TTD Comments 3). The Coalition Associations, with support from ACD, also assert that, if the Board concludes it cannot consider the performance of contract traffic, the agency should reopen *Reciprocal Switching,* Docket No. EP 711 (Sub-No. 1), to adopt that proposal with several proposed modifications. (Coal. Ass'ns Reply 47–52; ACD Reply 3.)

The Board appreciates the Coalition Associations' efforts as well as the numerous additional suggestions from others about possible Board actions outside of this docket. However, the Board would like to gauge the effectiveness of this new rule before considering other ways to pursue the objectives of section 11102(c). As noted in the *NPRM,* in choosing to focus reciprocal switching reform on service issues at this time, the Board does not intend to suggest that consideration of additional reforms geared toward increasing competitive options is foreclosed. *Id.* at 63900. And, even with the adoption of part 1145, shippers may still pursue access to an alternate rail carrier under parts 1144 and 1147, and advocate for continued development, including, as appropriate, development by the Board of adjudicatory policies and the appropriate application of those rules in individual cases. *Id.*

The Board expects part 1145 to be a significant step in incentivizing Class I railroads through competition to achieve and maintain higher service levels on an ongoing basis. The objective and transparent standards, defenses, and definitions in this rule should also provide greater certainty

than the status quo. The Board also expects the new data collection to help ensure that it has an informed view of service issues across the network.

Legal Framework

Design of Part 1145

As discussed in the NPRM, part 1145 implements the Board's authority under 49 U.S.C. 11102(c) to prescribe reciprocal switching agreements when ''practicable and in the public interest.'' *NPRM,* 88 FR at 63899. There is a clear public interest in adequate rail service—a matter of fundamental concern under the Interstate Commerce Act. *See United States* v. *Lowden,* 308 U.S. 225, 230 (1939); 49 U.S.C. 10101 (in various policies referencing an ''efficient'' and ''sound'' rail system that can ''meet the needs of the public''); *see also* House Report No. 96–1430: Staggers Rail Act of 1980, Report of the Committee on Conference on S. 1946 at 80 (Sept. 29, 1980). Inadequate rail service can substantially impair rail customers' ability to operate their businesses, resulting in substantial harm to the United States economy as a whole. *NPRM,* 88 FR at 63899–900 (citing 49 U.S.C. 10101). The Board's decision to adopt part 1145 grows out of the Board's recognition that inadequate rail service can critically and adversely affect the national economy, yet the Board's existing regulations do not necessarily provide a sufficient response. *NPRM,* 88 FR at 63900 & n.7. Part 1145 addresses these concerns by providing a reasonably predictable and efficient path toward a prescription under section 11102(c) while, at the same time, providing for regulatory intervention only when there are sufficient, service-related signs of a public interest in intervention and when there would be no undue impairment to rail carriers' operations or ability to service other customers.

Part 1145 is designed specifically to promote the provision of adequate rail service to terminal-area customers that have practical physical access to only one Class I rail carrier or affiliate. *NPRM,* 88 FR at 63899. Under part 1145, upon petition by a shipper or receiver, the Board will prescribe a time-limited reciprocal switching agreement when (1) the prescription is in a terminal area and the petitioner has practical physical access to only one Class I rail carrier or affiliate, *see* 49 CFR 1145.1 (definition of ''reciprocal switching agreement''), 1145.6(a)(1); (2) the incumbent rail carrier failed to meet one or more performance standards, *see* 49 CFR 1145.2, 1145.6(a)(2); (3) that failure was not excused by an affirmative defense, *see* 49 CFR 1145.3, 1145.6(a)(3); (4) transfers under the reciprocal switching agreement would be operationally feasible and would not unduly impair service to other customers, *see* 49 CFR 1145.6(b); and (5) resulting line-haul arrangements would be operationally feasible and would not unduly impair a participating rail carrier's ability to serve its other customers, *see id.*

The performance standards in part 1145, which can be easily understood by shippers and carriers, address three fundamental aspects of adequate rail service: reliable timing in the arrival of line-haul shipments, consistent shipment times, and on-time local pick-ups and deliveries. The standards are set at levels such that performance below the standards would not meet many shippers' (and carriers') service expectations. *See* Performance Standards. Upon a petitioner's demonstration of such a failure and in the absence of an incumbent or alternate carrier's demonstration of an affirmative defense, infeasibility, or undue impairment as provided for in part 1145, *see* 49 CFR 1145.3, 1145.6(b), the Board would prescribe a reciprocal switching agreement, which would give the petitioner the opportunity to obtain line-haul service from an alternate carrier that may be able to provide better service. The prescription of a reciprocal switching agreement does not necessarily mean that the incumbent carrier would lose line-haul service because the incumbent carrier would continue to have the opportunity to compete to serve the petitioner. *NPRM,* 88 FR at 63901. The initial term of any prescribed agreement is for a limited duration of three to five years. 49 CFR 1145.6(c).

Part 1145 will promote the provision of adequate rail service, not only to a successful petitioner, but on a broader network basis. By providing a clearer set of conditions and procedures for the Board to prescribe reciprocal switching agreements, part 1145 will create an incentive for rail carriers to provide adequate service to terminal-area customers that lack another rail option. Part 1145 will also reduce regulatory risk and burdens under section 11102(c) by (1) enhancing the predictability of regulatory outcomes, (2) enabling potential petitioners to evaluate the costs and potential benefits of seeking a prescription, and (3) helping to contain the time and cost of petitioning for a prescription. *NPRM,* 88 FR at 63901. At the same time—because part 1145 provides for an appropriately defined and scoped switching agreement prescription only after careful consideration of affirmative defenses, infeasibility, and undue impairment—part 1145 will not result in the prescription of a reciprocal switching agreement when there is an insufficient basis or when the prescription would be unwise as a matter of policy. *See Midtec Paper Corp.* v. *United States,* 857 F.2d 1487, 1499 (D.C. Cir. 1988).

Comments

Class I rail carriers claim that adoption of part 1145 would exceed the scope of the Board's legal authority. These carriers assert that, as a condition to prescribing a reciprocal switching agreement, the Board must undertake a case-by-case analysis that would be far more elaborate than what is called for under part 1145. According to carriers, the Board must find that: (1) the incumbent carrier consistently provides inadequate service to the petitioner; (2) the incumbent carrier failed to cure the inadequacy after being given notice and a reasonable opportunity to cure; (3) the inadequacy continues to exist at the time of the Board's prescription; (4) service to the petitioner is worse than service to other customers; (5) the petitioner has a compelling need for alternate rail service, as indicated by demonstrated harm to the petitioner's planning and business needs; (6) alternate service would not impose greater harm on other stakeholders; (7) the alternate service would be safe and practicable; and (8) the alternate service would actually remedy the inadequate service. (*See* AAR Comments 2, 5, 8, 13, 17–18, 20–22, 62; *see also* CN Comments 16, 21; CN Reply 3–4; NSR Comments 8–10; CSXT Comments 10–12; CSXT Reply 4–5.)

In attempting to find a legal foundation for their approach, rail carriers look past the text of section 11102(c) to three cases in which the Board's predecessor, the Interstate Commerce Commission (ICC or Commission), applied the public interest standard: *Jamestown Chamber of Commerce* v. *Jamestown, Westfield, & Northwestern Railroad,* 195 I.C.C. 289 (1933); *Central States Enterprises, Inc.* v. *Seaboard Coast Line Railroad,* NOR 38891 (ICC served May 15, 1984), *aff'd sub nom., Central States Enterprises* v. *ICC,* 780 F.2d 664 (7th Cir. 1985); and *Delaware & Hudson Railway* v. *Consolidated Rail Corp.,* 367 I.C.C. 718 (1983). According to carriers, these cases indicate that, to find that a reciprocal switching agreement would be in the public interest, the Board must find that the petitioner has a ''compelling need'' for the agreement. (*See, e.g.,* AAR Comments 12–14.) AAR also relies on a statement in the legislative history suggesting that the

''practicable and in the public interest'' standard in section 11102(c) is ''the same standard the Commission has applied for many years in considering whether to order the joint use of terminal facilities.'' (*See* AAR Comments 14 (citing H.R. Rep. No. 1430 at 116 (1980)).)

Shippers respond that carriers' ''compelling need'' test misstates the law. According to NSSGA, the outcome in *Jamestown* (in which the ICC denied a request to prescribe terminal trackage rights) rested in part on the fact that the incumbent carrier there provided exceptionally good service. (NSSGA Reply 1–2.) Similarly, WCTL argues that *Jamestown* was premised in part on the fact that the proposed service arrangement was sought to aid a financially weak rail carrier. (WCTL Reply 10.) PCA asserts that any ''compelling need'' test would improperly impose an extra-statutory limitation on the Board's authority to prescribe reciprocal switching agreements. (PCA Reply 2, 5 (describing *Jamestown* as inapposite and stating that an ''actual necessity/compelling reason'' standard is found nowhere in the governing statute).) The Coalition Associations assert that the carriers' proposed ''compelling need'' test is overly narrow. They argue that the in-depth inquiry that carriers propose under the ''compelling need'' test would, as a practical matter, limit the availability of prescribed reciprocal switching agreements. According to the Coalition Associations, there is sufficient need for part 1145 given the public interest in creating an incentive to provide adequate rail service. (Coal. Ass'ns Reply 15–18.) The Coalition Associations add that the Board's authority to enact part 1145 flows not only from the ''practicable and in the public interest'' standard but also from the ''competitive rail service'' standard in section 11102(c). (*Id.* at 15–16.)

Class I carriers assert, not only that the Board must undertake a detailed case-by-case investigation as described above, but that, as a condition to prescribing a reciprocal switching agreement, the Board must find that the petitioner lacks an adequate intermodal transportation option (i.e., a transportation option via a mode other than rail). Carriers reason that, when there is an intermodal option, there is unlikely to be a compelling need for an alternate rail option. (*See* AAR Comments 78–79; *see also* BNSF Comments 14–15.) The Coalition Associations respond that intermodal options are not a realistic incentive to provide adequate rail service, reasoning that a customer might have structured its facilities and business model around rail transportation. (*See* Coal. Ass'ns Reply 22–23; *see also* AF&PA/ISRI Reply 7–8.)

On a separate tack, AAR asserts that part 1145 would inappropriately amount to direct regulation of the quality of rail service. AAR bases its assertion on the rule's use of defined performance standards. According to AAR, direct regulation of quality of service would contradict congressional policy to minimize the need for federal regulatory control over the rail transportation system. (AAR Comments 14–15.)

Finally, CPKC argues that the Board is precluded by the doctrine of legislative ratification from undertaking the approach taken in part 1145. Citing a statement in *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1507, that Congress did not intend the agency to undertake a radical restructuring of the rail sector through its switching authority, CPKC asserts that Congress ratified what CPKC calls the ''limited scope of the statute'' by not passing any of eighteen bills that, according to CPKC, would have relaxed the approach in *Midtec.* CPKC concludes on that basis that the Board may prescribe a reciprocal switching agreement only as a direct remedy to an inadequacy that is demonstrated on a case-by-case basis considering all relevant factors. (CPKC Reply 5 n.2.)

The Board's Assessment

Part 1145 reasonably implements the Board's authority to prescribe reciprocal switching agreements when practicable and in the public interest. Class I rail carriers' arguments to the contrary rest on a misinterpretation of the public interest standard in section 11102(c)—a misinterpretation that would effectively replace the statutory standard with a ''compelling need'' standard that, as interpreted by the carriers, would leave the Board little room to fashion its implementation of the public interest standard and the underlying congressional objectives according to the circumstances at hand. The carriers' generalized concerns about the prescription of reciprocal switching agreements are also misguided. Finally, because part 1145 is amply justified under the ''practicable and in the public interest'' standard, it is unnecessary to consider here whether part 1145 is also justified under the ''competitive rail service'' standard in section 11102(c), as some commenters have argued.

Governing Principles

The public interest standard in section 11102(c) gives the Board broad discretion to determine when to prescribe reciprocal switching agreements. In other contexts in which Congress has used the public interest standard, the United States Supreme Court has described the standard as ''expansive.'' *Nat'l Broad. Co.* v. *United States,* 319 U.S. 190, 219 (1943). The public interest standard serves as a ''supple instrument'' for the exercise of discretion by the expert body that Congress charged with carrying out legislative policy. *FCC* v. *Pottsville Broad. Co.,* 309 U.S. 134, 137–38 (1940); *see also McManus* v. *Civil Aeronautics Bd.,* 286 F.2d 414, 419–20 (1960) (citing *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 396 (1940)). The public interest standard allows the agency to respond to changes in the industry and to the interplay of complex factors, consistent with policy objectives that Congress established by statute. *Gen. Tel. Co. of Cal.* v. *FCC,* 413 F.2d 390, 398 (D.C. Cir. 1969); *Huawei Techs. USA, Inc.* v. *FCC,* 2 F.4th 421, 439 (5th Cir. 2021). In addition, both before and after the Staggers Act, there has been a recognition that the public interest in adequate transportation could be served through the introduction of another rail carrier. *See, e.g., Pa. Co.* v. *United States,* 236 U.S. 351 (1915) (pre-Staggers); 49 U.S.C. 11102(c); *Del. & Hudson,* 367 I.C.C. at 723 (post-Staggers).

In implementing the public interest standard in section 11102(c), the Board's discretion is to be guided by the policy objectives that Congress established through section 10101 (previously section 10101a) of the Act (the Rail Transportation Policy or RTP)). *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1499–500; *see also N.Y. Cent. Sec. Corp.,* 287 U.S. 24–25 (1932) (establishing that an agency's implementation of broad statutory authority is to be guided by policies set forth by Congress). Depending on the facts at hand, relevant considerations may include the potential to secure lower rates and/or better service, the expansion of shipping options, and possible detriments to affected carriers. *See, e.g., Del. & Hudson,* 367 I.C.C. at 723–24, 726. As needed, in considering whether a proposed action would advance the statutory objectives in section 10101, the Board weighs and balances the various elements of the RTP to ''arrive at a reasonable accommodation of the conflicting policies'' in the Act. *Ass'n of Am. R.Rs.* v. *STB,* 306 F.3d 1108, 1111 (D.C. Cir. 2002); *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1497, 1500; *see also Vill. of Palestine* v. *ICC,* 936 F.2d 1335

(D.C. Cir. 1991) (agency looks to relevant and pertinent rail transportation policies).

Implementation of the Public Interest Standard Through Part 1145

Part 1145 advances the statutory goal of developing and continuing a sound rail transportation system. 49 U.S.C. 10101(4). Part 1145 does so by striking an appropriate balance between, on one hand, the shipping public's interest in securing better rail service and, on the other hand, the interest of rail carriers. *See* 49 U.S.C. 10101(1), (3), (4) and (5); *NPRM,* 88 FR at 63901. Part 1145 strikes this balance by providing for the introduction of an alternate rail carrier via an appropriately defined and scoped switching agreement prescription only when there are sufficient indications, based on the incumbent carrier's performance, that the introduction of a competing carrier would create the possibility of an improved service environment and when the affected carriers have not demonstrated that the proposed prescription would unduly impair their operations or ability to serve their other customers. As the ICC indicated in *Delaware & Hudson,* the introduction of an alternate rail carrier provides the potential to achieve better service. *Del. & Hudson,* 367 I.C.C. at 723; *see also NPRM,* 88 FR at 63901 (noting that part 1145 would ''advance the policies in § 10101 of having a rail system that meets the public need, of ensuring effective competition among rail carriers, of minimizing the need for regulatory control, and of reaching regulatory decisions on a fair and expeditious basis'').

The design of part 1145 takes into account carriers' need to earn adequate revenues. *See* 49 U.S.C. 10101(3). Its built-in limitations ensure that a prescription will not be issued if carriers demonstrate that a particular proposed prescription would unduly impair the carrier's ability to serve its existing customers. Other relevant considerations include that the rule does not apply to traffic moving under contract and that the initial duration of a prescription under part 1145 is limited to three to five years. While it is possible that a particular prescription could result in some reduction in an incumbent carrier's revenues (because a shipper chooses to use the alternate carrier after considering the service offerings of both the incumbent and the alternative carrier) such a potential concern is outweighed by the public interest in securing reliable and consistent rail service through an expeditious regulatory process for prescribing a reciprocal switching agreement when, as provided for in part 1145, no undue impairment would result. Part 1145 also balances consideration of the impact on non-petitioning shippers, as the Board will consider carrier arguments, if raised, about the impact on other shippers in determining whether a petition should be granted. Even with the potential concerns that any particular prescribed switch might raise, Congress expressly provided that the Board should have the authority to determine when such switches are ''practicable and in the public interest'' and part 1145 reasonably includes analysis of those statutory factors.

Part 1145 also gives reasonable effect to the statutory objectives of minimizing the need for federal regulation and of providing for efficient and fair regulatory proceedings. *See* 49 U.S.C. 10101(2), (15). First, part 1145 allows rail carriers to retain sufficient operational flexibility. While part 1145 could lead to some alterations in a carrier's operations, those alterations would be based largely on how the carrier chooses to respond to the potential of an alternate carrier, as part 1145 does not establish a service level for purposes of assessing common carrier or other statutory violations and remedies. *See NPRM,* 88 FR at 63902. Second, with respect to efficient and fair proceedings, part 1145 advances that interest through a targeted, service-based approach to regulatory intervention based on readily obtainable and understood information. The performance standards themselves are largely based on data that carriers and shippers use in the ordinary course of business and the assessment of performance is straightforward to calculate. Part 1145 provides specific affirmative defenses, which help to narrow the scope of a proceeding, and also allows for case-by-case consideration of other relevant issues when warranted. This ease of administration is an important policy goal, particularly where there have been concerns expressed about the efficiency of the Board's existing processes. *See, e.g., NPRM,* 88 FR at 63900 n.7.

In addition, as a condition to regulatory intervention under part 1145, there must be sufficient indications, in the form of the incumbent carrier's failure to meet a service-based performance standard and the absence of an affirmative defense or demonstration of undue impairment, that the introduction of an alternate rail carrier via an appropriately defined and scoped switching agreement prescription could be valuable in bringing about better rail service. *See* 49 CFR 1145.6. Part 1145 will lead to regulatory intervention only when, on balance, such intervention is specifically warranted and therefore does not implicate the D.C. Circuit's opinion in *Midtec Paper Corp.* v. *United States* about a radical restructuring of the rail sector. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1507. And even when that regulatory intervention occurs, given part 1145's express recognition of the incumbent rail carrier's ability to continue to compete for a successful petitioner's traffic even when a switch is prescribed, the rule furthers section 10101(4)'s goal of relying appropriately on competition among rail carriers. A shipper that obtains a prescribed switch after careful Board analysis will have the ability to elect the service provider that best addresses its needs. *See NPRM,* 88 FR at 63901; *see also Del. & Hudson,* 167 I.C.C. at 723 (''Additional rail competition is a clear public benefit . . . , one which is endorsed by rail transportation policy announced in the Staggers Act.'').

The Carriers' Proposed Approach Is Not Required by Law

The elaborate, case-by-case approach that rail carriers advocate is not required by law and, at the same time, would undermine the policy goals that the Board seeks to advance here. In the carriers' view, as a condition to prescribing a reciprocal switching agreement, the Board would need (1) to compare the quality of service to the petitioner versus the quality of service to other customers, (2) to assess whether any differences in the quality of service were reasonable, (3) to identify the petitioner's business needs, (4) to identify the level of transportation service that would reasonably meet those needs, and (5) to determine which rail carrier could provide better service. (*See, e.g.,* AAR Comments 19–23.) If this approach were required by law, as alleged by carriers, then the Board would lose the discretion that is inherent in section 11102(c)—the discretion to respond to different types of needs and to changing needs by prioritizing different objectives in section 10101 as appropriate to meet those needs. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1497, 1500 (stating that the question is whether the agency arrived at a reasonable accommodation of the conflicting policies in its governing statute).

The most glaring deficiency in carriers' argument is that nothing in the text of section 11102(c) suggests that the Board's discretion is limited to where the Board undertakes carriers' elaborate

approach. Likewise, none of the cases that the carriers cite suggest that the carriers' approach is required by law. In *Jamestown,* the petitioners sought the prescription of terminal trackage rights under what is now section 11102(a). The requested prescription would have required the incumbent rail carrier to construct terminal-area facilities to enable the petitioners to directly reach another rail carrier (as it stood, the petitioners drayed their shipments to the other carrier). *Jamestown,* 195 I.C.C. at 289–91. In denying the prescription, the ICC noted that the prescription would have caused distortions by requiring the incumbent carrier to invest in facilities for the benefit of its weaker competitor. *Id.* at 291. The ICC concluded therefore that, while the prescription would have provided a convenience to the petitioners, more was needed to meet the public interest standard. To outweigh the harm that the prescription would cause, the petitioners would had to have shown more than a mere convenience:

> Where something substantial is to be taken away from a carrier for the sole benefit of [the petitioners], and with no corresponding benefit to the carrier, as in this case, we are inclined to the view that some actual necessity or compelling reason must be shown before we can find such action in the public interest.

Id.

The circumstances that led the ICC to look for a compelling need in *Jamestown* have no meaningful parallel to circumstances that could arise under part 1145. A prescription under part 1145 would not require the incumbent carrier to make investments for the benefit of a competitor, involves a limited form of intervention, and would be granted only if the carriers did not adequately demonstrate infeasibility or undue impairment to their operations or ability to serve other customers, among other limitations and protections under this rule. Of critical note, the *NPRM* made clear that a carrier's loss of a customer's business as a result of a prescription based on a failed performance standard is not a loss that needs to be redressed, (*see NPRM,* 88 FR at 63909), and part 1145 includes protections to avoid any associated undue impairment to the carrier's ability to service other customers, thus minimizing any potential concerns. Indeed, an incumbent carrier's financial losses in such a case would largely reflect its own service failure—it failed to meet one of three performance standards, and the carrier cannot offer an affirmative defense to excuse the service failure—and the shipper's election of the alternate carrier once given the option to choose rail providers. For these reasons, in the present context, there is no need for the Board to find, as a condition to a prescription, a heightened need that would outweigh harm to the incumbent carrier. As indicated by the ICC in *Delaware & Hudson,* the interest of the shipping public in securing better service is not a mere convenience. *Del. & Hudson,* 367 I.C.C. at 723 (stating that there is a light burden under the statute for a petitioner that seeks the potential to secure better rail service through the introduction of an additional rail carrier).

Like carriers' reliance on *Jamestown,* carriers' reliance on *Central States* is misplaced. There, the petitioner sought the prescription of either trackage rights or a reciprocal switching agreement so that the petitioner could have a shipment moved from the terminus of one carrier's tracks to a destination on another carrier's tracks 1.4 miles away. The ICC found that the proposed arrangement was intended to achieve business purposes unrelated to the adequacy of rail service and, moreover, would have threatened the affected carrier's already weak financial standing. The ICC denied the petition, reasoning that, in light of that harm, the public interest required more than a showing that the prescription would provide a convenience to the petitioner. *Cent. States,* 780 F.2d at 670–71, 679.

As with *Jamestown,* the circumstances that led the ICC to look for a compelling need in *Central States* have no meaningful parallel under part 1145. The harm that would have arisen in *Central States*—substantial harm to the affected carrier's already weak financial standing—is unlikely to arise under part 1145 because today each of the Class I carriers' financial standing is significantly stronger, *see R.R. Revenue Adequacy—2022 Determination,* Docket No. EP 552 (Sub-No. 27) (STB served Sept. 5, 2023); because a prescription under part 1145 would, at most, result in the incumbent carrier's loss of the petitioner's business for the limited duration of the prescription; and because of the numerous other protections and limitations in this rule. *See, e.g.,* 49 CFR 1145.6. For example, if the incumbent carrier were to demonstrate that a prescription under part 1145 would unduly impair operations or its ability to serve other customers, then the Board would not grant the prescription as provided for in 49 CFR 1145.6(b). Accordingly, the introduction of an alternate carrier through a prescription under part 1145 would only occur when there are potential public benefits and, given the Board's consideration of relevant issues, the risk of cognizable negative impacts is greatly minimized.

The ICC's decision in *Delaware & Hudson,* while cited by carriers, directly contradicts carriers' narrow approach to implementing the public interest standard in section 11102(c). There the ICC cited *Jamestown* for the proposition that the agency must find "some actual necessity or compelling reason" to prescribe a reciprocal switching agreement. At the same time, the ICC indicated the potential benefits of competition are not merely something convenient or desirable to a petitioner, as those benefits are normally presumed to be in the public interest. *Del. & Hudson,* 367 I.C.C. at 723. The ICC prescribed a reciprocal switching agreement in *Delaware & Hudson* based on these benefits plus the expansion of shipping options to customers in the terminal area and the lack of substantial harm to the complaining carrier. *Id.* at 723–24, 726.

In contrast, the ICC did not make the findings that AAR asserts are necessary pre-conditions to prescription of a reciprocal switching agreement. The ICC did not examine whether customers had a compelling need for the prescription as evidenced by regulatory determinations that customers had experienced consistently inadequate service or that the inadequacy persisted. The ICC did not examine whether customers' businesses had been harmed by existing service and whether any such harm was proportionally greater than harm to other customers. Finally, the ICC did not examine whether an inadequacy in service would be cured by alternate rail service. If anything, part 1145 is more conservative than the ICC's approach in *Delaware & Hudson* given that, under part 1145, prescription of a reciprocal switching agreement is available only if the incumbent carrier failed a performance standard and the other conditions to a prescription under part 1145 were met.[3]

[3] The approach and goals in part 1147 of the Board's regulations differ from those in part 1145 as well as from those in part 1144 of the Board's regulations. Part 1147 ("Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies") was issued in conjunction with the Board's issuance of regulations on emergency service orders in 1998. Part 1147 was designed to create a regulatory option to address a service-based issue that was longer-term than an emergency service order (and distinct from the permanent prescription of access to an alternate carrier as provided for in part 1144). Part 1147 was designed specifically to replace an incumbent carrier for the duration of a service inadequacy. *See Expedited Relief for Serv. Inadequacies,* 3 S.T.B. 968 (1998), 63 FR 71396, 71396–97 (published Dec. 28, 1998). Therefore, part

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All that remains of carriers' legal argument is an unremarkable statement in the legislative history that the ''practicable and in the public interest'' standard in section 11102(c) is ''the same standard the Commission has applied for many years in considering whether to order the joint use of terminal facilities.'' *See* H.R. Rep. No. 1430 at 116; *see also* 125 Cong. Rec. 15309, 15319 (1979). Without support, carriers contend that this general statement implies a host of restrictions on the Board's statutory authority. Properly understood, however, the statement merely points out a parallel between section 11102(a) on terminal trackage rights and section 11102(c) on reciprocal switching: both provisions use the ''practicable and in the public interest'' standard. Nothing in Congress's mere observation of that parallel suggests that henceforth, in implementing the public interest standard, the agency was to be bound by policy decisions or approaches that the agency had adopted in the past.

Rail carriers' interpretation of the ''same standard'' language fails on another level. Carriers imply that Congress meant to equate the public interest standard with the ''compelling need'' that the ICC looked for in *Jamestown,* even though neither the statutory text nor the legislative history includes any reference to a compelling need or to *Jamestown.* In fact, the ICC's inquiry in *Jamestown* grew out of the peculiar facts of that case; in other pre-Staggers cases in which the ICC applied the public interest standard, the ICC said nothing about a compelling need. *See, e.g., Seaboard Air Line R.R.—Terminal Facilities of Fla. E. Coast Ry.,* 327 I.C.C. 1, 7–8 (1965) (finding that the proposed service arrangement was in the public interest based on anticipated operating efficiencies, without reference to whether there was a compelling need for the arrangement).

Finally, even if a compelling need were required under the public interest standard in section 11102(c), a prescription under part 1145 would meet that standard. Part 1145 promotes adequate rail service both by introducing an alternate rail carrier via an appropriately defined and scoped reciprocal switching agreement when there have been sufficient indications of service issues (without the establishment of an affirmative defense or undue impairment) and by more broadly creating an incentive for rail carriers to provide adequate service. This approach—both for individual cases and at a broader systemic level—will help to mitigate the substantial harm that inadequate rail service imposes on the national economy. *NPRM,* 88 FR at 63900. At the same time and as noted throughout this decision, the Final Rule contains numerous protections against undue impairment, infeasibility, and operational impairment, including about carriers' investments and the ability to raise capital to the extent that results in undue impairment or an inability to serve other shippers. *See* Analytical Justification. Part 1145 further promotes adequate rail service by providing a clearer path to a prescription under section 11102(c), whereas carriers' approach would impose undue barriers.

Intermodal Competition

Carriers erroneously assert that, as a condition to prescribing a reciprocal switching agreement, the Board must find that the petitioner lacks an adequate option via another mode of transportation. (*See, e.g.,* AAR Comments 78–79; BNSF Comments 14–15.) Neither the text of section 11102(c) nor the legislative history suggests that the Board's discretion to prescribe a reciprocal switching agreement is limited to where there is an absence of intermodal competition.[4] *See Del. & Hudson Ry.* v. *Consol. Rail Corp.,* 366 I.C.C. 845, 854 (1982), *affirmed,* 367 I.C.C. at 727 (finding that the agency's authority to prescribe a reciprocal switching agreement is not limited to where there is an absence of intermodal competition). The presence or absence of intermodal competition might be relevant for purposes of part 1144, given that part 1144 seeks to remedy or prevent an act that is contrary to the competition policies of section 10101 or is otherwise anticompetitive. In that context, a finding of intermodal competition might inform whether the incumbent carrier could have abused market power for purposes of part 1144. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1513. As is well established, though, part 1144 does not reflect the full breadth of the Board's discretion under section 11102(c). The statute itself does not require a finding of conduct that is anticompetitive or contrary to the competition policies of section 10101, much less a finding that the incumbent carrier holds or abused market power. *See also* 49 CFR part 1147 (providing for a prescription without regard to whether the incumbent carrier holds or abused market power).

Here, there is no need either to find that the petitioner lacks an intermodal option or that the incumbent carrier holds or abused market power in serving the petitioner. To require those findings would be inconsistent with the specific concerns that the Board seeks to address through part 1145. The types of service-related problems that part 1145 seeks to address—insufficient reliability and excessive transit times—might reflect an abuse of market power vis-à-vis the petitioner but might also reflect broader management or operating decisions that are not well directed toward the development of a sound rail system. Part 1145 creates an incentive to avoid service issues, to the benefit of the rail system at large, by providing for the introduction of an alternate carrier in individual cases as would enable the shipper to choose a more efficient and responsive rail carrier.[5]

The Ratification Doctrine Does Not Preclude Adoption of Part 1145

CPKC's ratification argument—that, by not acting on legislative proposals after *Midtec Paper Corp.* v. *United States,* Congress mandated a narrow

1147 calls for the Board to (1) examine whether there has been a substantial, measurable deterioration or other demonstrated inadequacy in the incumbent carrier's service, and (2) consider whether another rail carrier is committed to providing alternate service. *See* 49 CFR 1147.1(a), (b)(iii).

While part 1147 is thus similar in some respects to the approach that AAR advocates here, part 1147 does not require several findings that AAR claims are required by statute. As examples, part 1147 does not require a finding of disproportionate harm to the petitioner or a finding that service to the petitioner is worse than service to other customers. But more importantly, as discussed above, none of part 1147, part 1144, and part 1145 seeks to define the absolute limits of the Board's discretion in implementing section 11102(c). The approach under each regulation is designed to address a specific concern; each approach reflects a particular prioritization or balancing of legislative objectives as reasonably appropriate to addressing the specific concern at hand. *See Midtec Paper Corp.* v. *United States,* 857 F.2d at 1497, 1500. The range of approaches across the Board's regulations and the case law underscores AAR's error in asserting that, by law, the Board's discretion to advance the public interest through section 11102(c) is limited to the overly restrictive approach that AAR advocates.

[4] The absence of a requirement in section 11102(c) to consider intermodal competition stands in contrast to other sections where Congress has expressly required the Board to consider intermodal competition. *See, e.g.,* 49 U.S.C. 10707 (requiring the Board to consider competition from other rail carriers and other modes of transportation when making market dominance determinations).

[5] It is beyond the scope of this proceeding to address whether, for the duration of a reciprocal switching agreement under part 1145, a carrier that served the petitioner necessarily would lack market dominance within the meaning of section 10707 and therefore would not be subject to rate review with respect to that carrier's line-haul rate to the petitioner. (*See, e.g.,* BNSF Reply 16; Coal. Ass'ns Comments 60; Coal. Ass'ns Reply 22–23.) The question of market dominance could be presented for consideration on a case-by-case basis, under the standards in section 10707, in the context of any challenge to the relevant line-haul rate.

interpretation of section 11102, (*see* CPKC Reply 5 n.2)—is unfounded. First, CPKC mischaracterizes the D.C. Circuit's decision in *Midtec Paper Corp.* v. *United States.* When the court suggested that Congress did not envision a radical restructuring of the rail sector, *see* 857 F.2d at 1507, the court did not suggest that the agency's discretion under the statute was limited to application of the standards in part 1144. To the contrary, the court noted that, through part 1144, *the agency* had narrowed its discretion. *Id.* at 1500; *see also Balt. Gas & Elec.,* 817 F.2d at 115 (leaving open the question whether a broader approach to implementing the agency's reciprocal switching authority would meet the objectives of the Staggers Act). CPKC's vague assertion that *Midtec Paper Corp.* v. *United States* confirmed ''the limited scope of the statute'' ignores the court's actual language.

Second, as relevant to part 1145, no reasonable inference can be drawn from legislative inaction on bills that were introduced after *Midtec Paper Corp.* v. *United States.* To find that Congress ratified or acquiesced to the interpretation of a statute, there must be *overwhelming* evidence that Congress considered and rejected the *precise* issue at hand. *See Rapanos* v. *United States,* 547 U.S. 715, 750 (2016). CPKC has failed to meet that burden, offering nothing to suggest that Congress has ever considered much less rejected an approach similar to the approach in part 1145. The inability to draw any relevant inference from legislative inaction after *Midtec Paper Corp.* v. *United States* is underscored by the lack of connection between part 1145 and the concern that the D.C. Circuit identified in *Midtec Paper Corp.* v. *United States.* Under part 1145, a prescription is not warranted merely by the fact that the petitioner has direct physical access to only one Class I carrier. A time-limited prescription would not be issued under part 1145 unless the shipper is only served by one Class I carrier, only in a terminal area, and only after the carrier failed to meet one of three performance standards, no affirmative defenses were established, and infeasibility or undue impairment were not demonstrated. The fact that part 1145 does not implicate the D.C. Circuit's concern about a radical restructuring further undermines CPKC's dubious theory that, by not acting after *Midtec Paper Corp.* v. *United States,* Congress precluded the approach in part 1145.

Finally, it would be unreasonable to conclude that—through inaction, with no indication of legislative intent—Congress reversed its affirmative decision to grant the agency broad authority to prescribe reciprocal switching agreements. If anything, Congress' reenactment of the public interest standard in section 11102(c) confirms the agency's broad authority in this context. *See Reciprocal Switching* (*2016 NPRM*), Docket No. EP 711 (Sub-No. 1) slip op. at 11–13 (STB served July 27, 2016), 81 FR 51149 (published Aug. 3, 2016).

Analytical Justification

Class I rail carriers suggest that the Board has failed to adequately support promulgation of part 1145. First, the carriers suggest that the Board must go farther than it does in analyzing the effects that the rule might bring about. Second, the carriers suggest that the levels of the performance standards in part 1145 are not adequately supported by record evidence. The following discussion addresses each argument in turn, explaining why each lacks merit.

Scope of Analysis

Comments

AAR asserts that, under principles of reasoned decision making, the Board must assess the cumulative advantages and disadvantages of promulgating part 1145 and must find that the advantages outweigh the disadvantages, even if the Board would later consider advantages and disadvantages in applying the rule on a case-by-case basis. (*See* AAR Comments 113–15 (citing *Michigan* v. *EPA,* 576 U.S. 743, 753 (2015)).)

AAR then directs a broad challenge at any rule that provides for the prescription of reciprocal switching agreements, without regard to the specific provisions of that rule. (*See* AAR Comments 113–15.) According to AAR, the promulgation of any such rule would create numerous disadvantages. First, in AAR's view, any expansion of ''forced switching'' would directly impair investment by increasing operational burdens, reducing resiliency, increasing costs, and reducing profits. (*Id.* at 115–21.) Second, in AAR's view, so-called ''sweeping'' switching requirements would distort the market for transportation service, in contradiction of congressional policy to achieve sound economics in transportation. AAR states that, where switching is economically efficient, it is likely to occur voluntarily. (*Id.* at 116–19, 123; *id.,* V.S. Orszag & Eilat at 14 (market distortions could result from regulatory intervention where there has been no demonstration of a deviation from efficient market outcomes); *see also* AAR Comments 9, 24–25 (asserting that, under part 1145, shippers could seek prescription of a reciprocal switching agreement, not because they needed alternate service, but as a means to extract rate concessions at others' expense).)

Third, in AAR's view, sweeping switching requirements would undermine the use of differential pricing, which AAR characterizes as critical to the health of the rail network. (*Id.* at 122 (citing *Pet. For Rulemaking to Adopt Revised Competitive Switching Rules* (*2012 Rulemaking*), EP 711, slip op. at 7 (STB served July 25, 2012)).) Additional disadvantages alleged by AAR include inefficient routing, increased congestion, environmental costs that are associated with increased use of fuel and emissions, train delays, higher risk of service failure due to increased ''touches,'' depressed incentives for future investment with resulting reductions in the quality of service, operational inefficiencies, safety risks, and threats to carriers' ability to recover the costs of their entire networks and to maintain financial viability. (AAR Comments 113.)

While naming a litany of alleged disadvantages, AAR asserts that provision for the prescription of reciprocal switching agreements would provide no public benefit. AAR suggests that the only benefit would be any benefit that accrued to the successful petitioner and that this benefit would impose burdens on others—for example, by causing disruptions or inefficiencies in rail service on a system-wide basis. (*Id.* at 119.)

AAR suggests that the alleged disadvantages of promulgating part 1145 can to some extent be quantified. (*Id.* at 114.) According to AAR, the Board has recognized the need for data-driven rulemaking. (*Id.* (citing *2012 Rulemaking,* EP 711).)

The Board's Assessment

The Board has engaged in reasoned decision-making, and AAR's arguments to the contrary lack merit. First, AAR mischaracterizes the standard for reasoned decision-making that applies in the present context. Second, the disadvantages that AAR alleges in connection with promulgation of part 1145 do not reflect the actual regulation.

AAR Mischaracterizes the Applicable Standard

An agency engages in reasoned decision making under the Administrative Procedure Act, 5 U.S.C. 551–559, when the agency reaches a logical conclusion based on relevant factors. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–43 (1983). The factors that the

agency must consider are defined by the governing statute. *See Michigan* v. *EPA,* 576 U.S. 743. As discussed above, the relevant factors in implementing section 11102(c) are the RTP factors, which the Board has weighed as discussed in Legal Framework.

AAR errs in suggesting that, under *Michigan* v. *EPA,* the Board must go farther than it does in addressing the impact of part 1145. In *Michigan* v. *EPA,* the EPA decided to subject power plants to certain minimum, regulatory standards under the Clean Air Act. The Court found that, under the ''appropriate and necessary'' standard in the Clean Air Act, the EPA should have considered what it would cost power plants to comply with the regulatory standards in question. The Court reasoned that, within the statutory framework, the ''appropriate and necessary'' standard was properly interpreted as calling for consideration of the cost of compliance. The Court relied in this respect on the fact that related provisions of the Act expressly directed the EPA to consider the cost of compliance. *Michigan* v. *EPA,* 576 U.S. at 749–54. The Court's assessment of the factors that the EPA needed to consider rested specifically on the relevant provisions of the Clean Air Act. *Id.*

Michigan v. *EPA* therefore does not suggest that other agencies, in implementing other statutory provisions, must consider the same factors. *See Env't Comm. of Fla.* v. *EPA,* 94 F.4th 77, 97–98 (D.C. Cir. 2024). Of equal significance, *Michigan* v. *EPA* left in place the principle that agencies have broad discretion in *how* to consider relevant factors.[6] Even in *Michigan* v. *EPA,* where the Court held that the agency must consider quantifiable costs, the Court declined to hold that the EPA must conduct a particular type of cost-based analysis: ''It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for costs.'' *Michigan* v. *EPA,* 576 U.S. at 759. Here, neither section 11102(c) nor any related statutory provision indicates that the Board must undertake a particular form of analysis when implementing section 11102(c).

Michigan v. *EPA* likewise does not suggest that the Board must speculate on the cumulative impacts of part 1145. As noted above, part 1145 establishes a framework for case-by-case consideration of the ''practicable and in the public interest'' standard in section 11102(c) in the context of a petition for prescription of a reciprocal switching agreement. While the Board expects that the number of petitions under part 1145 will not be significant, the actual number will depend on factors that the Board cannot now predict—factors that, among other things, will include rail carriers' management and operating decisions. Whether the Board grants a given petition will also depend on factors that the Board cannot now predict, such as whether the incumbent carrier had an affirmative defense and whether the carriers could demonstrate undue impairment as provided for under part 1145. Unlike part 1145, the regulatory scheme in *Michigan* v. *EPA* did not involve case-by-case consideration. The future action that the EPA contemplated would have imposed more stringent standards on power plants, beyond the minimum standards that resulted from the EPA's original decision to regulate. *Michigan* v. *EPA,* 576 U.S. at 756–57. *Michigan* v. *EPA* therefore does not suggest that—when a rule establishes requirements that will be implemented only on a case-by-case basis, and when the outcomes in individual cases will turn on variable facts that the agency cannot reasonably predict—the agency must nevertheless speculate on outcomes as a condition to promulgating the rule. In any event, as discussed in Legal Framework, the Board has considered the many positive impacts this regulation will have on the incentive for carriers to provide adequate service and the concerns that may arise from particular switching orders. The Board has found that the qualitative advantages of part 1145 under the RTP outweigh those concerns and, in reaching this conclusion, has appropriately considered the relevant factors.

AAR's reliance on the *2012 Rulemaking*—for the proposition that the Board should conduct a more data-driven analysis here—is similarly unpersuasive. Pending before the Board at that time was a proposal by the National Industrial Transportation League (NITL). NITL's proposal was to provide, by rule, for the prescription of a reciprocal switching agreement when four conditions were met: (1) the shipper was served by a single Class I rail carrier; (2) there was no effective intermodal or intramodal competition for the relevant line-haul movement; (3) there was or could be ''a working interchange'' within a ''reasonable distance'' of the shipper's facility; and (4) switching would be safe and feasible, with no adverse effect on existing service. The proposal would have established conclusive presumptions for when the second and third elements of the four-part test were met. For example, the Board would conclusively presume that there was no effective intermodal or intramodal competition for a movement if the incumbent carrier's associated revenues exceeded its variable costs by a given ratio or if the incumbent carrier had handled a given amount of the relevant traffic. *See 2012 Rulemaking,* EP 711, slip. op. at 4.

The Board found that these conclusive presumptions would tend to make only certain types of shippers eligible for a prescription and, indeed, would result more or less automatically in prescriptions on behalf of those shippers. *Id.* The Board expressed concern that—if those shippers obtained lower rates on a widespread basis, due to the widespread prescription of reciprocal switching agreements on their behalf—then other shippers (those that remained captive) might bear an excessive portion of system costs. *Id.* at 7. The Board therefore sought empirical evidence on three impacts of NITL's proposal: (1) the impact on rates and service for qualifying shippers; (2) the impact on rates and service for captive shippers that would not qualify; and (3) the impacts on the financial condition of the rail industry and on the efficiency of the industry's operations. *Id.* at 2.

In 2016, the Board rejected NITL's proposal, concluding that the proposal would unduly favor certain shippers. The Board decided, as part of the same decision, to propose a different approach to reciprocal switching—an approach that, rather than relying on conclusive presumptions, left the prescription of reciprocal switching agreements almost entirely to case-by-case basis evaluation. *See 2016 NPRM,* EP 711 et al., slip. op. at 13–15, 16, 20. Given the difference in the approach in the 2016 proposal, the Board did not call for empirical evidence on the impact of that proposal.

The Board called for a particular type of analysis in considering NITL's proposal because, due to the nature of the proposal, it seemed likely that the proposal would have a discernible and predictable impact on rates and service. The Board did not call for a comparable analysis in considering the 2016 proposal, which left implementation almost entirely to the Board's discretion on a case-by-case basis. It would have been impractical, in that context, to attempt to predict the impact of the proposal on rates or service. Part 1145

[6] *See Stilwell* v. *Off. of Thrift Supervision,* 569 F.3d 516, 519 (D.C. Cir. 2009) (''The [Administrative Procedure Act] imposes no general obligation on agencies to produce empirical evidence.''); *Sacora* v. *Thomas,* 628 F.3d 1059, 1067 (9th Cir. 2010) (an agency is entitled to rely on its own expertise in promulgating a regulation); *see also Northport Health Servs. of Ark.* v. *U.S. Dep't of Health & Hum. Servs.,* 14 F.4th 856, 874 (8th Cir. 2021) (an agency is entitled to rely on anecdotal evidence in promulgating a regulation).

is like the 2016 proposal in this sense. Under part 1145, the Board will prescribe a reciprocal switching agreement only on a case-by-case basis and only upon making specific determinations under the ''practicable and in the public interest'' standard.

AAR Mischaracterizes the Impact of Part 1145

The Board finds unpersuasive AAR's claim that promulgation of part 1145 would impose significant disadvantages. AAR's list of alleged disadvantages is notably directed at *any* regulation that the Board might promulgate on reciprocal switching, no matter what standards the Board established through that regulation. (*See* AAR Comments 113.) On that level alone, AAR's list of alleged disadvantages is flawed as a basis for challenging promulgation of part 1145; AAR has failed to establish a sufficient nexus between its list of alleged disadvantages and promulgation of part 1145.

Of particular note, a prescription under part 1145 would not ''force'' the incumbent carrier to relinquish the petitioner's shipment to another rail carrier. A prescription under part 1145 would merely establish the legal foundation for the petitioner's shipment to be transferred to the other rail carrier should the shipper elect to take service from that carrier. Whether a transfer actually occurred would be determined by the petitioner, who could choose between competitive options—the services of the incumbent railroad and those of the alternate carrier. Within this regulatory scheme, particularly in light of the numerous protections in the rule, a carrier that desires more certainty, for example with respect to its capital investment decisions, can ensure that it provides high level service, can negotiate suitable contracts when appropriate, and can otherwise work with its customers to avoid regulatory intervention under part 1145.

Nor will part 1145 result in ''sweeping switching requirements,'' given numerous limitations that are built into part 1145. First, under part 1145, the Board will prescribe a reciprocal switching agreement only on behalf of a shipper or receiver that is served by a single Class I rail carrier (or affiliate), only in a terminal area, and only after the incumbent carrier failed to meet one of three performance standards. Second, a prescription would not be available under part 1145 for movements that occur under valid transportation contracts or for movements of exempt commodities. As explained below, a shipper of an exempt commodity would need to obtain revocation of the exemption before obtaining prescription of a reciprocal switching agreement under part 1145. *See* Contract Traffic and Exempt Traffic. As a result of these limitations, only a relatively small portion of all Class I movements are even potentially eligible for a prescription under part 1145. *See* ''Freight Rail Pricing,'' Report to Congressional Committees by the U.S. Government Accountability Office, GAO–17–166 at 5 (December 2016). Third, under part 1145, the Board will not prescribe a reciprocal switching agreement when there is demonstrated infeasibility or undue impairment to a carrier's operation or ability to serve other customers as provided for in part 1145. Fourth, a reciprocal switching agreement that is prescribed under part 1145 would remain in place after its initial duration only to the extent that the carrier failed to meet standards for termination or chose not to seek termination. Fifth, the rule allows incumbent carriers to offer affirmative defenses regarding a failure to meet a performance standard. It not only specifically enumerates multiple affirmative defenses but also allows a carrier to offer additional affirmative defenses on a case-by-case basis. In all, due to the reasonably tailored approach in part 1145, there is no basis to assume that part 1145 will lead to significant adverse overall impacts.

Besides lacking a sufficient nexus to part 1145, AAR's list is flawed on another fundamental level. Underlying the list is a mischaracterization of the nature of reciprocal switching. Under the proper characterization, reciprocal switching is merely an incidental movement to the line-haul movement. When a customer chooses to rely on a reciprocal switching agreement, the incumbent carrier simply moves the customer's shipment to/from the alternate carrier's switching yard for the customer's terminal area rather than to/from the incumbent's yard for that terminal area. These types of movements are routine in the rail industry and are governed by applicable safety and related regulations. In addition, as described throughout this decision, part 1145 includes protections against infeasibility and undue operational impairment. Any change in fuel use or emissions would be minimal; shippers have incentives to select the route that is overall most efficient, which may often be the route that is most fuel efficient. (*See* AAR Comments, 113–21; *id.,* V.S. Orszag & Eilat at 15–17.) By extension, given that an individual prescription is unlikely to impose adverse impacts in these respects, it is unlikely that promulgation of part 1145 will impose meaningful cumulative, adverse impacts in these respects.

The protections that are built into part 1145 also will allow carriers to raise concerns about investments and the ability to attract capital (*see id.,* V.S. Orszag & Eilat at 6), in that the Board would consider arguments in individual cases that a proposed prescription would impair investments to the point of unduly impairing operations or the ability to serve other customers. Limited eligibility under part 1145 (for example, the fact that a prescription would be available under part 1145 only for points of origin or final destination in a terminal area) also protects against substantial, cumulative adverse impacts on carriers' revenues, ability to attract capital, and ability to engage in differential pricing.

Finally, the Board disagrees that the introduction of an alternate rail carrier under this framework, especially when there are sufficient indications that sub-optimal service was provided, could substantially distort the market. (*See, e.g.,* AAR Comments, V.S. Orszag & Eilat at 10 (suggesting that the Board's intervention when service dips below a certain threshold level could result in market distortions); *id.* at 14 (''Cases in which switching has not happened by voluntary agreement require an explanation for why that is the case if switching is indeed the operationally and economically efficient outcome.''); AAR Comments 123.) A voluntary agreement between carriers to transfer a shipment from one carrier to another might enable the carriers to maximize their profits, but that outcome does not necessarily determine whether the carriers have made efficient investment and operating decisions from the perspective of the rail network as a whole.

Levels of the Performance Standards

Part 1145 relies on conservative performance standards—standards that are set below common service expectations and goals—as indicators of where it might be beneficial, consistent with the purposes of part 1145, to introduce an alternate rail carrier via an appropriately defined and scoped reciprocal switching agreement. As described in the *NPRM,* 88 FR at 63900, the Board has used two points of reference in setting the levels of the performance standards in part 1145. The first point of reference is customers' service expectations. Through public hearings in early 2022 and through numerous ''ex parte'' meetings since then, the Board has collected extensive

information about customers' service expectations. *See, e.g.,* Hr'g Tr. 64:5 to 64:9, Apr. 26, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770; Ex Parte Mtg. Summary, Mar. 31, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1). The record shows that, when customers expressed heightened concern about carriers' performance, carriers' performance was falling dramatically.[7] There is also significant consistency among customers in their service expectations.[8] These factors provide sufficient confidence in the context of part 1145, given its specific design and purposes, that the service expectations that customers have identified in these proceedings generally reflect a level of rail service that is needed for customers to conduct their businesses on a reasonably efficient basis. While the performance standards in part 1145 are set with reference to customers' service expectations, the standards are set at or below the level of service that many customers have said is needed to avoid serious disruptions in their operations. A carrier's failure to meet one or more of the performance standards therefore is strongly indicative that the introduction of another carrier (which would allow market forces to address those concerns, subject to appropriate protections) could be beneficial.

The Board's second point of reference in setting the levels of the performance standards is the evidence that the Board collected in 2022 and 2023 in reviewing the performance of Class I rail carriers. That evidence corroborates the service expectation levels that are suggested by customers. The Board began its recent service oversight during the early 2020s, when it was widely recognized that delays and other deficiencies in the transportation of freight were substantially impairing the national economy.[9] Due to the pervasiveness of poor rail service, testimony during a public hearing in March 2022—a hearing in Docket No. EP 711 (Sub–No. 1) that was meant to explore competitive access on a more general level—often turned to customers' need for better service. *See, e.g.,* Hr'g Tr. 105:4 to 105:17, Mar. 15, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1) et al. At roughly the same time as that hearing, the Board received several reports—including from the Secretary of Agriculture, U.S. Senator Shelley Moore Capito, and stakeholders—about the serious impact that poor service was having on rail customers. *See Urgent Issues in Freight Rail Serv.,* EP 770, slip op. at 2 n.1 (STB served Apr. 7, 2022) (citing Honorable Thomas J. Vilsack, USDA Letter, Mar. 30, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1); Letter from Honorable Shelley Moore Capito, to Board Members Martin J. Oberman, Michelle A. Schultz, Patrick J. Fuchs, Robert E. Primus, & Karen J. Hedlund (Mar. 29, 2022), available at *www.stb.gov* (open tab ''News & Communications'' & select ''Non-Docketed Public Correspondence''); Letter from NGFA to Board Members Martin J. Oberman, Michelle A. Schultz, Patrick J. Fuchs, Robert E. Primus, & Karen J. Hedlund (Mar. 24, 2022), available at *www.stb.gov* (open tab ''News & Communications'' & select ''Non-Docketed Public Correspondence''); Letter from SMART–TD to Chairman Martin J. Oberman (Apr. 1, 2022), available at *www.stb.gov* (open tab ''News & Communications'' & select ''Non-Docketed Public Correspondence'')).

These concerns led the Board to establish a new docket, *Urgent Issues in Freight Rail Service,* Docket No. EP 770, and to hold a hearing in that docket in April 2022. Through that hearing and subsequent meetings, the Board sought to understand customers' need for service and to examine decisions by rail carriers that had contributed to carriers' failure to meet that need. *See Urgent Issues in Freight Rail Serv.,* EP 770 (STB served Apr. 7, 2022). Shortly after the April 2022 hearing, the Board began to collect data on Class I carriers' performances both in completing line hauls and in providing local service on a timely basis. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (STB served May 6, 2022); *see also NPRM,* 88 FR at 63904.

The evidence that the Board collected reveals that Class I carriers' system-average performances varied significantly from time period to time period and from carrier to carrier during the early 2020s. *NPRM,* 88 FR at 63903–04, 63906. The evidence does more, though, than reveal carriers' faltering and erratic service during those years. It identifies the level of service that Class I carriers themselves set as their short-term performance goals to bring them out of the crisis period.[10] For example, the 70% reliability standard in part 1145 is set above the average level of Class I carriers' system-wide performances during the early 2020s yet generally below the carriers' own performance targets. This evidence reinforces the conclusion that the reliability standard is set at a modest level that balances the public interest in adequate rail service with a measured approach to regulatory intervention. Application of the reliability standard would provide a reasonable basis to conclude that intervention here—the prescription of an appropriately defined and scoped reciprocal switching agreement—could be beneficial (provided that the affected carriers did not demonstrate an affirmative defense, infeasibility, or undue impairment to their ability to serve other customers).

The same is true of the service consistency standard in part 1145. It is clear from the carriers' reports that a 20% increase in transit time can indicate the presence of significant service issues. In Docket No. EP 770 (Sub–No. 1), the Board required BNSF, CSXT, NSR, and UP to report a target system velocity for the period coming

[7] *See e.g.,* Hr'g Tr. 544:21 to 545:4, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770. The evidence underscores the critical need for improved rail service reliability. When the Board held its hearing in EP 770, CSXT and UP had 69% and 63% OETA for manifest traffic, respectively. *See* CSXT Performance Data at Row 163, May 18, 2022, and UP Performance Data at Row 182, May 18, 2022, available at *www.stb.gov/reports-data/railservice-data/.* In addition, according to 10–K filings made with the U.S. Securities and Exchange Commission (SEC), CSXT had carload trip plan compliance of 64% in the 2022 fiscal year, and UP had manifest/automotive car trip plan compliance of 59% in the 2022 fiscal year, but 71% in fiscal year 2020. These SEC filings are available at *www.sec.gov* (open tab ''Filings'', select ''Search for Company Filings'', and then select ''EDGAR full text search'').

[8] (*See* Coal. Ass'ns Comments 22; LyondellBasell Comments 2; DCPC Comments 6–8; NGFA Comments 12; PRFBA Comments 7; GISCC Comments 5; AFPM Comments 8–9; API Comments 3–4; NSSGA Comments 6–7; EMA Comments 6 PRFBA Comments 6–7 (each seeking a reliability standard as defined in the *NPRM* of at least 70%); *see also* Coal. Ass'ns Comments 32; ACD Comments 5; NGFA Comments 12–13; Olin Comments 6 (each seeking a service consistency standard where a failure would result from an increase of 15% or less in transit time); *see, e.g.,* Coal. Ass'ns Comments 5; NSSGA Comments 9; AFPM Comments 12; EMA Comments 8; PRFBA Comments 9; DCPC Comments 10; API Comments 5; NGFA Comments 13; FRCA/NCTA Comments 2 (each seeking an ISP standard of 90%).)

[9] *See, e.g.,* Fed. Reserve Bank of Cleveland, Matthew V. Gordon and Todd E. Clark, ''The Impacts of Supply Chain Disruptions on Inflation,'' Number 2023–08 (May 10, 2023), *www.clevelandfed.org/publications/economic-commentary/2023/ec-202308-impacts-supply-chain-disruptions-on-inflation.*

[10] *See, e.g.,* BNSF Status Report, Interim Update 7, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (Merchandise OTP = 65% and ISP (referred to as ''Local Service Performance'') = 91%); CSXT Status Report Interim Update 3, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (Manifest TPC w/in 24 Hours = 82% and ISP/FMLM = 87%); NSR Status Report, Interim Update 5, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (Merchandise TPC = 82% and ISP (referred to as Local Operating Plan Adherence) = 78%); and UP Status Report, Interim Update 4, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1) (TPC Manifest = 70% and ISP (referred to as FMLM) = 91%). *See also NPRM,* 88 FR at 63901 (the carriers recognized that their performance during the early 2020s fell below reasonable service expectations).

out of the crisis of the early 2020s.[11] The data that the Board has collected on train speed informs the reasonableness of the service consistency standard, even though that standard measures increases in transit time rather than decreases in train speed.[12] For each carrier, a 20% drop from the carrier's target velocity [13] would correspond to service as bad as or worse than the carrier's service during what clearly were highly problematic periods on the network, as indicated by average train speeds that the carriers reported for those periods. *See United States Rail Service Issues—Performance Data Reporting,* EP 724 (Sub–No. 5) and data submitted to the Board pursuant to 49 CFR part 1250.[14] Even where velocity was reduced by less than 20% from the carrier's target velocity, the carriers recognized that the reduction in velocity imposed significant burdens on shippers.[15]

This evidence is corroborated by testimony of shippers in Docket No. EP 770, which shows that shippers were complaining about drops in velocity of less than 20% during the early 2020s.[16] When a shipper uses railcars that the shipper supplies itself, any significant reduction in the velocity of those cars through the system means that the cars are substantially less productive, resulting in adverse impacts on the shipper's costs, revenues, or both. *See, e.g.,* Hr'g Tr. 551:6 to 551:14, 568:12 to 569:9, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770. Shippers that rely on carrier-supplied cars may not have the same concern about fleet productivity but, as with other shippers, would still be impacted by the inventory cost of undelivered freight. A significant reduction in velocity might also be associated with reduced availability of carrier-supplied cars, to a shipper's detriment.

In all, record evidence indicates the conservative nature of the service consistency standard in part 1145, which reserves federal intervention for an increase in transit time of more than 20%. In the absence of a proven affirmative defense, such an increase in transit time provides sufficient indicia of service problems that are inconsistent with meeting customer and carrier expectations. In effect, such an increase points sufficiently to the potential value of introducing an additional line haul carrier.

To the extent that some commenters argue that the performance standards in part 1145 might be overinclusive, *i.e.,* counting as a ''failure'' service that would not prove to be inadequate in the market, the public interest is protected both by the provisions in part 1145 for consideration of factors that could work against a prescription and by the specific and limited nature of regulatory intervention under part 1145. Regulatory intervention—again, the prescription of an appropriately defined and scoped reciprocal switching agreement—would give the petitioner a service option when there is a factual predicate for concluding that intervention is warranted. Petitioners have the incentive to select, over the duration of the prescribed agreement, the more efficient and responsive carrier. To the extent that the performance standards might be underinclusive, counting as a ''pass'' service that would have proven to be inadequate in the market, the public interest is protected by the opportunity for the affected shipper or receiver to seek a prescription under the Board's other regulations. In all cases, the public interest is protected not only by the performance standards themselves, but also by the opportunity that carriers would have, on a case-by-case basis, to demonstrate an affirmative defense, infeasibility, or undue impairment to their ability to serve other customers. By ensuring that application of the performance standards is not the end of the inquiry, part 1145 precludes a prescription when sufficient countervailing public interest has been

[11] The target system velocities that the carriers reported are as follows: BNSF—Overall Velocity = 26 mph (BNSF Status Report, Interim Update 7, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*); CSXT—(STB LOR Velocity = 24.2 mph (CSXT Status Report Interim Update 3, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*); NSR—System Velocity = 22 mph (NSR Status Report, Interim Update 5, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting*); and UP—Car Velocity = 207 (Status Report, Interim Update 4, Dec. 2, 2022, *Urgent Issues in Freight Rail Serv.—R.R. Reporting* (note that UP reports its velocity as measuring the average daily miles a car moves on UP's network)).

[12] Train speed is based on the time that it took a train to cover the distance *between* two terminals. *See* 49 CFR 1250.2(a)(1). A reduction in train speed means that the train sat idle for a longer time between terminals, without saying anything about how long the train sat idle at a terminal. In contrast, an increase in transit time could arise out of increased delays at a terminal and/or increased delays between terminals. It is reasonable to conclude therefore that, during periods when a carrier's average train speeds were reduced by a significant percentage, transit times over the carrier's system likely increased by the same percentage or a higher percentage.

[13] The Board recognizes these velocity figures are system averages, and it explains below how its service consistency standard accounts for variability across lanes.

[14] For example, a 20% drop for BNSF from its target would be 20.8 mph. The lowest average train speed BNSF has experienced since reporting began under 49 CFR part 1250 occurred in the March 29, 2019 reporting week with a system velocity of 22.3 mph. This was due to extreme flooding in the Midwest at that time. *See* ''Railroads' flood-ravaged Midwestern tracks trigger emergency declaration,'' Progressive Railroading (Mar. 21, 2019), *www.progressiverailroading.com/class_is/news/Railroads-flood-ravaged-Midwestern-tracks-trigger-FRA-emergency-declaration—57161.* Even during the service problems of the early 2020s, BNSF's lowest average train speed was 24 mph—a drop of only 7.69% from BNSF's target velocity. For CSXT, a 20% drop from its target would be 19.36 mph. The lowest average train speed CSXT has experienced since reporting began under 49 CFR part 1250 occurred in the August 16, 2017 reporting week with a system velocity of 18.4 mph. The Board held a hearing on CSXT's service issues at this time. *See Public Listening Session Regarding CSXT's Rail Serv. Issues,* EP 742 (STB served Aug. 24, 2017). A 20% drop for NSR from its target would be 17.6 mph. NSR had an average train speed of 17.6 mph in the November 5, 2021 reporting week and 17.0 mph in the November 24, 2021 reporting week. The 17.0 mph is the lowest recorded average train speed for NSR since reporting began. For UP, its average train speed was 24 mph for the reporting week of May 5, 2023. A 20% drop from UP from this level would be 19.2 mph. The lowest average train speed that UP has experienced since reporting began in under 49 CFR part 1250 occurred in the March 29, 2019 reporting week with a system velocity of 21.3 mph. As with BNSF, this low velocity was due to extreme flooding in the Midwest at that time. Even during the service problems of the early 2020s, UP's lowest average train speed was 22.8 mph—a drop of only about 5% from UP's target velocity. To access data filed pursuant to 49 CFR part 1250 visit *www.stb.gov/reports-data/rail-service-data/* (in table under ''Individual Carrier Performance Data'' select the individual railroad; then click the most current hyperlink; then filter by date, average train speed, and carrier).

[15] For example, during the week of April 15, 2022, UP had an average train speed of 22.8 mph—only 5% below UP's target of 24 mph. *See id.* During the Board's hearing in April 2022, UP acknowledged that even that reduction in velocity represented a failure to meet reasonable public demand. *See* testimony of Eric Gehringer VP of Operations at UP at the Apr. 27, 2022 Urgent Issues hearing and Testimony of Steve Bobb Chief Marketing Officer at BNSF Hr'g Tr. 805:8–813:19, and 813:11–17, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (''We know we are not currently meeting our customer's expectations. I want to reinforce our commitment to restoring network velocity so that we can deliver the quality of service our customers have come to expect, and position ourselves to grow with our customers, long-term.'') *See also* UP's 10–K filing with the SEC, which is available at *www.sec.gov* (open tab ''Filings'', select ''Search for Company Filings'', and then select ''EDGAR full text search'').

[16] At the April 2022 hearing in Docket No. EP 770, several shippers testified about the burdens associated with increased transit times. *See, e.g.,* Hr'g Tr. 73:7–13, Apr. 26, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (Cargill testifying that rail service deterioration since the fourth quarter of 2021 resulted in a 15% increase in transit time for its private fleet); Hr'g Tr. 364:18 to 367:15, Apr. 26, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (increased transit days resulting from rail service issues ''has had a huge financial impact'' on Molson Coors); Hr'g Tr. 551:6–8, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (NITL testifying that ''transit times in the first quarter this year have increased by 15% over pre-pandemic levels due to crew and power shortages''); Hr'g Tr. 558:12–18, Apr. 27, 2022, *Urgent Issues in Freight Rail Serv.,* EP 770 (ASLRRA testifying that, since the fourth quarter of 2020, one member company ''experienced significant deterioration in rail service'' including transit times that increased by six days and variability of transit that made it ''impossible for shippers to plan their business'').

demonstrated. In addition, as discussed in Legal Framework, the Board's paramount interest in establishing an expeditious process for addressing service-based reciprocal switching petitions and fostering a sound rail transportation system is best supported by a process that does not require protracted litigation.

Carriers' Objections

According to Class I rail carriers, the levels of the performance standards in part 1145 are not adequately supported by record evidence. The carriers allege several errors in this respect. First, according to AAR, the levels of the standards were inappropriately derived from data in Docket No. EP 770 (Sub–No. 1) that shows system-average performance. According to AAR, system-average performance does not necessarily indicate the level of performance that constitutes adequate service over a given lane or at a given time. (AAR Comments 46–50; *see also* CPKC Reply at 2, 8; R.V.S. Workman & Nelson at 19–23.) In addition, according to AAR, system-average performance does not distinguish between common carriage service and contract service. AAR suggests that this distinction is relevant because, according to AAR, contract customers might have agreed to different levels of service. (AAR Comments 9, 49–50; V.S. Orszag/Eilat 7, 21–24; *see also* CN Comments 5–6; CSXT Comments 14–15.)

Second, according to UP, it is inappropriate to rely on the data in Docket No. EP 770 (Sub–No. 1) because UP used one-week periods to measure its performance (*i.e.,* UP reported for each week the percentage of shipments that it delivered on time during that week). UP asserts that a carrier's level of performance over one-week periods cannot reasonably be used to extrapolate a reasonable level of performance over 12-week periods as provided for in part 1145. (UP Comments 4–5.)

Third, according to UP, it is problematic to base the levels of the performance standards on the data in Docket No. EP 770 (Sub–No. 1) because the carriers did not necessarily report their performance in the same way that compliance with the performance standards in part 1145 will be measured. For example, UP considered itself to have succeeded in completing a line haul on time if UP met its original trip plan as adjusted to account for delays encountered en route. In contrast, under part 1145, a rail carrier will be considered to have succeeded only if it came within 24 hours of the original estimated time of arrival, without adjustment for delays encountered en route. UP implies that, due to how carriers reported their performance in Docket No. EP 770 (Sub–No. 1), the data there overstates actual performance as compared to how performance will be measured under part 1145. (UP Comments 6.)

Finally, in its attempt to show that the performance standards in part 1145 are not adequately supported, AAR conducted a study of transit times. AAR submitted the study in its reply comments, as a result of which other parties did not have the opportunity to comment on the study. The study was based on transit times for all movements over Class I rail carriers from 2020 to 2023, with some exclusions. (AAR Reply, R.V.S. Baranowski & Zebrowski at 5–6.) The study purported to show that a year-over-year decrease in velocity of 20% would capture about 53.9% of the movements in 2020, about 76.6% of the movements in 2021, about 82.5% of the movements during 2022, and about 65.5% of the movements during 2023. (*Id.* at 7.) AAR concludes, based on its study, that it is typical for shipments to experience increases (and decreases) in transit time from one year to the next and that therefore the transit time standard does not capture only inadequate service. (*Id.* at 4–5.) AAR adds that its analysis showed no difference between consistency in serving captive customers and consistency in serving other customers. AAR concludes on that basis that the prescription of a reciprocal switching agreement would not necessarily cure an increase in transit time. (*Id.* at 5–6.)

The Board's Assessment

The Board rejects each of the foregoing arguments. First, contrary to carriers' suggestion, it is reasonable for system-average performance to inform the levels of the performance standards in part 1145. In the Board's experience, system-average performance is a strong indicator of the capability of the rail system to meet the public need for transportation service. While there is heterogeneity in lanes and traffic, and while variations can impact different geographies and businesses differently, the specific performance measurements under part 1145 largely factor in these differences. For example, the reliability standard in part 1145 is based on the estimated time of arrival that the carrier originally predicted. In setting the OETA, the carrier can account for the characteristics of the given lane (and, by extension, the characteristics of the shipper's traffic [17]) and likely delays. As a result, this type of measurement essentially controls for lane and traffic characteristics, so service over one lane is no more likely than service over another lane to fail the reliability standard. The consistency standard in part 1145 is based on how long it took the carrier to deliver the shipment over the same lane and over the same 12-week period during the previous year. This approach essentially controls for differences between service over a lane that has a longer-than-average transit time and service over other lanes.

A similar analysis applies to seasonal variations in rail service. For example, because a railroad can account for likely delays in setting OETA, service in one season is no more likely than service in another season to fail the reliability standard. In the case of an extreme weather-related event, that event could provide an affirmative defense to the extent that the event could not reasonably be predicted or mitigated. As for the fact that the system-wide data in Docket No. EP 770 (Sub–No. 1) included service to contract customers, the Board finds that detail to be irrelevant. In the Board's experience, most contracts do not establish standards for quality of service and, in any event, the EP 770 data does not establish whether carriers were providing service consistent with any contractual commitments that might have applied.

Second, contrary to UP's suggestion, it is reasonable to use system-average performance as reported for one-week periods as the basis for assessing performance over a 12-week period. The Board has accounted for any volatility that might have resulted from week-to-week reporting by using records of system-average performance over the course of several years and by relying heavily on customers' reasonable service expectations and carriers' performance targets.

Third, the ''apples to oranges'' problem that UP describes is both substantially overstated and ultimately irrelevant. As would be expected, in Docket No. EP 770 (Sub–No. 1), railroads that adjusted their original trip plans for delays that they encountered en route appeared to perform better than carriers that did not make those adjustments. The incremental difference between the two groups of rail carriers

[17] Under the definition of the term ''lane,'' the Board states that ''shipments of the same commodity that have the same point of origin and the same designated destination are deemed to travel over the same lane, regardless of which route(s) the rail carrier uses to move the shipments from origin to destination.'' 49 CFR 1145.1. Through this definition, the Board is eliminating potentially flawed comparisons between traffic of different characteristics (*e.g.,* differences by commodity) and between traffic with different origin-destination pairs.

tended to be fairly constant.[18] As a result, the Board can reasonably discern what system-average performance would have been across the industry if all carriers had reported their performance on the same basis.

Of equal importance are the details of the reliability standard in part 1145. A carrier would fail to meet the reliability standard only if, over a 12-week period, the carrier fell below 70% in meeting its OETA plus or minus 24 hours. The general range of the reliability standard recognizes that, in the ordinary course of rail service, a shipment might encounter a certain number of unanticipated delays en route. The specific percentage (70%) provides an additional cushion between ordinary service and the possibility of regulatory intervention, as suggested by the data that the Board collected in Docket No. EP 770 (Sub–No. 1)—data that was largely collected during the major service problems of the early 2020s. The Board reasonably expects that rail service in the ordinary course will be better than rail service during that period. The 24-hour grace period provides even more cushion. In effect, the reliability standard in part 1145 provides for regulatory intervention on a conservative basis. The 70% standard is not as conservative as the 60% standard that the Board inquired about in the *NPRM* but—in the Board's judgment, based on comments and further analysis—provides appropriate ground for considering whether to prescribe a reciprocal switching agreement. *See* Performance Standards.

Finally, AAR's study of transit times does not persuade the Board that the performance standards in part 1145 would capture typical rail service. One of the glaring deficiencies in AAR's study is that it compared transit times from year to year during the early 2020s, when rail service was faltering and erratic. It would be unreasonable to conclude that increases in transit times during that period reflected variations in transit times that might be expected in the ordinary course of rail operations; if the Board were to accept AAR's study, the Board would implicitly and unreasonably conclude that the years that AAR used in its study provide the proper baseline for assessing changes in transit time.

Performance Standards

Service Reliability: Original Estimated Time of Arrival

As discussed in the *NPRM,* the proposed service reliability standard would measure a Class I rail carrier's success in delivering a shipment near its OETA, *i.e.,* the estimated time of arrival that the rail carrier provided when the shipper tendered the bill of lading for shipment. *NPRM,* 88 FR at 63903. The OETA would be compared to when the car was delivered to the designated destination. *Id.* Application of the service reliability standard would be based on all shipments that the shipper tendered to the carrier over a given lane over 12 consecutive weeks. *Id.*[19]

Using data that Class I carriers provided in Docket No. EP 770 (Sub–No. 1) as a reasonable starting point, the agency proposed a reliability standard of 60%, where a carrier would meet the standard if, over a period of 12 consecutive weeks, the carrier delivered at least 60% of the relevant shipments within 24 hours of the OETA. *Id.* at 63903–04. The Board also suggested that the reliability standard could be set by rule to escalate one year after the rule took effect. *Id.* at 63904. The Board sought comment on the percentage at which the reliability standard should be set, what the applicable grace period should be, and other matters relevant to the reliability standard. *Id.* at 63903–04.

Reasonableness of Using OETA

CPKC questions whether OETA is a meaningful reference point. According to CPKC, nearly half of its shipments arrive a day or more after the OETA. CPKC claims that it is infeasible to try to provide a more accurate OETA because, according to CPKC, there are too many routine factors that contribute to variations from the company's original trip plan. (*See* CPKC Reply, R.V.S. Workman & Nelson 15–16.)

Contrary to CPKC's suggestion, it is reasonable to use OETA data over a 12-week period to provide indicia of the overall reliability of a carrier's service for purposes of part 1145. Rail carriers bring their considerable expertise to the task of developing OETAs. Carriers typically study the factors that affect transit time over a lane, account for those factors through seasonal or other appropriate tolerances, and apply those tolerances in setting OETAs. CPKC, which is the only carrier to question use of OETA, has failed to convince the Board that the company cannot adopt a similar approach.

OETA Percentage

Many shipper organizations ask the Board to set the reliability standard (when based on a 24-hour grace period) at more than 60%. For example, the Coalition Associations ask the Board to set the percentage at 70%. (Coal. Ass'ns Comments 22.) They claim that the 70% threshold is attainable, is more consistent with Class I carriers' own expectations of the quality of service that they should provide, and better reflects the threshold at which poor service reliability has significant operational consequences for rail customers. (*Id.* at 24.)

LyondellBasell urges the Board to adopt the 70% standard proposed by the Coalition Associations. (LyondellBasell Comments 2.) It asserts that the higher standard is more in line with the level of service customers require to conduct their business. (*Id.*) LyondellBasell notes that, when railroads fail to deliver shipments close to the OETA, it incurs: (1) increased costs from diverting traffic to other sub-optimal modes of transportation; (2) lack of products at distribution facilities, which in turn has required LyondellBasell to use inefficient distribution sites and means of transportation; and (3) reduced production rates, shutdowns, or both for its own and its customers' facilities. (*Id.*) Even at reliability levels at or above 70%, according to LyondellBasell, the company incurs a substantial burden on its operations. (*Id.*) For example, because most polymer plants produce materials coming off the production line directly into railcars as the storage receptacle, LyondellBasell will likely have already reduced its production rates at such polymer sites. (*Id.* at 2–3.)

Other shipper groups ask the Board either to set the reliability standard at more than 70% at the outset or eventually to escalate the standard to above 70%. (DCPC Comments 6–8 (80% in year 1 and 90% in year 2); NGFA

[18] For example, the Board observes a reasonably strong linear association between UP's reliability data and BNSF's reliability data as reported in Docket No. EP 770. UP and BNSF operate in similar geographical environments, with approximately the same route miles and employment levels. In reporting reliability, UP adjusted its estimated time of arrival to reflect delays that UP encountered en route when those delays were not caused by UP. (*See* UP Comments at 6.) BNSF did not do so. During 85 weeks of the reporting period (May 13, 2022 to December 22, 2023), there was a correlation of 0.55 between reliability data for UP and reliability data for BNSF. The magnitude of the difference between the two carriers was fairly constant after adjusting for natural shocks (such as weather-related incidents) that each carrier may individually have experienced; for 55 of the 85 weeks of the difference in the two carriers' reliability data fell within a 2.9% to 12.1% range. Overall, UP had 77 weeks of better performance than BNSF. The consistency of the difference indicates that the difference was due to the difference in how the two carriers reported their reliability data.

[19] Under part 1145, once a carrier has communicated an OETA to a customer, that time will not be changed to reflect any subsequent change to the original trip plan of the car, no matter the cause of that change. As a result, a carrier will be deemed to miss the OETA for cars that are delayed due to a cancelled or annulled train if cars are not delivered within 24 hours of the original estimated time of arrival.

Comments 12 (supports ''closer to 100%''); PRFBA Comments 7 (80%); GISCC Comments 5 (80%); AFPM Comments 8–9 (65% in year 1, 70% in year 2, 75% in year 3, and 80% in year 4).) API argues that the second-year standard should be set at 80% to 85% and that, even at higher levels of performance by rail carriers, there are adverse impacts on the public interest. (API Comments 3–4.) API adds that service levels affect labor decisions made by the shipper, and that late shipments result in lost production time; overtime labor; increased transportation costs, demurrage, administrative burden, storage costs, and private railcar fleets; and loss of business opportunities. (*Id.* at 4.) NSSGA and EMA, which seek a reliability standard of 80% or higher, claim that at 60% their members would need to curtail operations or ship by truck. (NSSGA Comments 6–7; EMA Comments 6.) EMA adds that, for some of its members, trucking is not an option at all. (EMA Comments 6.)

Railroads oppose the 60% reliability standard as well as any other reliability standard, arguing that there is insufficient record evidence to support such a standard. Railroads otherwise do not comment on the level at which the reliability standard should be set. As explained in the Analytical Justification section above, however, the Board has sufficient justification for setting its standards based on credible evidence of reasonable service expectations and evidence that the Board has collected since 2022 in investigating the performance of Class I rail carriers. AAR adds that what a customer perceives as service that best meets its individual ''needs and requirements'' may run counter to the interests of other shippers and the health of the overall network that serves many shippers. (AAR Reply 39.) According to AAR, a standard that bypasses consideration of other shippers or the network as a whole—or the question whether a switch would remedy the shipper's service concerns—would not be consistent with the approach Congress directed. (*Id.*)

The Board will set the reliability standard at 70%.[20] Although several shippers support a higher OETA standard based on the argument that it would be ''attainable'' by the railroads, that is not the basis for the Board's decision here. The reliability standard, like the other metrics, grows out of shippers' reasonable service expectations, carriers' performance records, and carriers' performance goals without specifically rendering judgment on the level of reliability that rail carriers might in theory attain. As discussed above, many shippers have commented that a reliability standard of 60% is too low, as service even above that level exposes shippers to significant problems, including increased costs and production delays. A number of shipper organizations indicate that their members are impacted by poor service even when the carrier provides service above 60% reliability (measured as OETA + 24 hours). For example, PRFBA explains:

> [T]hat 60%, and indeed even 70%, represent far too low a bar for service reliability. Under the proposed rule, even those carriers who meet the standard with 60% nearly on-time performance would force some PRFBA members to shut down their plants and still others frantically to seek out alternative transport by truck. There are not enough trucks or truck drivers to keep up with that demand, to say nothing of the greater expense passed onto the consumer and drastically greater polluting emissions caused by trucking goods as compared with rail shipping. Moreover, for some PRFBA members, trucking goods simply is not an option altogether. Also, all PRFBA members suffer from the underutilization of their railcars whenever service is poor.

(PRFBA Comments 6–7.)

The Board specifically requested that shippers identify the point at which there are negative business impacts from poor reliability in rail service, *see NPRM,* 88 FR at 63904, and the information provided by shippers supports a finding at this point that a 70% level of reliability is reasonable as a reflection of service expectations.

The 60% standard in the *NPRM* was also a conservative proposal. As the Board explained, much of the underlying Docket No. EP 770 (Sub–No. 1) data in the *NPRM* reflected a challenging service period. Indeed, overall on-time performance for BNSF, CSXT, NSR, and UP had fallen from a pre-pandemic average of 85% in May 2019 to just 67% in the last week of May 2022, as crew shortages plagued rail service. *See* Stephens, Bill, Data Reported to Federal Regulators Reveal Extent of Deterioration in Rail Service—Trains (June 9, 2022). The Board found that 60% was a reasonable potential starting point for determining the reliability standard because it reflected a level that even the carriers acknowledged was far below expectations, but the Board also proposed an alternate standard that would escalate to 70% one year after the effective date of the rule, reflecting the view that service during that challenging time might not be the appropriate long-term measure for service performance for purposes of part 1145. Not only is that view supported by shippers' comments detailing the negative impact of service even above the 60% reliability standard, Docket No. EP 770 (Sub–No. 1) data from last December does in fact show that carriers are performing better. Indeed, data for the week ending December 22, 2023, indicates overall on-time performance of the four carriers averaging 80.1%. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub–No. 1), slip op. at 4 (STB served Jan. 31, 2024). Considering this data, the comments from shippers about negative impacts to their businesses, and the overall framework in which failure to meet a service standard acts as a mechanism—with appropriate protections—for switching (as opposed to a different, more intrusive, or more severe form of regulatory intervention), a 70% standard is therefore reasonable.

A 70% standard is also consistent with railroads' stated, near-term performance goals as reported in Docket No. EP 770. As noted in the *NPRM,* BNSF, CSXT, NSR, and UP each identified a target for its systemwide weekly percentage of manifest railcars placed within 24 hours of OETA (as reported in Docket No. EP 770 (Sub–No. 1)) that the carrier would meet beginning May 2023, and these targets average approximately 74%. *NPRM,* 88 FR at 63903. The 70% reliability standard in the final rule remains below that average [as well as the average in more recent Docket No. EP 770 (Sub–No. 1) reports]. *See* Analytical Justification.

While the current record supports a finding that a reliability standard of 70% is reasonable, the Board declines at this time to set the reliability standard at a higher level or to provide by rule for escalation of that standard as requested by some shipper interests. The Board concludes that the better course of action is to gain experience under the 70% standard and gauge the effectiveness of part 1145 before considering whether to raise the standard above 70%.

Observation Period

Several shipper groups ask that a petitioner be allowed to rely on less than 12 weeks of data. (EMA Comments 6 (six weeks); PRFBA Comments 7 (six weeks); GPI Comments 3 (eight weeks); GISCC Comments 5 (four to six weeks).) According to NSSGA, which requests a six-week period, 12 weeks of bad service would have a ''devastating

[20] As discussed later in this decision, the 70% reliability standard will apply not only to cars that arrive more than 24 hours after the OETA but also those that arrive more than 24 hours *earlier* than the OETA.

impact'' on NSSGA members' operations. (NSSGA Comments 7.) Similarly, AFPM asserts that allowing poor service to continue for even six weeks would severely hurt refiners and petrochemical manufacturers, causing curtailments in output and even shutdowns. (AFPM Comments 9.) AAR responds that the record before the Board provides no basis to conclude that any of those changes would help the Board accurately and effectively identify situations where a service inadequacy exists and warrants regulatory intervention. (AAR Reply 41.) According to AAR, such changes would significantly complicate the proposed rule's operation and risk generating a large number of false positives. (*Id.*)

The Board will use an observation period of 12 weeks as proposed in the *NPRM.* Using a 12-week observation period means that the OETA standard will not be triggered by a service problem of relatively short duration, unless the problem is of such severity that it nevertheless results in failure to meet the 70% standard over the 12-week period. This approach will tend to reserve regulatory intervention under part 1145 for cases in which there had been a more chronic problem in serving the petitioner. A chronic but not necessarily acute problem is the type of problem that, compared to other types of service problems, is more likely to benefit from the introduction of rail-to-rail competition as provided for in part 1145. For acute service problems, shippers may seek relief under parts 1146 and 1147, without waiting for a 12-week observation period to end.

NSR recommends measuring performance under the reliability standard over quarters of the calendar year, rather than over a rolling 12-week period. According to NSR, using a rolling 12-week period would allow shippers to petition for a prescription based on performance that did not reflect the carrier's typical performance or indicate an ongoing service problem. (NSR Comments, V.S. Israel 3, 14; *see also* UP Comments 19 (encouraging an approach based on the last calendar quarter to mitigate the burden of data production).) The Board declines to adopt NSR's recommendation. To use quarters of the calendar year as the observation period would make the standard less likely to identify service for which the public interest would be served by introducing an alternate rail carrier (*e.g.,* a carrier could miss the OETA for 22 weeks and would not fail the standard if half of those weeks were in one quarter and the other half were in the next quarter).

The Definition of OETA

AAR notes that the definition of OETA in the *NPRM* differs from the definition of OETA in the demurrage setting and asserts that the definition in part 1145 should conform to the definition that is used for purposes of demurrage. (AAR Comments 51–52.) Under proposed § 1145.1, OETA is provided upon tender of a bill of lading. *NPRM,* 88 FR at 63912–13. For purposes of demurrage billing, OETA is provided after the shipment is physically released to the carrier or received by the carrier in interchange and is based on the first movement of the origin carrier. *See* 49 CFR 1333.4(d)(1). AAR claims that having two different definitions creates risk of confusion and would lead to duplicative efforts. (AAR Comments 51–52.) Individual railroads also call for OETA to be measured at time of release. (CN Comments 45; UP Comments 6.)

The Board will not change the definition of OETA under part 1145. The demurrage OETA definition, while appropriate for part 1333's ''minimum'' informational purposes, does not meet the goals of this rulemaking. As noted by the Coalition Associations, to use the OETA that is based on the carrier's first movement of the shipment rather than tender of the bill of lading would not capture a carrier's delay in picking up a car that had been tendered for shipment. (Coal. Ass'ns Reply 29.) And, if the carrier failed the reliability standard due to the shipper's delay in releasing the car, that could be raised as an affirmative defense. *See* Affirmative Defenses.

Delivery at Interchange

In the *NPRM,* the Board proposed that, in the case of interline service where the shipment is transferred between line-haul carriers at an interchange en route, the shipment is deemed to be delivered when the receiving carrier acknowledges receipt of that shipment. *NPRM,* 88 FR at 63904, 63912. Several commenters raised concerns with this approach.

CN asserts that this approach fails to account for cases in which the shipment arrived at the interchange but the receiving carrier is unable to accept the shipment. (CN Comments 48–49.) UP similarly asserts that a car should be deemed to be delivered upon ''delivery in interchange.'' According to UP, ''delivery in interchange'' occurs when a railroad moves the car past a designated automatic equipment identification reader or places the car on a designated interchange track, depending on the specific interchange that is involved. (UP Comments 7.) UP claims that a car can potentially sit on an interchange track for several days after delivery and before the subsequent carrier acknowledges receipt, when the matter is out of the delivering carrier's control. (*Id.; see also* API Comments 4 (suggesting that the gap between delivery and receipt can last for several hours).) The Coalition Associations respond that no carrier offers a practical solution to address concerns about a gap, but that AAR's own rules for assigning responsibility for car hire provide a clear and appropriate framework for determining when interchange occurs, including in situations where the receiving carrier causes an interchange delay. (Coal. Ass'ns Reply 43.)

The Board will define ''delivery'' at the interchange using UP's proposal. Although the Board suggested that in case of a dispute about a gap at the interchange it would be guided by interchange rules, *NPRM,* 88 FR at 63903, UP's approach is superior. While the car hire data is more accurate, it is more difficult to retrieve and can only be used after any disputes are resolved. In contrast, Delivery in Interchange data is routinely reported to the shipper on a real time basis. As such, based on UP's approach, a car will be deemed delivered at an interchange when it is moved past a designated automatic equipment identification reader or placed on a designated interchange track, depending on the specific interchange location involved. However, if there are disputes about the accuracy of a delivery time by either the customer or the receiving railroad, the Board can use car hire accounting records to decide the issue.

Delivery at Customer's Facility

For deliveries to a customer's facility, the Board proposed to define ''delivery'' as when a shipment either is actually placed at the designated destination or, in given circumstances, is constructively placed at a local yard that is convenient to the designated destination. *NPRM,* 88 FR at 63912.

UP notes that for traffic it delivers to customer facilities, UP's Trip Plan Compliance (TPC) measure for manifest traffic measures compliance based on when the car is delivered to the customer facility, regardless of whether it spends time in constructive placement. (UP Comments 8.) For ''order in'' customers—customers who by prior agreement have UP hold cars in serving yards pending the recipient's request for delivery—UP ''stops the clock'' during the time a car spends in constructive placement for purposes of measuring TPC. (*Id.*) If ''spot on arrival''

customers—customers with facilities where railcars may be placed without placement instructions—cannot accept delivery when their cars arrive, UP puts the cars into a hold status then adjusts the time of arrival under UP's trip plan when the car is released from that status. UP asserts that its calculation method reflects the customer's role in the delivery schedule and the full journey of the railcar. (*Id.*) UP asks that the Board conform to the railroad's practice. (*Id.*)

The Board will retain its approach from the *NPRM* and not adopt UP's proposal to define delivery as being at a customer's facility. The proposed definition of delivery takes into account both situations described by UP. For ''order in'' customers, the car would be ''delivered'' for purposes of OETA when the car is constructively placed at a local yard that is convenient to the designated destination, which is the time it arrives in the local serving yard and is ready for local service in accordance with the rail carrier's established protocol. *See NPRM,* 88 FR at 63903 n.17. The same would be true for ''spot on arrival'' customers that are not able to accept delivery at the designated destination. If the customer is not able to accept delivery, the car is ''delivered'' at the time it arrives in the local serving yard and is ready for local service in accordance with the rail carrier's established protocol. The Board recognizes that each carrier may currently define its trip plan compliance-like metric differently, but one of the objectives of this rule is to standardize the metrics that will be used for part 1145 so that they may be easily understood by shippers, carriers, the Board, and the public. The approach from the *NPRM* accomplishes this. *See also* Data Production to an Eligible Customer.

Unit Trains and Intercity Passenger Trains

The Board proposed to apply the reliability standard only to shipments that are moving in manifest service, not to unit trains. *NPRM,* 88 FR at 63904. The Board explained that, in its experience, deliveries of unit trains do not give rise to the same type of concerns with respect to meeting OETA. *Id.*

A number of shipper groups ask the Board to include unit trains. (API Comments 3; AFPM Comments 9 n.15; NSSGA Comments 7; *see also* FRCA/NCTA Comments 3.) NGFA disagrees that unit trains do not have the same need as manifest trains to be delivered on time. It adds that the failure of Class I carriers to deliver unit trains on time can result in significant harm to the shipper/receiver and the shipper's/receiver's customers. (NGFA Comments 12.)

The Coalition Associations recommend including unit trains and using a higher reliability standard (of 90%) for those trains. (Coal. Ass'ns Comments 31.) According to the Coalition Associations, a 90% standard would better reflect the nature of unit trains, which tend to go through few if any interchanges. (*Id.*) In addition, according to the Coalition Associations, a 90% reliability standard for unit trains would better reflect the fact that the early or late arrival of a unit train (which might consist of 80 or more cars) can have a proportionally greater adverse effect on the customer. (*Id.*)

The Board will not apply a reliability standard to unit trains for purposes of part 1145. Based on Board experience, while manifest traffic runs on scheduled trains, unit trains generally do not have schedules. They run at various, usually irregular times. And, although some railroads have trip plans based on the unique schedule for each unit train that are applied to each car on the train, CN, CSXT, and NSR do not currently produce trip plans for unit trains. (*See* CN Comments 44); *Urgent Issues in Freight R.R. Serv.—R.R. Reporting,* EP 770 (Sub–No. 1), slip op. 5 n.16, 6 n.19 (STB served Jan. 31, 2024). It would be unduly burdensome to require those carriers to produce trip plans (including an OETA) for unit trains for purposes of the reliability standard under part 1145, factoring in that problems with the delivery of unit trains can also be captured by the service consistency standard in part 1145.

One commenter asks the Board to apply the reliability standard to intercity passenger trains. (Ravnitzky Comments 1.) The performance of intercity passenger trains is beyond the scope of this proceeding. As proposed in the *NPRM,* part 1145 applies only to Class I freight carriers and their affiliates and provides only for the prescription of a reciprocal switching agreement, a regulatory action that would not be meaningful for intercity passenger trains. Regardless, other statutory provisions address on-time performance issues of intercity passenger trains. *See* 49 U.S.C. 24308(f); *Compl. & Pet. of Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak Sunset Ltd. Trains 1 & 2,* NOR 42175, slip op. at 1 (STB served July 11, 2023).

Severity of Delay

The Coalition Associations suggest significant additions to the OETA + 24 hours model. They ask the Board to establish graduated reliability standards, where the standard would increase as the differential between the OETA and the time of delivery increased. Under the Coalition Associations' approach, the reliability standard would be set at 70% at OETA + 24 hours, 80% at OETA + 48 hours, and 90% at OETA + 72 hours. (Coal. Ass'ns Comments 4; *see also* ACD Comments 4.) The Coalition Associations also ask the Board to base the standards for the 24-, 48-, and 72-hour time bands on the average systemwide performance of all Class I carriers for those respective bands. (Coal. Ass'ns Comments 4.) According to the Coalition Associations, these standards would provide a strong incentive to railroads to achieve a reasonable level of service reliability that is consistent with changing industry conditions. (*Id.*)

Others raise concerns that the reliability standard, when based on OETA + 24 hours, does not measure the severity of deficiencies in the carrier's performance. For example, CSXT suggests that, under the reliability standard, a delivery 25 hours after OETA would be treated the same as a delivery 25 days after OETA. (CSXT Comments 17–18.) NSR recommends replacing OETA + 24 hours with a standard that measures both whether a delay has occurred and the severity of delay. (NSR Comments, V.S. Israel 13.) NSR specifically recommends use of a service reliability ratio, which would measure by what percent of the actual duration of the shipment the carrier missed OETA + 24 hours. (*Id.*)

The Board will not at this time change the reliability standard to account for the severity of a delay. The Board appreciates that its approach does not distinguish between failed deliveries that are just past the 24-hour mark and cars that are many days past that mark, but the Board would like to gauge the effectiveness of its basic concept of OETA + 24 hours before considering changes or refinements to account for degrees of severity. And, if extremely late deliveries are frequent, that could result in the service consistency standard not being met. Part 1145 is also not the only course of action a shipper will be able to pursue. In the case of more egregious delays, the shipper could petition under part 1147 without waiting the 12 week-observation period provided by part 1145. Where appropriate, the shipper could also pursue a separate action based on the common carrier obligation.

Early Cars

The Coalition Associations ask the Board to clarify that shipments that arrive more than 24 hours early do not count as being delivered on time. The Coalition Associations suggest that this approach will remove any incentive for rail carriers to ''game'' the reliability standard by artificially inflating OETAs and note that early cars can cause congestion at a shipper's facility. (Coal. Ass'ns Comments 4, 29; *see also* Olin Comments 5.) AAR opposes application of the reliability standard to early arrivals and asserts that early deliveries were not addressed in the *NPRM.* (AAR Reply 46–47.) AAR argues that shippers and railroads should be able to work together to manage flow into a customer facility, including by using constructive placement. (*Id.*) AAR adds that applying the reliability standard to early deliveries could encourage carriers to slow down the movement of traffic through their systems. (*Id.*)

The Board will adopt the proposal and clarify that cars arriving more than 24 hours before the OETA will count against the carrier for purposes of the service reliability standard. While delivering cars excessively early could potentially disrupt a carrier's system, it remains a possibility that a carrier could seek to avoid failing the standard through such practices. The Board is also persuaded by the Coalition Associations' assertion that unexpected early deliveries can have significant economic and operational consequences for rail customers. (Coal. Ass'ns Comments 29.) When railcars arrive unexpectedly early at a rail customer's facility, they can cause congestion at the facility that can impair operations. (*Id.; see also* Dow Reply 2 (noting that when raw materials customers order from Dow by rail are delayed or arrive excessively early, the customers can experience production slowdowns or downtime or may not have appropriate staffing to handle the delivery).) Even if a customer has a yard or even some extra capacity, it may simply not be ready to accept that car for various reasons. And, if the customer does not have the infrastructure to accept an early delivery, the customer usually must incur demurrage or storage charges. (Coal. Ass'ns Comments 30.)

AAR claims that constructive placement prevents the problems that early arrivals can cause for customers, (AAR Reply 46–47), but the Coalition Associations' complaint suggests that constructive placement is not solving the problems the shipper groups identify. In the Board's experience, railroads usually only begin constructive placement of cars to a spot-on-arrival customer once that shipper's facility is full of cars and no more cars can be actually placed. *See Capitol Materials Inc.—Pet. for Declaratory Ord.—Certain Rates & Pracs. of Norfolk S. Ry.,* NOR 42068, slip op. at 10 (STB served Apr. 12, 2004); (*see also* Coal. Ass'ns Comments 29). Constructive placement is therefore often not a solution for a customer who is faced with an early arrival.

While the Board did not specifically propose to cover early deliveries in the *NPRM,* it made clear that it was open to approaches to assessing reliability other than the approaches that were specifically discussed in the *NPRM. See NPRM,* 88 FR at 63904. The *NPRM* stated that OETA ''would . . . promote the completion of line hauls near the original estimated time of arrival. The on-time completion of line hauls allows the shipper to conduct its operations on a timely basis while permitting effective coordination between rail service and other modes of transportation.'' *NPRM,* 88 FR at 63903. It was therefore foreseeable that the Board might consider early arrivals as a circumstance that could negatively affect shippers' operations and coordination, as reflected in the Coalition Associations' comments. Other parties had full opportunity to respond to the Coalition Associations' proposal. *See Logansport Broad. Corp.* v. *United States,* 210 F.2d 24, 28 (D.C. Cir. 1954); *Int'l Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

Cross-Border Traffic

CN raises concerns about the application of part 1145 to movements that cross into or out of the United States; CN suggests that part 1145 should apply only to movements that take place entirely within the United States. (CN Comments 49–50.) CN also argues that system-wide reporting should exclude cross-border traffic and notes that it only reported on domestic U.S. trains as part of its reporting for Docket No. EP 770 (Sub–No. 1). (*Id.*)

The Board will not exclude this traffic from either the service reliability standard or the service consistency standard. The Board's jurisdiction includes rail transportation ''in the United States between a place in . . . the United States and another place in the United States through a foreign country; or . . . the United States and a place in a foreign country.'' 49 U.S.C. 10501(a)(2)(E)-(F). As to cross-border traffic, the Board has jurisdiction to determine the reasonableness of a joint through rate covering international transportation in the United States and in a foreign country. *E.g., Can. Packers, Ltd.* v. *Atchison, Topeka & Santa Fe R.R.,* 385 U.S. 182, 184 (1966). However, the Board does not have jurisdiction over operations outside of the United States. *See* 49 U.S.C. 10501(a)(2) (the Board's jurisdiction ''applies only to transportation in the United States''). Given the Board's jurisdiction, retaining part 1145's coverage of such traffic furthers the rule's underlying goal of incentivizing carriers to provide a level of service that best meets the need of the public.

However, the Board will limit action under part 1145 to situations where there is a distinguishable movement in the United States, specifically when the carrier records receipt or delivery at or near the U.S. border (including where the shipment is transferred between affiliated rail carriers at that point).[21] At this time, CPKC does not record an event for the U.S.-only portions of moves into or out of Canada. (CPKC Comments 13.) And it does not appear that requiring CPKC to do so would advance the purposes of the rule because, for moves into or out of Canada, the record before the Board does not indicate that the border has operational significance to customers in terms of service reliability. However, if a customer is concerned about service for cross-border movements within the Board's jurisdiction but without a separately measured U.S. component, the customer could seek relief under other statutes or regulations (*e.g.,* part 1147).

Multiple Lanes

In the *NPRM,* the Board explained that the service reliability standard generally would apply individually to each lane of traffic to/from the petitioner's facility. *NPRM,* 88 FR at 63904. Nonetheless, in certain circumstances, the Board proposed that it would prescribe a reciprocal switching agreement that governs multiple lanes of traffic to/from the petitioner's facility, each of which has practical physical access to only one Class I carrier, when (1) the average of the incumbent rail carrier's success rates for the relevant lanes fell below the applicable performance standard, (2) the Board determines that a prescription would be practical and efficient only when the prescription governs all of those lanes; and (3) the petition meets all other conditions to a prescription. *Id.* The petitioner could choose which lanes to/from its facility to include in

[21] Kansas City Southern historically has used such an approach for movements with an origin or destination in Mexico. (CPKC Comments 13.)

determining the incumbent rail carrier's average success rate. *Id.*

AAR raises various concerns about this approach, including that it (1) would not satisfy the ''actual necessity or compelling reason'' standard, (2) would undermine the Board's goal of predictability, (3) would present serious complexities to the Board, (4) would undermine carriers' abilities to plan and invest, and (5) would allow the petitioner to use reciprocal switching only for some of the lanes even though the Board had found that the reciprocal switching agreement would be ''practical and efficient'' only if it governed all of the lanes. (AAR Comments 66–69 (quoting *NPRM,* 88 FR at 63904, 63914).) AAR therefore asks the Board to apply the performance standards in part 1145 only to individual lanes. (AAR Comments 69.) AAR adds that a shipper could aggregate lanes in its petition, as a means to increase efficiency in proceedings before the Board, provided again that the performance standards applied only to each lane individually. (*Id.; see also* CN Comments 20–21.)

The proposal to allow prescriptions that cover multiple lanes has raised a number of questions, (*see* AAR Comments 68–69), and drew no explicit support from shippers. Therefore, in order to keep the procedures under part 1145 simple and predictable, the Board will withdraw this proposal. Thus, the service reliability standard and service consistency standard will only apply individually to each lane of traffic to/from the petitioner's facility. This, however, does not foreclose the possibility that a petitioner could make a case for switching irrespective of particular lanes under another part of the Board's regulations, *e.g.,* part 1147.

Additional Proposals

NSR asserts that the Board should modify the reliability standard to incorporate data on rail performance from competitive markets, which NSR asserts could include movements of exempt commodities and movements of boxcars. NSR suggests that, by incorporating that data, the Board would have a more useful benchmark to evaluate the quality of service to a petitioner. (NSR Comments, V.S. Israel 15–18.) Under NSR's proposal, the reliability standard would be replaced with a standard that measured deviations from system-wide average performance in competitive markets. (*Id.,* V.S. Israel 17.)

The Board will not adopt NSR's proposal, which would undermine predictability and ease of administration by potentially requiring multiple OETA standards, the identification of the particular competitive movement(s) that would provide a benchmark for the petitioner's movement, and periodic revisions to the OETA standard(s). NSR's proposal is also flawed insofar as it suggests that the Board should not prescribe a reciprocal switching agreement when service falls below reasonable expectations and performance goals unless the carrier has singled out one or more captive shippers in failing to meet those expectations and goals. In effect, NSR's proposal is based on the incorrect premise that the Board's discretion to introduce an alternate carrier is limited to situations in which the carrier is engaged in a demonstrated abuse of market power.

UP argues that the reliability standard should allow adjustments for delays that are not service related, such as a customer's request while a car is en route to have the car delivered to a different destination. (UP Comments 6.) It is not necessary to incorporate such a ''time-out'' into the reliability standard. The Board has provided, in part 1145, for affirmative defenses, which can include that a shipment was diverted en route based on a customer's request. The Board can judge the merits of such a defense in the context of a specific case and it seems unlikely that a petitioner would bring a petition if its service were routinely affected by that issue in any given 12-week period.

CSXT raises concerns that part 1145 does not require evidence that the customer relied on the OETA to its detriment or even that the customer was aware of OETA. CSXT also suggests that railroads should get credit for providing updated OETAs. (CSXT Comments 17–18.) CSXT's concerns fail to grapple with the purpose of the reliability standard, which is to promote on-time deliveries vis-à-vis the schedule that the carrier originally provides unless an affirmative defense applies. As noted by the Coalition Associations, accurate OETAs help avoid supply disruptions. (Coal. Ass'ns Reply 33.) They submit that, without an accurate OETA, a rail customer cannot effectively plan its shipments, operations, and fleet needs to avoid a supply disruption at the destination. (*Id.*) As a result, rail customers must maintain additional storage and railcar fleet capacity to prevent transportation delays from causing supply disruptions. Moreover, ETA updates do not make up for inaccurate OETAs. (*Id.*) The Coalition Associations explain that, while an updated ETA may be helpful to allow a rail customer to mitigate the impacts of transit variability to OETA, mitigating delays while a shipment is in transit is challenging, and mitigation options typically dwindle as the shipment progresses to the destination. (*Id.*) Thus, ETA updates do not resolve the root problem or provide the additional inventory and railcars necessary to address delays. (*Id.*)

The Board appreciates that updated ETAs remain important to customers so that the actual status of the car and probable date of arrival are known. With that said, shippers have pointed to numerous valid reasons why failure to meet OETA is problematic for customers and harmful to business operations. Given the goal of part 1145, it is reasonable to hold a railroad accountable for its original trip plan. To not hold the railroad accountable would undermine one of the Board's goals of incentivizing carriers to provide service that meets their own and shippers' expectations and needs. The Board will therefore not modify the rule as suggested by CSXT.

Summary

In conclusion, the Board will adopt the service reliability standard in the *NPRM* with the following changes: (1) the reliability standard will increase to 70%; (2) the definition of ''delivery'' will be clarified for purposes of interchange; (3) the reliability standard will measure early arrivals as well as late arrivals, in each case with a 24-hour grace period; (4) the reliability standard will be clarified for cross-border traffic; and (5) the reliability standard will only apply individually to each lane of traffic to/from the petitioner's facility.

Service Consistency: Transit Time [22]

As discussed in the *NPRM,* the service consistency standard would measure a rail carrier's success in maintaining, over time, the carrier's efficiency in moving a shipment through the rail system. *NPRM,* 88 FR at 63905. Based on the Board's understanding of the rail network and available data, the Board proposed that, for loaded manifest cars and loaded unit trains, a rail carrier would fail the service consistency standard if the carrier's average transit time for a shipment over a 12-week period increased by either 20% or 25% (to be determined in the final rule) as compared to the carrier's average transit time for that shipment over the same 12-

[22] As noted in the Delivery at Interchange section above, the Board is changing the definition of ''delivery'' for purposes of a movement that involves an interchange between carriers en route. This change also applies to the service consistency standard. Moreover, as discussed above in Cross-Border Traffic, the Board is clarifying how its service reliability and service consistency standard will apply to cross-border traffic.

week period during the previous year. *Id.* Deliveries of empty system cars and empty private cars could also result in a failure to meet the service consistency standard. *Id.* The Board sought comment on what level of increase in transit time should be used in the service consistency standard and whether the Board should adopt a different standard—in lieu of the proposed service consistency standard—that captures prolonged transit time problems, to the extent those problems would not be captured by the reliability standard or ISP standard. *Id.*

Whether To Adopt the Service Consistency Standard

Some carriers question the usefulness of the service consistency standard. For example, CSXT asserts that fluctuations in transit time for individual lanes are normal on a dynamic network and not meaningful indicia of a service problem. (CSXT Comments 18.) CSXT adds that a year-over-year comparison does not consider other events affecting velocity such as track work, capacity improvements, volume surges in other traffic, slowdowns on another railroad network, and service design changes. (*Id.* at 19–20.) Similarly, CPKC warns that, unless the service consistency standard is carefully aligned with real world facts and data pertaining to the normal functioning of manifest carload networks, the standard would misidentify normal variations in service outcomes as service failures rather than spotlighting only those situations that represent real service inadequacies. (CPKC Reply 10.) In CSXT's view, this would lead to wasteful expenditures on proceedings that are triggered by misaligned thresholds and, moreover, would cause operational inefficiencies. CSXT also claims that the service consistency standard could lead railroads ''to shun traffic that does not fit into repeatable network operations.'' (*Id.*)

Using a rolling 12-week observation period at a 20% service consistency standard, AAR's consultants project a high likelihood—65.5%—that any given carload would not meet the service consistency standards. (AAR Reply, R.V.S. Baranowski & Zebrowski 7, tbl. 2.) AAR argues that this study confirms that there are substantial natural variations in transit time, such that nearly any lane, observed enough times, could trigger the service consistency standard. (AAR Reply 50.)

Based on data that AAR submitted in its reply comments, NSR asserts that the service consistency standard is seriously flawed as a measure of inadequate service. Rather than identifying potential service problems, the standard (according to NSR) captures the majority of rail traffic, where normal variations in transit time do not indicate inadequate service. (NSR Reply 9–15.) NSR argues that, if the Board wishes to use a service consistency standard, the Board should suspend this proceeding to more carefully study transit time data, so that any service consistency standard is empirically supported. (*Id.* at 2.) NSR also suggests, as an alternative, that the Board request supplemental evidence in support of the service consistency standard. (*Id.*) CN makes a similar recommendation. (CN Reply 8.)

The Board will retain the service consistency standard. Taken at face value, Baranowski and Zebrowski's results seem to indicate normal variability in transit times. But that appearance is misleading. A majority of the analysis period primarily covers the pandemic and supply chain crises years (2020, 2021, 2022).[23] If those years included one ''fast'' year because shipments were down and then one ''slow'' year because the carriers had decreased their staff numbers, it would follow that a significant amount of traffic would have been captured under this standard. In any case, what Baranowski and Zebrowski show is that the service consistency standard may indeed capture a crisis on a carrier's system. The Board does not find that outcome to be problematic. Such a carrier crisis is among the problems that the Board wishes to address through this rulemaking. *See also* Analytical Justification.

The railroads have pushed our sites to take on more expense and change operations to match the new process and operating strategies. We have had to increase our railcar fleet by over 10 percent in the past couple of years solely due to inconsistency in the rail service and increased transit time. And we're about to increase our fleet again in the next six months by approximately seven to eight percent. This is again due to the inconsistency in the service and transit time.

Hr'g Tr. 792:19 to 793:6, Mar. 16, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1). Another shipper commented: ''Our plant in the Northeast lost production of over 57 million pounds during the first two months of 2022 mostly due to increased transit time and railroad delays resulting from crew shortages.'' *Id.,* Hr'g Tr. 795:7 to 795:10, Mar. 16, 2022.

Furthermore, as explained in the *NPRM,* the service consistency standard promotes the public interest in various ways. For example, it helps to prevent the possibility that a rail carrier would increase the OETA for a shipment for the sole purpose of meeting the OETA performance standard—a practice that could obscure inadequate service. *NPRM,* 88 FR at 63901. The standard also provides an incentive for carriers to maintain velocity through the rail system. *Id.* Declines in velocity can require shippers to procure more railcars. (LyondellBasell Comments 3.) Increased fleets are a burden on railroads, shippers, and the system as a whole. As UP explained at the Board's hearing concerning reciprocal switching in Docket No. EP 711 (Sub–No. 1), ''if we assume the cycle times for manifest traffic increase by 24 hours, then customers would need to increase their fleets by 3,200 railcars. A chemical customer shared that a one-day increase in transit time would translate to an additional railcar lease cost of $100,000 annually, and $350,000 in annual inventory carrying costs.'' Hr'g Tr. 287:9 to 287:16, Mar. 15, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1).

NSR itself notes that transit time data is a useful tool:

[T]ransit time data is important to its customers, and it is important to NS—NS monitors transit time and uses it as a tool to diagnose and problem-solve network issues as part of its commitment to providing safe, reliable service to its customers. As such, NS believes transit time data can be valuable for monitoring service.

(NSR Reply 9.)

The Board appreciates the carriers' concerns that normal variants could be captured by the metric under certain challenging operating periods like those that occurred during the pandemic. But just because a situation is ''normal'' or has occurred before does not mean it is excusable or acceptable. That said, part 1145 has also left the door open to other affirmative defenses such as, for example, a velocity problem that was due to scheduled maintenance and capital improvement projects.[24] And,

[23] At the March 2022 hearing in *Reciprocal Switching,* EP 711 (Sub–No. 1), the Board heard testimony from shippers about the following types of problems encountered during this period:

[24] As discussed in the Affirmative Defenses section, the Board will consider ''scheduled maintenance and capital improvement projects'' on a case-by-case basis. The Board does not intend the rule to disincentivize capital investment and in fact expects that this rule will help promote investments necessary for adequate service. However, the nature of ''scheduled'' maintenance and capital improvement projects suggests that carriers have a degree of control over their execution, and the Board intends to ensure that carriers exercise that

Continued

any time that is customer-controlled time is not counted in computation of the velocity and not counted against a railroad.

Percentage

A number of shipper groups ask the Board to set the service consistency standard at a level that would capture smaller reductions in velocity from one year to the next. For example, based on member feedback, the Coalition Associations urge the Board to reduce the standard to 15%. (Coal. Ass'ns Comments 32.) They assert that a sustained 15% increase in transit times would mean that shippers must purchase or lease additional railcars and would incur additional railcar maintenance costs. (Coal. Ass'ns Comments 32.) And, as shippers rely on more and more railcars to address longer transit times, these additional railcars can create network congestion that increases transit times even more, thereby requiring the shipper to acquire even more railcars. (*Id.*) Also, as shippers' railcar fleets swell to address transit-time increases above 15%, corresponding rail infrastructure requirements increase. (*Id.* at 33.) Rail customers would need additional railcar storage capacity to ensure they have enough spare railcars available, because increased transit times increase demand for railcars in transit as well as spares. (*Id.*)

Other shipper groups also support a more rigorous service consistency standard. ACD agrees that the standard should be set at 15%, (ACD Comments 5), while NGFA believes the Board should intervene except where transit time is nearly equal to transit time during the preceding year, (NGFA Comments 12–13). Olin adds that a service consistency standard in the 10% to 15% range is appropriate because service has been especially bad in the last few years and hence the ''base'' transit times have already been skewed downwards. (Olin Comments 6.)

AAR responds that none of the proposed service consistency standards are supported by data and that therefore none of the proposed standards identify where prescription of a reciprocal switching agreement could relieve inadequate service. (AAR Reply 49; *see also* CPKC Reply 6–7 (asserting that the proposed service consistency standards are not based on data concerning fluctuations in transit time from year to year).)

The Board proposed in the *NPRM* to set the percentage at either 20% or 25%. *NPRM,* 88 FR at 63905. Based on the comments received, the Board will set the standard at 20%. The Board must guard against making the standard too lenient, as at 25%, and thus not intervening before problems with poor velocity become severe and clog a carrier's system with cars. As acknowledged by railroads themselves, poor velocity can trigger a vicious cycle that is harmful to shippers, the incumbent railroad, and the network as a whole. *See* Hr'g Tr. 287:9 to 287:16, Mar. 15, 2022, *Reciprocal Switching,* EP 711 (Sub–No. 1); Hr'g Tr. 787:1 to 787:13, Apr. 27, 2022, *Urgent Issues in Rail Freight Serv.,* EP 770. On the other hand, the standard should not be too strict, as that could capture situations not warranting regulatory intervention under part 1145. Weighing these considerations, the Board finds that 20% is currently appropriate here.[25] The Board appreciates that a 20% standard is conservative given that some of the testimony considered in making this proposal referred to 15% drops in velocity, and given commenters' subsequent calls for a standard that is not met when a decrease is above 15%. However, the Board finds as a policy matter that, at this point, it would be preferable to use a standard that reserves part 1145 for somewhat more significant concerns about patterns of decreased velocity over time. This approach is reinforced by the Board's decision to capture, in the final rule, gradual increases in transit time as discussed below. The Board reiterates that stakeholders will continue to have access to other relief for service inadequacies, including under parts 1144, 1146, and 1147. And, while the railroads assert that the Board's general support for the part 1145 standards percentage is insufficient and not supported by data, as discussed in the Analytical Justification section, those arguments fail to adequately consider the purpose and built-in limitations of the rule and the reasonableness of the indicators that the Board has chosen based on record evidence. Here, not only has the Board considered data submitted by the carriers, the Board has testimony from shippers as well as comments from numerous shippers upon which to inform its decision.

Observation Period

As with the reliability standard, a number of shipper groups ask the Board to decrease the observation period for the service consistency standard. NSSGA submits that 12 weeks is too long a period of bad service, claiming that it could potentially ruin its members' businesses. (NSSGA Comments 8.) NSSGA instead proposes a six-week period. (*Id.; see also* PRFBA Comments 10 (six weeks); AFPM Comments 10–11 (six weeks).) EMA also suggests that the Board adopt a six-week period rather than 12 weeks so that carriers ''have less time to obscure what level of service they truly are providing.'' (EMA Comments 7–8, 9.)

The Board will retain the 12-week observation period. As noted early in the service reliability section, a shorter observation period would not as clearly signal the public interest in introducing an alternate rail carrier via switching as the means to allow the petitioner to choose the carrier that better met its needs. And, as noted earlier, stakeholders will continue to have access to other Board relief, including parts 1144, 1146, and 1147—without needing to wait for a 12-week observation period to end.

Empty Railcars

Various carriers claim that the service consistency standard should not be triggered by decreases in velocity for movements of empty railcars. According to CN, application of the service consistency standard to movements of empty railcars could give a shipper access to an alternate line-haul carrier for loaded cars when the incumbent carrier is performing well in delivering those cars. In that case, according to CN, the shipper's petition would not meet the ''actual necessity or compelling reason'' standard that carriers contend should apply. (CN Comments 47; *see also* AAR Comments 56–57.)[26] CN further asserts that there are differences in how empty cars are managed and moved and that these differences affect transit times for those movements. (CN Comments 46–47.) CN notes that variables such as car supply, customer behavior, diversions, and other effects unrelated to service performance can result in high variability in transit time for empty private cars. (*Id.* at 47.) CSXT makes similar arguments, noting that

control with reasonable consideration of shippers' service levels.

[25] The Board rejects CPKC's argument that normal fluctuations in transit time are so significant as to ''swamp'' a 20% change in transit time. (*See* CPKC Reply, R.V.S. Workman & Nelson at 19–23.) CPKC's argument fails to account for how the service consistency standard works. The standard assesses changes from year to year in the average transit time over a lane over the same 12-week period. This approach inherently accounts for normal fluctuations in transit time over the lane in question, identifying a failure to meet the service consistency standard only when the average transit time over that lane increased from one year to the next by more than 20%.

[26] As discussed in Legal Framework, the carriers' claims concerning the appropriate standard lack merit.

empty cars do not cycle between the same origin and destination and are often diverted. (CSXT Comments 36–37.)

The Coalition Associations urge the Board to reject railroad arguments that oppose considering empty-car movements under the service consistency standard. They assert that railroad concerns about the differences in how loaded and empty cars move are overstated. (Coal. Ass'ns Reply 35.) Even though empty railcars might not cycle between the same origins and destinations, the Coalition Associations note that railroads can still measure transit times on empty cars that do move between the same empty origin and empty destination, which the Coalition Associations claim is a substantial number of private cars. (*Id.* at 36.) The Coalition Associations add that transit time increases involving empty-car movements can have a significant impact on rail customers, and allowing transit time increases on empty railcar movements to justify reciprocal switching prescriptions for both the empty movement and the associated loaded movement is a practical solution to discourage inadequate service involving empty movements. (*Id.* at 36–37.)

The Board will continue to include movements of empty cars in applying the service consistency standard. Consistent transit time in returning private/leased empties to the original place of loading is critical to having cars available for loading at that location. Indeed, if a year ago a shipper's fleet cycled at the rate of two roundtrips per month and that deteriorated to, for example, 1.4 roundtrips per month while demand remained constant, the customer would be faced with either obtaining more equipment or reducing its delivery of product. As AFPM explains, increased transit times for empty railcars can interrupt a rail customer's supply of cars needed to support operations, deprive a rail customer of empty cars that it may need for the goods it produces, and ultimately prevent a rail customer from fulfilling its own customers' orders. (AFPM Comments 11.) In the direst situations, a disruption in empty-car supply may cause severe facility backups, requiring a reduction of or even stalling operations. (*Id.*) The Board will therefore provide for a prescription based on the velocity of empty cars. However, customer behavior and customer-ordered diversions could constitute an affirmative defense to a service consistency failure arising from empty-car movements. Finally, similar to loaded cars (as discussed below), the Board will apply the three-year, 25% standard and 36-hour floor to empty cars.

Lanes vs. Routes

UP asserts that the Board should apply the service consistency standard to routes as opposed to lanes. (UP Comments 9–10.)[27] UP claims that comparing transit times for a given route from year to year, as opposed to comparing transit times for a given lane from year to year, is necessary to avoid distorted results. UP appears to reason that, by comparing transit times for a given route, the Board could better account for unanticipated events that occurred over a given segment of the rail system. (*Id.*)

The Board will continue to apply the service consistency standard to lanes, not routes. It is true that different routes can have different run times and lead to different delivery dates. But those changes nonetheless can affect a shipper's or receiver's business. If a railroad has decided to downgrade a route and condense volume on a core route and that decision adds miles and days to the transit time, then there might be grounds to prescribe access to another line haul carrier, subject to other requirements in part 1145. As noted by the Coalition Associations, UP's proposal would not capture increases in transit time that resulted from the incumbent carrier's routing decisions. (Coal. Ass'ns Comments 39.) If a routing decision is a function of, for example, a bridge washing out, the Board has provided an affirmative defense for extraordinary circumstances, and the carrier has other affirmatives defenses available in other circumstances.

DCPC recommends making a customer's facility open to reciprocal switching for all lanes, presumably as long as the incumbent carrier failed to meet a performance standard for at least one of those lanes and as long as the other conditions to a prescription were met. (DCPC Comments 4.) The company reasons that otherwise the customer and the carriers would need to closely monitor which cars from the facility were eligible for reciprocal switching and which cars from the facility were not. (*Id.* at 3–4.)

The Board declines at this time to adopt DCPC's approach, which would represent a major change to the framework the Board proposed in the *NPRM.* Its approach could make reciprocal switching available for movements that were not necessarily implicated by the carrier's failure to meet a performance standard. As a result, this approach would go beyond the current design and purpose of part 1145. DCPC also asks what would happen if a carrier created a new lane and whether a petitioner would need to refile with the Board to seek to add that lane to any prescription. (DCPC Comments 3–4.) As noted in Multiple Lanes, however, the Board has decided not to allow petitioners to combine lanes.

Shorter Lanes

Several carriers raise the concern that the service consistency standard will disproportionately affect traffic that has relatively short running times. CN reasons that, for trips of twelve hours, the addition of only a few hours in transit time from year to year could mean failing to meet the service consistency standard. (CN Comments 46.) CPKC raises a similar concern, noting that a 24-hour or greater delay–occasioned for example by a single missed connection–over a shipment that is scheduled to arrive in four days would exceed the 20% service consistency standard. (CPKP Reply 26.) CPKC argues that establishing a minimum absolute value for downward movement in average transit times of ''perhaps 36 hours'' would help to address this flaw. (CPKC Reply 26, 41.)

The Coalition Associations respond that the service consistency standard should be based on a percentage of transit time. They reason (1) that increases in cycle time require proportional increases in the size of the fleet that the shipper needs to maintain the same delivery rate to the destination, and (2) that this increase in the required size of the fleet imposes significant economic consequences on shippers. Having said that, the Coalition Associations suggest that the Board could adopt a 24-hour floor for the service consistency standard because its shippers typically plan fleet needs based on days in transit rather than hours in transit. (*See* Coal. Ass'ns Reply at 38–39.)

The Board will adopt an absolute floor of 36 hours, meaning that an increase in transit time over a 12-week period will fail the service consistency standard only if the increase is more than 36 hours. This approach is grounded in practical considerations and the specific goals of part 1145. A reciprocal switching movement itself might add roughly 24 hours to a trip. It is therefore unlikely that it would serve the public interest to prescribe a reciprocal switching agreement under

[27] Movement over a lane (transportation from a given point of origin to a given destination) often can be accomplished over a variety of routes.

part 1145, as a means to introduce an additional line-haul carrier, based on an increase in transit time of 36 hours or less.[28] The 36-hour floor applies only under part 1145. A shipper would be free to seek to demonstrate under part 1144 or part 1147 that an increase in transit time of 36 hours or less justified prescription of a reciprocal switching agreement.

Calls To Measure the Entire Move

Some shipper groups raise concerns that the service consistency standard applies only to the incumbent carrier's portion of an interline movement and therefore does not account for increases in transit time over the entire interline movement. (PRFBA Comments 10; EMA Comments 9.) NSSGA suggests that applying the standard only to the incumbent carrier's portion is, in effect, to apply the standard to an ''arbitrary subset'' of the entire movement. (NSSGA Comments 8.) The Board disagrees that it is arbitrary to apply the service consistency standard only to the incumbent carrier's portion of the interline movement, given that the incumbent carrier has the most direct control over its portion of the movement. If the incumbent carrier provided sufficiently consistent transit times over its portion, yet there was an excessive decline in transit times over the entire movement, then this would very likely be due to factors beyond the incumbent carrier's reasonable control. Given this high likelihood, the Board sees no value in requiring the incumbent carrier to demonstrate, as an affirmative defense, that a decline in transit time over the entire movement was beyond the incumbent carrier's reasonable control.

Volume

AAR notes that the service consistency standard requires comparing transit time performance in a particular lane between two windows of time. (AAR Comments 56.) To make this an ''apples-to-apples'' comparison, it asks the Board to clarify that the selected windows must have seen reasonably equivalent volumes shipped, with shipments moving under non-exempt common carrier service in both windows. (*Id.*) AAR asserts that volume can significantly affect transit time for a variety of operational and economic reasons and that large blocks of cars will often move through the network faster than single carloads. (*Id.*) The Board will not adopt AAR's clarification. Requiring a shipper to compare volumes as well as observation periods would be more difficult to apply, and affirmative defenses provide an adequate and appropriate path for an incumbent carrier to address transit-time increases that primarily result from volume changes, including where the likelihood of this occurring is not clear or predictable. (Coal. Ass'ns Comments 37.)

Gradual Increases in Transit Time

A number of parties claim that comparing transit time from one year to the next might not capture a significant increase in transit time that develops over a period of several years. For example, AFPM notes that, using the standard's proposed 20% or 25% year-over-year increase for a shipment that takes 14 days today could result in an increase to 17.5 days in the first year and nearly 22 days in the second year, continuing to grow exponentially in perpetuity, nearly doubling its 14-day transit time to more than 27 days after just three years. (AFPM Comments 11; *see also* FRCA/NCTA Comments 3.) To avoid the compounding effect of increases in transit time, the Coalition Associations ask the Board to adopt an additional threshold that would make reciprocal switching available if transit time increases by more than 25% during the prior three years. (Coal. Ass'ns Comments 4, 31–32; V.S. Crowley/Fapp, Ex. 2 at 5; *see also* Dow Reply 3.) Although AAR also made this point in its comments, (AAR Comments, V.S. Orszag/Eilat 18), it later argues that a multi-year approach would not be useful because, according to AAR, it would still capture normal variations in transit time. (AAR Reply, R.V.S. Baranowski & Zebrowski 9.)

To capture a slow increase in transit time that becomes substantial over time, the Board will modify the transit time measure to include an additional metric, which a carrier would not meet if a petitioner's transit time over the lane increased by more than 25% over the prior three years. *See* 49 CFR 1145.2(b)(2). For example, if the base year average transit time over a twelve-week period in the summer was 20 days, the incumbent carrier would fail to meet the standard if in years one through three, the average transit time for the corresponding 12-week period in any of those three years increased by five days or more, *i.e.,* to 25 days or more. A rail customer would qualify for a reciprocal switching agreement if it demonstrated that the incumbent carrier did not meet either the one-year or three-year threshold. As the Board explained in the *NPRM,* part 1145 ''would provide for the prescription of a reciprocal switching agreement to address deteriorating efficiency in Class I carriers' movements, specifically when the incumbent rail carrier failed to meet an objective standard for consistency, over time, in the transit time for a line haul.'' *NPRM,* 88 FR at 63901. The Board's modification of the transit time measure is consistent with that approach.

Summary

The Board will adopt the service consistency standard that was proposed in the *NPRM* using a 20% standard. The Board will also: (1) change the definition of delivery to an interchange and customer facility; (2) clarify how it measures transit time performance on international lanes; (3) modify the transit time measure to add a measure for a 25% increase in transit time over the prior three years; (4) create an absolute floor for both the one-year and three-year measure of 36 hours; and (5) provide that the service reliability standard only applies individually to each lane of traffic to/from the petitioner's facility.

Inadequate Local Service: Industry Spot and Pull

The third performance standard—ISP—would measure a rail carrier's success in performing local deliveries (''spots'') and pick-ups (''pulls'') of loaded railcars and unloaded private or shipper-leased railcars during the planned service window. *NPRM,* 88 FR at 63905. Under the *proposed rule,* a rail carrier would fail the ISP standard if the carrier had a success rate of less than 80% over a period of 12 consecutive weeks in performing local deliveries and pick-ups during the planned service window. *Id.* The success rate would compare (A) the number of planned service windows during which the carrier successfully completed the requested placements or pick-ups to (B) the number of planned service windows for which the shipper or receiver, by the applicable cut-off time, requested a placement or pick-up. *Id.* The carrier would be deemed to have missed the planned service window if the carrier did not pick up or place all the cars requested by the shipper or receiver by the applicable cut-off time. *Id.* Subject to affirmative defenses, this would include situations in which the carrier has ''embargoed'' the shipper or receiver as a result of congestion or other fluidity issues on the carrier's network, which results in reduced service to the shipper or receiver. *Id.* Below are responses on these matters as well as other issues that drew significant comment.

[28] For the same reason the 36-hour floor also will be applied to the three-year standard.

The Board proposed the 80% standard based on data submitted in Docket No. EP 770 (Sub-No. 1). *Id.* at 63906. As with the service reliability standard, the Board requested that stakeholders and shippers/receivers provide evidence and comment on the appropriateness of this percentage and whether it should be higher or lower. *Id.* The Board also sought comment on a number of other points, including two possible service windows. *Id.* at 63906–07.

Whether To Adopt the ISP Standard

A number of carriers challenge the appropriateness of the ISP standard. For example, CN asserts that the Board should eliminate the ISP standard from § 1145.2 on the ground that the prescription of a reciprocal switching agreement is not an effective remedy for inadequate local service. CN reasons that, even where the petitioner chose the alternate carrier for line-haul service, the incumbent carrier would continue to provide local service to the petitioner. (CN Comments 36.) AAR agrees, adding that the petitioner's choice to rely on the alternate carrier for line-haul service might exacerbate the inadequate local service. (AAR Comments 57–58.) AAR suggests that a more appropriate response to poor local service might be the prescription of terminal trackage rights. AAR adds, however, that providing for the prescription of terminal trackage rights in this proceeding would exceed the scope of the *NPRM.* (*Id.* at 58.)

AAR asserts that, if the Board retains the ISP standard, the Board should establish a technical working group to study and consider the matter. AAR reasons that there is significant technical complexity related to how carriers provide local service. (*Id.* at 109.) CPKC goes further and argues that local services are too complex and require too much on-the-ground operating discretion and flexibility to warrant the Board's application of a universal performance standard for local service. CPKC suggests that, if the Board might wish to adopt standards for local service, then the agency should first examine in appropriate detail all of the complexities and potential adverse impacts associated with any such standard. (CPKC Reply 28.)

The Board will retain the ISP standard. The record in this proceeding demonstrates a significant public interest in promoting adequate local service. As discussed below, a number of shipper groups advocate for higher standards for service. (*See, e.g.,* ACD Comments 5 (noting that the group is supportive of this performance standard as first-mile/last-mile service has been a significant issue for shippers for decades); *see also* NSSGA Comments 9; AFPM Comments 12; EMA Comments 8; PRFBA Comments 9; DCPC Comments 10; API Comments 5; NGFA Comments 13; FRCA/NCTA Comments 2.) The Class I carriers agree that local service is critical to meeting customers' needs and that nevertheless, due to a variety of operating decisions by those carriers, the quality of local service is not at times where it should be. The public interest in adequate local service is effectively advanced by providing for the introduction of an alternate rail carrier for purposes of line-haul service when, through the subpar quality of the local service that it provides, the incumbent carrier failed to meet reasonable service expectations. The incumbent carrier's potential loss of the line haul creates an appropriate incentive to meet local service expectations given that provision of the line haul is the carrier's main source of revenue. Indeed, due to the economics of providing local service, the incumbent carrier might be indifferent to losing that service if it retained the line haul. Potential loss of the line haul also reflects the fact that overall operation of the network is more fluid when local service and line-haul service are well-coordinated, for example, when a local drop-off occurs within a reasonable time of when the line haul is completed. While the Board supports the carriers' goal of retaining flexibility in how they provide local service, as a means to maximize efficiency, it is vital that their less successful experimentation not threaten the fluidity of the network. An incumbent carrier that had to coordinate with an alternate line haul carrier would be more pressed to provide adequate local service.

The Board declines to convene a working group to consider complexities and variations in the provision of local service. From the customer's perspective, what matters is whether the carrier delivers and picks up cars when it says it will. The Board expects that each carrier will take into account the complexities of its operations when making those communications to the customer.

Calls To Measure by Railcar and for a No-Show Standard

Under the ISP standard proposed in the *NPRM,* a rail carrier would be deemed to have missed the planned service window for purposes of the ISP standard if the carrier did not pick up or place all the cars requested by the shipper or receiver by the applicable cut-off time. *NPRM,* 88 FR at 63906–07. Several commenters recommend modifying that approach.

The Coalition Associations propose two standards for local service. One standard would measure how many cars, out of the cars that were scheduled to be delivered or picked up during a planned service window, were not delivered or picked up. (Coal. Ass'ns Comments 4–5.) The other standard would measure how many planned service windows during the observation period were ''no shows,'' where the carrier failed to provide any local service during the planned service window. (*Id.*) The Coalition Associations assert that these different types of failure have different impacts on customers. (*Id.*) Under the Coalition Associations' proposed measure, the threshold would be tripped if the carrier failed to perform at least 80% of scheduled spots (deliveries) and pulls (pick-ups) during the planned service window and did not perform the remaining spots and pulls within the service window that immediately followed the planned service window. (*Id.* at 5, 36.) The Coalition Associations' proposed ''no-show'' standard would require a carrier to provide local service during at least 90% of the planned service windows over the 12-week observation period and not to miss two consecutive service windows. (*Id.* at 5, 37–38.)

AAR asserts that any standard for local service should be based on the number of cars that were spotted or pulled as scheduled within the planned service window. (AAR Comments 59.) AAR claims that the approach in the *NPRM* (which would credit the carrier with a ''hit'' only if the carrier spotted and pulled all scheduled cars during the planned service window) would overstate the impact of a carrier's failure to perform a small portion of the scheduled spots and pulls during the planned service window. (*Id.* at 23, 57–59, 109; *id.,* V.S. Orszag/Eilat 13.) CN agrees. (CN Comments 40.) CN states that it tracks local performance on a per-car basis. According to CN, this approach provides better insight into its performance and into the reasons for any misses. (*Id.* at 40–41; *see also* CSXT Comments 23; UP Comments 11.)

The Board will retain the approach to local service that was proposed in the *NPRM.* This approach is straightforward, avoids the complexity of the Coalition Associations' proposal, and provides an appropriate incentive to provide adequate local service. Not showing up at all counts as a ''miss'' under the Board's simpler approach and, in some circumstances, could be

captured by the service consistency and service reliability standards the Board is also adopting in part 1145. With respect to AAR's approach based on the number of cars spotted and pulled within any service window, the Board finds that the Board's approach is not only simpler to measure and consistent with the expeditious and efficient handling of proceedings but also properly reflects the relative impacts that local service failures have on customers. For these reasons, while the Board recognizes AAR's observation that service windows might include varying numbers of cars, the Board finds that AAR's concerns regarding overstatement are not persuasive. Under this rule, a carrier has flexibility to establish protocols governing their local service, including when to constructively place cars, when and how to establish cut-off times, and other actions important to formulating a work order that they should execute.

Percentage

Several shipper groups ask the Board to increase the threshold percentage used in the ISP standard. NSSGA argues that 80% is too low—that local service at that level causes a backup of products at the facilities of NSSGA members. (NSSGA Comments 9.) NSSGA asserts that 90% would be a more appropriate standard, which, if achieved, could protect against such backups. (*Id.*) AFPM also supports a 90% standard based on the adverse impacts that late or missed local service, as well as the spot or pull of incorrect cars, have on plant production and revenues. (AFPM Comments 12.) Others support setting the local service standard either at 90%, (EMA Comments 8; PRFBA Comments 9; DCPC Comments 10), or at 80% and providing by rule for an increase up to 85% or 90% after two years, (API Comments 5 (initial standard of 80% but 85% or 90% after two years)). NGFA recommends setting the standard at the ''high end of the interim performance targets'' from Docket No. EP 770 (Sub-No. 1). (NGFA Comments 13.) FRCA/NCTA recommend setting the standard at 85%. (FRCA/NCTA Comments 2.) AAR opposes these calls to increase the standard, asserting that the data does not support an increase. (AAR Reply 51.)

The Board will increase the local service standard. The 80% standard that was proposed in the *NPRM* would not have been triggered for many shippers until, on average over a 12-week period, the carrier had failed to fulfill a local work order for that shipper more than once per week. (EMA Comments 8.) The 80% figure, however, was too low to provide a useful indication of when it might be in the public interest to introduce an additional line-haul carrier through a prescription under part 1145. This point is clear both from shippers' comments and from data that the Board collected in Docket No. EP 770 (Sub-No. 1). The Rail Service Data page on the Board's website shows that, from May 13, 2022, to December 22, 2023, three of the four carriers that reported data for that period had average weekly ISP performance of between 89% and 91%, with highs between 93% and 97%. *See www.stb.gov/reports-data/rail-service-data/#Urgent%20Issues%20Rail%20Service%20Data.* While ISP performance was measured somewhat differently in Docket No. EP 770 (Sub-No. 1) as compared to how it will be measured under part 1145, the performance data from Docket No. EP 770 (Sub-No. 1) shows the high level of reliability that carriers seek to provide, and that customers expect, even during periods of major problems on the network. With this in mind, an 80% ISP standard would provide insufficient incentive for carriers to provide adequate local service. An 85% standard better reflects a level of service that is below what customers have consistently reported as their service expectations and what carriers appear to aim for in their service. *See id.* Although some shippers ask the Board to set a higher threshold, the agency would like to implement part 1145 before considering whether to increase the percentage.

Observation Period

AFPM argues that the 12-week observation period for the local service standard is too long for refiners and petrochemical manufacturers, adding that poor local service over such a sustained period will ''dramatically hurt'' their operations. (AFPM Comments 12.) For the reasons discussed above in the Observation Period sections concerning the service reliability standard and the service consistency standard, the Board will retain the 12-week observation for the local service standard.

Rebuttable Presumption

CSXT is concerned that the local service standard does not account for missed spots or pulls that were caused by the customer or resulted from the customer's request for service that exceeded the capacity of the customer's facility. (CSXT Comments 22.) CSXT asserts that the carrier should not be required to prove to the Board, after the event, that the miss was caused by the customer, arguing that the local crew's recorded determination at the time of the miss should be treated as presumptive evidence on that point. (*Id.* at 22–23.)

As stated in the *NPRM,* a miss caused by the customer would not be counted against the incumbent rail carrier. *NPRM,* 88 FR at 36907. The Coalition Associations asks the Board to include the phrase ''except due to a variation in its traffic,'' (Coal. Ass'ns Reply 44), but that suggestion will not be adopted. It is not clear without context why a miss caused by a variation in a customer's traffic should count against a carrier, but the Board can consider the relevance of the variation if presented as an affirmative defense.

The Board will not adopt CSXT's proposal to treat the local crew's determination of the cause of a miss as presumptive evidence of the cause. The burden should be on the railroad to provide persuasive evidence of the cause of the miss, given that the railroad would have the most direct knowledge of the cause. Persuasive evidence might include the local crew's determination at the time and can be provided by the railroad. The Board will consider this evidence but might find, based on the facts at hand, that the local crew's determination was insufficient.

Adjustment to the Local Service Standard Based on Reductions in Service

The Board proposed in the *NPRM* that, if a carrier unilaterally chooses to reduce the frequency of the local work that it makes available to a customer, based on considerations other than a commensurate drop in local customer demand, then the local service standard would become 90% for a period of one year. *NPRM,* 88 FR at 63907.

The Board will adopt this proposal in the final rule. AAR claims that an increase based on a reduction in the frequency of local service would limit carriers' flexibility and would make railroads more cautious to experiment with increased local service levels. (AAR Comments 59.) While the Board supports efforts to optimize rail service, it is important to disincentivize carrier efforts that, without collaboration with the shipper, reduce the quality of service to a shipper or receiver without corresponding increases in efficiency. A reduction in the frequency of local service can have substantial adverse effects on a shipper or receiver, especially if it does not reflect coordination with the shipper. For example, a shipper might need to build additional plant trackage to accommodate reduced pulls by the carrier. However, the Board may consider the impact of all customer

demand in the local serving area, not just that of petitioner, in considering whether a petitioner qualifies for this provision. The carrier will bear the burden to demonstrate that the drop in customer demand necessitated the reduction in local service.

The Board will extend to two years the period during which the increased local standard would apply. As the Coalition Associations explain, the burden of mitigating the risk of missed spots and pulls is significant and its members indicate that the infrastructure and fleet design changes necessary to implement these mitigation measures can take two years to fully implement. (Coal. Ass'ns Comments 41.) Although AFPM suggests a 95% standard, claiming that it recognizes some disruptions may occur while protecting shippers from service reductions that would result in poor ISP performance, (AFPM Comments 13), the Board will not adopt such a high standard. A 90% standard achieves the Board's goals, recognizing the high degree of accuracy that is appropriate in the context of local service while reserving the Board's introduction of an additional line-haul carrier for relatively significant local service issues.

The *NPRM* made clear, however, that the agency might find that the 90% ISP standard should not apply in a case. *NPRM,* 88 FR at 63907. The Board may consider, among other things, whether the carrier is offering more service during periods of seasonal or unusual demand to accommodate the demands of a shipper and whether such circumstances invalidate use of the 90% ISP standard. *Id.* Arguments such as these could be considered as affirmative defenses in response to a petition.

Service Window

The Board sought comment on two alternatives for what service window to use in applying the local service standard. *NPRM,* 88 FR at 63906. Under one alternative, the Board would use a standardized service window of 12 hours (the maximum duration that a crew is allowed to work), starting from the relevant serving crew's scheduled on-duty time. *Id.* Under the second alternative, the Board would use the service window that the rail carrier specified according to the carrier's established protocol, provided that the window did not exceed 12 hours. *Id.* at 63906–07.

The Coalition Associations recommend using service windows that comply with the carrier's established protocol rather than a standardized 12-hour window. (Coal. Ass'ns Comments 42.) They assert that using service windows that comply with the carriers' established protocol will encourage rail carriers to provide local service that meets the expectations that flow from the protocol, thus reducing disruptions to shippers. (*Id.*) The Coalition Associations note that when local service is unreliable, many customers stage cars for service the day before the service window and wait long after their service window for the carrier to pull staged cars. (*Id.* at 43.) At many facilities, this extended staging impairs or prohibits facility operations because it uses track space that the facility needs to operate and can lead to extra labor costs. (*Id.*)

The Board finds that, on balance, it is best to use a standardized 12-hour window for purposes of applying the local service standard. In response to the Coalition Associations' concern, the Board emphasizes that the 12-hour window that is used for purposes of the local service standard is not meant to override the rail carrier's protocols or to excuse carriers from complying with those protocols. The benefit of using a standardized 12-hour window for purposes of the local service standard is that it will result in uniform understanding of the point at which the Board would consider regulatory intervention. To use a carrier's shorter window would impose costs that the carrier might not have accounted for in setting that shorter window; the carrier might therefore be encouraged to lengthen the window beyond the window that is otherwise most efficient for that carrier. That outcome is inconsistent with the Board's intent, as it would undermine the public interest in efficient operation as well as the interests of the individual shipper or receiver. Likewise, for the sake of uniformity across railroads, the Board will decline AFPM's proposal to use a window that extends from two hours before to two hours after the estimated service time that was specified in the local crew's job plan. (AFPM Comments 13.)

Advance Notice

The Board sought comment from stakeholders on whether a rail carrier should be required to provide notice to the customer before the carrier changes the on-duty time for the local crew that serves the customer—at least for the purposes of regulatory measurement—and, if so, how much advance notice should be required. *NPRM,* 88 FR at 63906.

The Coalition Associations ask the Board to require carriers to provide 60 days' notice of a change to the service window. (Coal. Ass'ns Comments 43–44.) AFPM goes further and argues that railroads should not be allowed to unilaterally change a service window without (1) agreement from a customer, or (2) going through a formal mediation process. (AFPM Comments 13.)

The Board will not adopt these measures, which seem unnecessarily rigid and do not directly relate to the purpose and design of part 1145. The Board notes, though, that regular or unreasonably abrupt changes to a customer's service window might be relevant considerations under parts 1144 or 1147 of the Board's regulations.

Clarification for Spot on Arrival Cars

Per the Coalition Associations' request, the Board clarifies that the spot and pull standard includes ''spot on arrival'' railcars. (Coal. Ass'ns Comments 42.) However, failure to spot ''spot on arrival'' railcars for a planned service window results in a missed service window only if the railcars arrived at the local yard that services the customer and are ready for local service before the cut-off time applicable to the customer and in accordance with the carrier's established protocol.

Clarification of Applicable Traffic

CN asks the Board to clarify that the local service standard does not apply to unit trains or intermodal traffic. (CN Comments 43.) CN states that unit trains are not handled through the same process as manifest traffic—that unit trains are often staged in yards upstream from the destination while CN coordinates with the customer to determine the appropriate time for service. (*Id.* at 43–44.) Further, according to CN, the needs of unit train customers differ from those of manifest customers, as CN generally works to ensure that a certain number of unit trains are delivered based on monthly demand, as opposed to ensuring that unit trains are delivered according to planned service windows. (*Id.* at 44.) CN claims that intermodal traffic is not compatible with the local service standard because intermodal traffic presents unique factors and challenges associated with the transloading process. (*Id.*) With intermodal traffic, according to CN, containers are typically unloaded at an intermodal facility and then stacked at the facility until trucks arrive ingate to pick up the containers. (*Id.*)

The Board did not propose to apply the local service standard to unit trains or intermodal traffic and will not do so in the final rule. Unit trains are not switched or spotted and pulled in the same manner as other carload shipments. Similarly, when traffic is

transferred between a rail carrier and another mode of transportation, those transfers do not involve local service in the same manner as local traffic. The Board will clarify the exclusion of unit trains and intermodal traffic in the text of the adopted regulation, § 1145.2(e).

Summary

The Board will adopt the local service standard that was proposed in the *NPRM* using a 12-hour work window. The Board will also: (1) increase the local service standard to 85%; (2) extend the period during which a 90% standard would apply when a rail carrier unilaterally reduces service; (3) clarify how success in spotting ''spot on arrival'' railcars will be measured; and (4) clarify that the local service standard does not apply to unit trains or intermodal traffic. The Board also makes technical modifications, including reordering paragraphs and using more consistent terminology to describe service windows.

Data Production to the Board and Implementation

The Board proposed in the *NPRM* to continue to collect certain data that is relevant to service reliability and local service and similar to the data being collected on a temporary basis in Docket No. EP 770 (Sub-No. 1). *NPRM,* 88 FR at 36911. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 6 (STB served May 6, 2022) (items 5 and 7). The Board's ongoing collection of this data under part 1145 would be adapted to the design of part 1145.

It is true that the Board did not extend the temporary data reporting as defined in Docket No. EP 770 (Sub-No. 1) because overall performance data, especially with regard to service, showed improvement and because BNSF, CSXT, NSR, and UP were meeting the majority of their one-year service targets. *See Urgent Issues in Freight Rail Serv.—R.R. Reporting,* EP 770 (Sub-No. 1), slip op. at 2–3 (STB served Mar. 14, 2024). However, as noted in the *NPRM,* the collection of the data as defined in part 1145 will assist with general oversight and facilitate implementation of part 1145. *NPRM,* 88 FR at 63911. As a general matter, this material would also allow a reciprocal switching petitioner to compare its service to that of the industry or the incumbent carrier's service on a system and regional level to see whether service problems are systemic and/or worsening. *Id.* at 63902. FRA and DOT support an ongoing collection, noting that it provides them with ''invaluable insight into factors that affect the safety, reliability, and efficiency of railroad operations.'' (DOT/FRA Comments 3.) Additionally, they assert that the Board's proposed data requirements would promote transparency among rail customers and the broader public. (*Id.*) Other groups also support ongoing reporting. (*See, e.g.,* PRFBA Comments 4.)

The Board will therefore adopt the data collection it proposed in the *NPRM.* As discussed below, all six Class I rail carriers must begin reporting based on the new, standardized definitions of OETA and ISP by September 4, 2024. The Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) will provide the Class I rail carriers with a standardized template for these new reporting requirements.

Technical Working Group

AAR agrees with the Board that reporting service data by individual rail carriers is ''helpful to understanding conditions on the rail network.'' (AAR Comments 106.) However, it asserts that there are some details and considerations that need to be worked through before the Board requires permanent reporting. (*Id.* at 107.) It notes that the reporting for part 1145 will be standardized, unlike the temporary reporting for Docket No. EP 770 (Sub-No. 1). AAR also raises a number of issues purportedly requiring a technical conference, including OETA matters the Board already discussed in the Performance Standards section, the technical complexities of ISP, as well as questions about empty cars, routing instructions, and bad order cars. (*Id.* at 107–09.) According to AAR, those and other such considerations would benefit from consideration by a working group. (*Id.* at 109.) AAR claims that doing so will allow Board staff and interested parties to better understand the issues, work out necessary details, and build a more complete record of the technical issues for the Board to consider as it finalizes a rule. (*Id.*)

Similarly, CPKC seeks a technical conference or other process for undertaking a more systematic evaluation of real-world lane-specific service data before implementing a rule that could have sweeping consequences for the railroad operations and the incentives railroads confront in designing services that meet shipper needs. (CPKC Reply 1, 3, 24, 40–41.)

The Board will not establish a technical working group or hold a conference before implementing the final rule. The Class I carriers have had experience reporting data in Docket No. EP 770 (Sub-No. 1) and in *Demurrage Billing Requirements,* Docket No. EP 759. Although the Board is standardizing the definition of OETA and ISP, these measures are not significantly different from the type of reporting required of the railroads in Docket No. EP 770 (Sub-No. 1). If specific issues arise, the Board can address those issues as needed. AAR's other concerns also do not warrant a technical conference. The Board addresses AAR's OETA and ISP points in the Performance Standards section. And, AAR's questions about bad orders or problems with routing instructions can be examined in the context of a particular case. Finally, the Board is rejecting in the Analytical Justification and Legal Framework sections the notion that the agency must develop per-lane performance standards.

Calls for More Data

A number of entities ask the Board to require the rail carriers to provide additional data. For example, FRA and DOT suggest that the Board consider maintaining intermodal traffic data as a reporting requirement, stating that, while intermodal is not rate-regulated traffic, it is a valuable metric to monitor supply chain efficiency. (DOT/FRA Comments 3.) The Board will not require the Class I rail carriers to report this data because the railroads measure this traffic differently from other traffic, and standardizing intermodal service measurement is not one of the purposes of this regulation. Intermodal traffic is also typically a one-train event from origin to destination with no terminal switching events at origin, intermediate points, or destination.

API encourages the agency to collect regional-level data. It claims that this data will better inform the Board as to what and where FMLM issues exist. (API Comments 8.) Similarly, USDA argues that the Board should also collect regional data for transit time. (USDA Comments 3.) It notes that data is critical to well-functioning markets. (*Id.* at 8.) Although the Board appreciates these comments, it will collect ISP data on an operating division basis, which will provide similar granularity to regional data. The Board will therefore not expand the collection of data to the regional level but may seek more data at a later point, if necessary.

Implementation

AAR claims that because the proposed rule's service metrics are new, railroads need time to modify their systems to conform to the new standards and to build new systems to support their obligations. (AAR Comments 111.) CSXT raises a similar point and adds that it would need to

build a process to respond to customer requests, which could take one year. (CSXT Reply 15–16; *see id.,* R.V.S. Maio.) CSXT discusses this issue because ''the Board should be aware of the likely realistic timeline for creating a new regulatory regime in which bespoke lane-by-lane performance metrics would need to be produced on demand for any of CSXT's more than 5,000 customers and 60,000 lanes in a matter of days.'' (CSXT Reply 16; *see also* CPKC Comments 10.) And, UP argues that time is necessary (1) to create a new systems for Board reporting, which UP claims would take one to two years, and (2) to design, program, test, and implement new methods for developing arrival-time estimates that would be consistent with the methods used to determine compliance with OETA standard. (UP Comments 18.) UP estimates that between one and two years would be required to complete the design, programming, and testing of such systems before they could be implemented, and ''not the 10-person/days estimated in the NPRM.'' (*Id.*)

CPKC adds that unique to it is the challenge of preparing to comply with the proposed rule at a time when the separate rail carriers that are part of the CPKC network continue to maintain separate systems that have yet to be fully integrated. (CPKC Comments 11.) In CPKC's judgment, the systems of its predecessors will require modification to be able to provide petitioners the data on a lane-specific basis from different 12-week periods in the way the proposed rule contemplates. (*Id.*) It notes that the Board has taken similar considerations into account when imposing new disclosure requirements on carriers. *See, e.g., Released Rates of Motor Common Carriers of Household Goods,* RR 999 (Amendment No. 5), slip op. at 2–3 (STB served Mar. 9, 2012) (extending by six weeks the original three-month period from issuance of decision to effectiveness, ''in order to provide additional time for affected parties to come into compliance, and in order to allow consumers to benefit from the changes as soon as possible.'').

The Board disagrees with UP's stated concern that an entirely new system will be needed to meet the reporting requirements of this rule and similarly disagrees with CSXT's assertion that it will take a year to update its existing software. While the Board recognizes that implementation of this new rule may require some software programming changes, the railroads fail to support their burden arguments. Specifically, the railroads do not adequately explain how the variances in measuring OETA using their current definitions would require such a significant reprogramming based on the definition of OETA the Board is adopting for part 1145. They also do not make such a showing as to modifying the definition of ISP and the underlying metrics in their systems.

Additionally, while CSXT raises a concern about building a reporting platform, the Board finds this claim to be overstated. CSXT's current platform already has a module, ''Trip Plan Performance,'' which ''provides customers with information on how well CSXT is complying with the trip schedules it generates for each container, trailer, and carload shipped by CSXT at the system, location, and lane level.'' CSXT Comments 6, Dec. 17, 2021, *First Mile/Last Mile Serv.,* EP 767. Similarly, CPKC's concerns also appear unfounded as CP appears to have had a sophisticated system for its customers. *See* Canadian Pac. Comments 2, Nov. 6, 2019, *Demurrage Billing Requirements,* EP 759 (''CP, as well as other railroads, already provide or make readily available a plethora of data that meet these [demurrage] objectives. Detailed data is accessible to the customer on a real time basis and in downloadable form.''). The Board will therefore not unduly delay implementation of part 1145. To promote a smooth transition though, railroads will have until September 4, 2024, the effective date of the final rule, to modify their software.

Additionally, AAR argues that, in light of policy and fairness concerns, the Board should not order a switching prescription based on a carrier's performance before the date on which any final rule is promulgated. (AAR Comments 111.) The Board finds this reasonable. Cases can therefore only be brought under part 1145 based on service occurring after the rule becomes effective.

Interline Traffic

AAR argues that the Board should gain experience applying performance standards to single-line traffic before applying performance standards to interline traffic, given the greater complexities with interline traffic. (AAR Comments 11.) The Board disagrees. There is no need to apply the rule first to single-line movements and then to interline movements as the standards measure an individual carrier's success in performing its own movement. However, as discussed in the Performance Standards section, the Board appreciates that there can be problems at an interchange and has adjusted its definition of when a shipment is delivered there.

CPKC also argues that the Board should defer application of part 1145 to interline movements based on similar concerns. (CPKC Comments 8; CPKC Reply 39–40.) When the Board does apply the rule to interline movements, CPKC seeks two modifications based on its fear that a petitioner could be incentivized to seek an alternate carrier to convert an interline movement into a single-line movement when an incumbent carrier only handles traffic for a minority of the origin to destination routing. (CPKC Comments 8.) One proposed modification involves limiting the eligibility of certain alternate carriers, and the second involves limiting the duration of the prescription. (*Id.* at 9.)[29] CPKC claims that both could be implemented in a manner that would preserve the central feature and purpose of the Board's rule as a service remedy while minimizing the potential for overreach. (*Id.*)

The Board will not adopt these adjustments concerning interline traffic. A prescription would be available under part 1145 with respect to the incumbent carrier's portion of an interline movement only if the requirements of part 1145 were met with respect to that movement. The prescription in that case would be consistent with the Board's goals in enacting part 1145. There is no cause, within this framework, to consider the petitioner's motivation in seeking access to an alternate carrier for the incumbent carrier's portion of the interline movement. To the extent that the incumbent carrier believed that the proposed prescription would cause undue impairment as provided for in part 1145, the Board would consider the carrier's objection in deciding whether to grant the prescription.

[29] The first approach would disqualify a proposed alternate carrier from switching access if (a) the incumbent serves only a minority of full origin-to-destination routes, (b) the alternate carrier's network would serve the entire origin-to-destination route after being granted switching access, and (c) the alternate carrier is not the only other Class I rail carrier serving the pertinent terminal. (CPKC Comments 9.)

The second approach could be applied in cases where the only available alternate carrier would serve the entire route after being granted switching rights. In those situations, according to CPKC, the Board should avoid an overreaching restructuring of the shipper's rail service options by limiting the duration of the order to that necessary to enable the incumbent to demonstrate that it can provide adequate service. According to CPKC, an appropriate limit might be that the order is effective initially for three months, during which time the incumbent would be entitled to demonstrate that its service had risen to an adequate level thereby terminating the alternate carrier's access. (*Id.*)

Data Production to an Eligible Customer

In the *NPRM,* the Board proposed to require Class I carriers to provide, within seven days of receiving a related written request from a shipper or receiver, all individualized performance records necessary for that shipper or receiver to file a petition under part 1145. 88 FR at 63902, 63910–11. The incumbent carrier would be required to record that data and, upon request from a shipper or receiver, would be required provide it to that customer. *Id.* at 63911.[30] The Board stated that the data disclosure requirement would facilitate implementation of part 1145 and provide customers with records ''necessary to ascertain whether a carrier did not meet the OETA, transit time, and/or ISP standards'' in order to bring a case at the Board. *Id.* at 63898, 63902. The Board also stated that railroads would be required to provide the shipper or receiver with machine-readable data, as defined in *Demurrage Billing Requirements,* EP 759, slip op. at 3 (STB served Apr. 6, 2021). *NPRM,* 88 FR at 63911 (inviting stakeholders to comment on what format and fields would be useful). The Board also sought comment on (1) whether carriers could be required to disclose data about past service to a shipper or receiver when a different entity paid for the service, and (2) whether the entity that paid for such service should be given an opportunity to seek confidential treatment of that service data. *Id.* at 63911 n.40.

CN and CSXT oppose the data disclosure proposal, arguing that it amounts to pre-petition discovery and that it improperly departs from both traditional litigation and standard Board practice. (CN Comments 32–22; CSXT Comments 38–39.) The carriers also argue that the *NPRM* did not identify a source of statutory authority that would allow the Board to require data disclosure outside the context of a Board proceeding and that neither section 11102 nor section 1321 support the data disclosure proposal. (CN Comments 33–34; CSXT Comments 39–40.) UP argues that shippers should not need data from the incumbent rail carrier to decide whether they are receiving inadequate service that justifies filing a petition under part 1145. (UP Reply 1–3 (stating that UP customers have online access to data allowing the customer to track and quantify UP's performance); *see also* CSXT Comments 40–41 (stating that CSXT already provides certain data to shippers).)

CN, CSXT, and UP also argue that the proposed data disclosure regulation at § 1145.8(a) is vague and overly broad. (CN Comments 31–32; CSXT Comments 39; UP Reply 2; *see also* AAR Comments 106–07 (urging the Board to provide details about the reporting requirements).) CN and CSXT state that the proposed regulation would not limit who can request data. They also raise concerns about the extent and potential frequency of data requests. (CN Comments 31; CSXT Comments 38–39 (arguing that requiring railroads to disclose information to parties not eligible for relief under part 1145 ''would serve no clear regulatory purpose'').) UP asserts that it is unclear whether a railroad will be ''expected to scour its records to identify any 12-week period in which standards were not met in a given lane'' and whether a carrier would satisfy the data disclosure requirement by producing no records if it determines that a standard was not violated. (UP Reply 2; *see* CN Comments 31–32.) These rail carriers suggest that the Board should instead require railroads to disclose certain performance records to customers only after that customer has filed a petition under part 1145. (CN Comments 35 (noting that the petitioner should also file a protective order); CSXT Comments 39 (stating that metrics could be provided through either the discovery process or an initial disclosure process); UP Reply 3 (suggesting an ''expedited discovery process'' following the filing of a petition).)

The Coalition Associations oppose requiring shippers to file a petition under part 1145 before a rail carrier is required to disclose individualized performance data. The Coalition Associations argue that such a procedure would require shippers to file a petition before knowing whether data demonstrates a service inadequacy that supports a petition under part 1145. (Coal. Ass'ns Reply 25.) As an alternative to the proposal to require a petition to be filed before a railroad would be required to disclose data, the Coalition Associations propose that shippers submit a 30-day pre-filing notice, after which the incumbent rail carrier would have five business days to provide the requisite service data for the six-month period preceding the pre-filing notice. (*Id.* at 25–26.) In contrast, NGFA argues that shippers and receivers should be able to request and receive data as often as they believe it would be beneficial and that shippers should be able to challenge the data that the carrier provides. (NGFA Comments 4.)

The Board declines to adopt proposals that would require railroads to disclose performance data to a shipper or receiver only after the shipper or receiver has filed a petition under part 1145. Section 1321(a) gives the Board broad authority to fashion means to carry out its duties under Chapter 13 and Subtitle IV of the Interstate Commerce Act, including the Board's duty to exercise its discretion under section 11102(c) in furtherance of the public interest. Indeed, as expressly provided in section 1321(a), the enumeration of particular powers in Chapter 13 and Subtitle IV does not exclude other powers that the Board may have in carrying out those provisions. More generally as well, the Board has broad discretion to fashion means to carry out its duties, even when those means are not expressly enumerated in the Act. *See ICC* v. *Am. Trucking Ass'ns,* 467 U.S. 354, 364–65 (1984) (citing *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978)) (stating that the ICC may exercise powers that are not expressly enumerated when those powers are legitimate, reasonable, and directly adjunct to the agency's express statutory powers); *Zola* v. *ICC,* 889 F.2d 508, 516 (3d Cir. 1989). Therefore, the Board is not persuaded that, absent express authorization in section 1321 or section 11102 to require railroads to disclose information to third parties, the Board lacks such authority. (CN Comments 34.) Such a narrow reading of the Board's authority would unduly hinder implementation of section 11102(c) by blocking the availability of information that the Board has determined is relevant to the public interest thereunder.

Here, the data disclosure requirement is a reasonable exercise of the Board's discretion and is narrowly tailored to implement a particular procedure under section 11102(c) effectively. As stated in the *NPRM,* the data disclosure requirement is intended to provide customers with records that are necessary to ascertain whether a carrier has met the OETA, transit time, and/or ISP standards. *NPRM,* 88 FR at 63902. In the context of part 1145, the requirement that rail carriers provide this information to shippers/receivers about their own traffic ensures that these customers have basic eligibility information that is otherwise in the hands of the carriers. In this way, the data disclosure requirement differs from traditional discovery. Without the data, a shipper or receiver may have difficulty in determining whether, if the shipper or receiver submitted a petition, the

[30] As explained in the *NPRM,* the data in question would include all of the customer's data on traffic that was assigned OETAs and local service windows, along with corresponding time stamps indicating performance. *NPRM,* 88 FR at 63911.

shipper or receiver could establish a failure to meet a performance standard. Ensuring that a shipper or receiver has access to evaluate basic eligibility before filing a petition will help to facilitate the Board's implementation of part 1145 and is consistent with the Board's authority under section 11102(c)(1), as it will reduce unnecessary litigation and facilitate the expeditious handling and resolutions of petitions for prescription of a reciprocal switching agreement. By promoting efficient regulatory proceedings and sound regulatory decisions, the data disclosure requirement is reasonably adjunct to the Board's statutory responsibilities while advancing the purposes of section 1321(b) and the RTP. *See* 49 U.S.C. 10101(2), (15).

Moreover, although some rail carriers argue that shippers already have access to carriers' online platforms containing data necessary to file a petition, rail users have complained that railroads often provide data in a way that is ''incomprehensible to even seasoned industry veterans.'' [31] Given the variability of individual carrier online platforms and current metric-related methodologies, the data disclosure requirement will ensure that shippers and receivers have access to standardized data clearly correlating to the standards in part 1145. Carriers remain free, however, to maintain their existing platforms and customer interfaces as long as they are also able to provide the standardized part 1145 data to shippers upon request.

Contrary to CN's argument, it would not be inconsistent with the Board's practices to require data disclosure before a regulatory proceeding. For example, the Board requires carriers to include specific information on demurrage bills to allow customers to more readily gauge whether to challenge their demurrage assessments. *See* 49 CFR 1333.4; *see Demurrage Billing Requirements,* EP 759, slip op. at 1, 9.

The Board also rejects the Coalition Associations' proposal to require a potential petitioner to submit a prefiling notice, with that notice serving as the basis for the potential petitioner to obtain data from its incumbent carrier. The purpose of the data disclosure requirement is to enable a potential petitioner to assess *before* initiating regulatory proceedings whether to initiate those proceedings. That objective would be undermined by requiring a potential petitioner to submit a pre-filing notice as a condition to obtaining relevant information. A pre-filing notice would be an additional step, one that could even discourage some shippers or receivers from moving forward under part 1145. At the same time, a pre-filing notice is not required as a matter of law. As discussed above, the Board has ample authority to require data disclosure without regard to whether related regulatory proceedings are pending.

However, the Board is persuaded that greater specificity in § 1145.8(a) would facilitate timely responses by carriers to requests for individualized performance records. The proposed regulatory text will be modified to require a response by the carrier when a shipper or receiver has practical physical access to only one Class I rail carrier with respect to the lane(s) in question and when the request identifies the relevant lane(s), the range of dates for which records are requested, and the performance standard(s) in question. The Board will also define ''individualized performance records'' as OETA, transit times, and/or ISP data related to the shipper or receiver's traffic, along with the corresponding time stamps.

The Board will not, as some rail carriers suggest, place limitations on the frequency of requests for individualized performance records or the time period during which data can be requested. (*See* CSXT Comments 38–39.) The record indicates that most, if not all, shippers already have access to similar data from carrier online platforms that provide performance information, though not on a standardized basis. (*See id.* at 40–41; UP Reply 2.) Therefore, the Board is not persuaded that the carriers' concerns about receiving voluminous requests for data are likely to come to bear, as shippers may choose not to formally request this information from railroads unless they are close to initiating a proceeding. (*See* CSXT Comments 38–39.) For the same reason, the Board finds that seven days is adequate for the incumbent rail carrier to provide individualized performance records upon written request from a shipper or receiver, given that the carriers already track this information in the ordinary course of business.[32]

However, the data production is intended to implement part 1145, and the Board expects shippers and receivers to request individualized performance records based on a good faith belief that the Class I rail carrier has provided service that does not meet at least one performance standard in part 1145. In response to such a request, a carrier shall provide records for the identified standard(s). In a petition for prescription of a reciprocal switching agreement, a shipper or receiver may also challenge the veracity of the data provided.

Additionally, and as proposed in the *NPRM,* the Board will adopt a requirement that the data be machine-readable, ''meaning 'data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.''' *NPRM,* 88 FR at 63911 (citing *Demurrage Billing Requirements,* EP 759, slip op. at 3 n.9). As noted above, some rail users state that data provided by railroads is often incomprehensible. (NSSGA Comments 4; AFPM Comments 6.) A machine-readable data requirement will ensure that rail users have access to data that allows them to ascertain whether their individualized performance records meet the standards for a petition under part 1145. The Board will give Class I carriers the discretion to determine how to provide rail users with access to machine-readable data, including through a customized link, electronic file, or other similar option. In addition, to provide greater clarity as requested by carriers and more generally to facilitate the implementation of the rule, the Board will require Class I carriers to retain all data necessary to respond to requests for individualized performance records for a minimum of four years. (*See* AAR Comments 107; CPKC Comments 11.)

[31] (NSSGA Comments 4; *see also* AFPM Comments 6 (stating that rail carriers have a ''history of technically providing data that were extremely difficult to understand''); CSXT Comments 15–16 (noting that the Board's definition of OETA is ''similar'' to CSXT's TPP, which CSXT reports on ShipCSXT); UP Comments 6 (noting that in assessing a car's compliance with its trip plan, UP's TPC measure for manifest traffic adjusts for the impact of various events that delay or change a car's arrival time but are not caused by UP service issues).)

[32] CN argues that the data disclosure requirement raises confidentiality concerns. CN appears to suggest that, when the shipper or receiver that requests data is not the payor, the payor may wish to seek confidential treatment of the data. (CN Comments 34–35.) CN also asks the Board to consider 49 U.S.C. 11904, which prohibits rail carriers from disclosing certain information to persons other than the shipper or consignee without consent. (CN Comments 34.) CN suggests that the Board instead require data disclosure only in the context of a formal regulatory proceeding, after a petition has been filed and the Board has issued a protective order. (*Id.*) The Board rejects CN's suggestion. If the payor is concerned that the shipper or receiver will disclose the requested data to an unauthorized third party, the payor may address that concern through its agreement with the shipper or receiver. There is no need for the Board to initiate a regulatory proceeding to protect the payor's interest. As for the prohibition on carriers' disclosure of certain service-related data to parties other than the shipper or consignee under section 11904, that prohibition is not implicated by the data disclosure requirement. As clarified in the final rule, a carrier need only provide to a shipper or receiver data that pertains to the carrier's service to that shipper or receiver, which is already permissible under section 11904.

This approach will ensure that the Board, shippers, and receivers have available data that is relevant to implementation of part 1145, including the multi-year transit time standard in § 1145.2(b)(2).

Terminal Areas

In this proceeding, the Board proposed a rule that would permit shippers and receivers to seek prescription of a reciprocal switching agreement for a movement that begins or ends within a terminal area. The reciprocal switching agreement would provide for the shipment to be transferred within the terminal area in which the shipment begins or ends its journey on the rail system. *NPRM,* 88 FR at 63902;[33] *id.* at 63898 (''The newly proposed regulations would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards.''). As discussed below, some commenters urge the Board to go further and institute broader competitive-access initiatives, while others request clarification or express views on how various terms should be understood. Some assert that the rule should not include a definition of ''terminal area'' but, rather, should simply rely on existing case precedent. However, no commenter questions the permissibility or practicality of a terminal-based approach. In AAR's view, a terminal-area limitation ''is good policy'' because it is likely to eliminate from consideration a number of potential switching arrangements that would be ''highly impractical and inefficient.'' (AAR Comments 27.)

The Coalition Associations—joined by Celanese and AF&PA/ISRI—state that they support the Board's proposed definition of ''terminal area'' (the area in which a shipper or receiver must be located to be eligible for prescription of a reciprocal switching agreement under part 1145) because ''[t]he function-based definition is consistent with precedent'' and constrains carriers' ability to undermine the proposal by seeking to establish ''narrow geographic boundaries.'' (Coal. Ass'ns Comments 5, 45; *accord* Celanese Comments 2; AF&PA/ISRI Comments 2.) USDA suggests that the Board consider providing a non-exhaustive list of ''terminal areas'' to which the rule would apply. (USDA Comments 7.)

Several commenters approve of the overall switching proposal in the *NPRM* but state that it should not be limited to terminal areas. For example, NGFA (joined by three other organizations)[34] supports the policy underlying the *NPRM*—to provide incentives for railroads to provide adequate service—but states that the proposed rule ''could prove to be too narrow in scope to be of use to many agricultural shippers by applying only to 'service to a terminal area shipper or receiver.''' (NGFA Comments 2, 8–9 (noting that its members are often captive to Class I rail carriers at locations that are outside of ''terminal areas'' as the Board would define that term in proposed § 1145.1).) EMA echoes this view, asserting that a rule limited to ''terminal areas'' would leave many rural EMA members who are captive shippers without a remedy for poor service. (EMA Comments 9–10; *accord* NMA Comments 6 (calling for access remedies for rail customers not located within terminal areas).) Olin and PCA assert that limiting reciprocal switching to ''terminal areas'' as defined in the *NPRM* is unduly restrictive because the statute does not require such a limitation. (Olin Comments 4–5; PCA Comments 3, 13–14.) WCTL and the Coalition Associations express a similar view. (WCTL Comments 9–10; Coal. Ass'ns Reply 19–20.) WCTL also states that the scope of reciprocal switching relief should be assessed on a case-by-case basis that allows for consideration of the facts and circumstances of the particular case, rather than ''strict, geographic limits.'' (WCTL Comments 10.) These commenters and others urge the Board to return to the proposal in Docket No. EP 711 (Sub-No. 1),[35] or take other action to broaden the impact of reciprocal switching prescriptions.[36]

Conversely, AAR asserts that any prescription of reciprocal switching must be limited to traffic within a terminal area because ''the terminal-area limitation is required by statute.'' (AAR Comments 25–26; *accord, e.g.,* CN Comments 8.) AAR further suggests that ''[t]he Proposed Rule will most effectively embody the Board's intent to limit switching arrangements to terminal areas'' if it relies on case precedent to define a terminal area and ''makes clear in the regulatory text that the Board will prescribe switching *only* in such areas.'' (AAR Comments 29.)

As stated in the *NPRM,* the Board proposed a rule that ''would provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards.'' *NPRM,* 88 FR at 63898. The proposed rule's focus on terminal-area shippers and receivers is consistent with prior cases on reciprocal switching. As a policy matter, the Board concludes that the same approach is appropriate to this rule. In the case of terminal-area shippers and receivers, access to another rail carrier tends to be limited by the difficulty of constructing even the minimal amount of new track that would allow the other carrier to reach the shipper or receiver directly. The new regulations in part 1145 are intended to address this relatively discrete need by focusing on terminal-area shippers and receivers. They are not intended to address circumstances in which, due to the shipper or receiver's location outside of a terminal area, a regulatory introduction of an alternate rail carrier to address service issues might have different policy implications.[37] Accordingly, the Board

[33] The *NPRM* proposed defining a ''terminal area,'' as a commercially cohesive area in which two or more railroads collect, classify, and distribute rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities such as freight or classification yards. The proposed definition further clarified that a point of origin or final destination on the rail system that is not integrated into or, using existing facilities, reasonably cannot be integrated into the incumbent carrier's terminal-area operations would not be suitable for a prescribed switching arrangement. 88 FR 63913.

[34] NGFA's comments are supported by the North American Millers' Association, Agricultural Retailers Association, and the National Council of Farmer Cooperatives. (NGFA Comments 2.)

[35] (*E.g.,* Olin Comments 4–5; PCA Comments 3, 13–14.)

[36] (*E.g.,* NGFA Comments 3, 9–11 (calling for the Board to resume or take final action under multiple dockets); EMA Comments 9–10 (broaden definition or develop new rule to protect EMA members who are remote rural captive shippers); Coal. Ass'ns Comments 46–47 (initiate proceeding to expand the rule to shippers outside terminal areas pursuant to 49 U.S.C. 10705(a)(2)(c)); Coal. Ass'ns Reply 19–20 (include common stations where the two carriers currently interchange traffic); Ravnitzky Comments 2 (establish a default interchange point based on the nearest feasible location where both railroads can access each other's tracks).) GPI encourages the Board to be attentive to any concerns expressed from rural captive shippers after the rule goes into effect to help ensure that these shippers are not disadvantaged as Class I rail carriers ''focus their priorities in more competitive areas of the country.'' (GPI Comments 3.)

With respect to NGFA's comment concerning action in other dockets, the Board notes that a final rule was issued earlier this year in Docket No. EP 762 amending the emergency service regulations at part 1146; among other things, the new rule establishes a more streamlined and accelerated process for entertaining emergency service petitions under 49 U.S.C. 11123 and clarifies the Board's use of its regulations when acting on its own initiative to direct emergency service. *See Expedited Relief for Serv. Emergencies,* EP 762.

[37] *See* Laurits R. Christensen Assoc., Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition, 22–13 (rev. 2009) (discussing economic implications of different forms of regulatory intervention); *Midtec Paper Corp.* v.

will not adopt commenter proposals to reopen Docket No. EP 711 (Sub-No. 1) or expand the scope of part 1145 to shippers and receivers outside of terminal areas as defined in part 1145. This decision does not leave such customers without recourse for poor service; parts 1144 and 1147 both cover trackage rights and through routes as well as reciprocal switching agreements, and both parts can provide a remedy for poor service when the conditions therein are met.[38] Given that the Board has chosen as a policy matter to limit part 1145 to terminal-area shippers and receivers, it is unnecessary to resolve here whether 49 U.S.C. 11102(c) would accommodate a more expansive approach. Below, the Board addresses commenters' claims and contentions about the significance of various facts in determining what constitutes a ''terminal area,'' and other remarks or requests pertaining to this subject.

The Board underscores at the outset that, consistent with case precedent, the Board has taken a functional approach to defining ''terminal area'' for purposes of this rule. The agency has long understood ''terminal area'' in such functional terms: as a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service, characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. *NPRM,* 88 FR at 63902 (citing cases). A terminal area (as opposed to main-line track) must contain, and cannot extend significantly beyond, recognized terminal facilities, such as freight or classification yards. *Id.* at n.11. In other words, a ''terminal area'' is defined by the scope and nature of its functions, rather than, for example, distance limits, and the assessment of related issues may be fact-specific.[39] For this reason, the Board agrees with AAR that it would not be practical or productive to publish a list of ''terminal areas'' (as USDA suggests).[40]

While the regulatory text does not incorporate a list, the Board notes that, as a general matter, a normal revenue interchange point on the Open and Pre-Pay Stations List is often located within a ''terminal area.'' AAR asserts that inclusion on that list ''does not suggest there is'' a terminal area as described in the *NPRM.* (AAR Comments 29–30.) As the Board indicated in the *NPRM,* inclusion on the list as a normal revenue interchange point would be relevant (albeit not dispositive) evidence in identifying a terminal area. The list is a useful tool that could assist shippers and receivers in assessing whether their facilities are within a terminal area. Carriers would remain free to present—and the Board would also consider—evidence and argument that the area does not possess the attributes needed to qualify as a terminal area.

The Board also notes that the types of equipment and crew used to accomplish a movement that is incidental to a line-haul move do not dictate whether a particular origin or destination point is within a ''terminal area.'' AAR's suggestion to the contrary is misplaced.[41] *See, e.g., Midtec,* 3 I.C.C.2d at 179 (rejecting incumbent carrier's contention that the service it provided to the shipper was line-haul service—not switching—because it used road trains and crews rather than the switch engines and yard crews generally used in switching or terminal operations). The case law allows the Board to consider whether movements from the customer's facility are integrated into the incumbent carrier's local terminal area operations, whether service is performed within a cohesive commercial area, and other relevant characteristics. *See, e.g., Rio Grande Indus.,* FD 31505, slip op. at 10–11 (collecting cases).[42] As has long been the case, these questions will be assessed on a case-by-case basis in the event of a dispute. *See, e.g., Midtec,* 3 I.C.C.2d at 179 (''The questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case.'').

For similar reasons, AAR's suggestion that a terminal area does not exist if one carrier serves all the industries in an area and ''must carry traffic on a line haul'' to reach the other carrier for purposes of the switch, (AAR Comments 26 n.3), is misguided. The Board would consider, on a case-by-case basis, taking into account all the pertinent facts, whether a particular switching interchange could be considered to be within a terminal area for purposes of this rule. FRCA/NCTA point out that ''[t]here are areas where a single railroad provides the terminal service for itself as well as its competitor(s),'' and assert that ''the requirement that two carriers perform terminal services in a given area appears overly restrictive.'' (FRCA/NCTA Comments 2.) The Board will maintain the two-carrier requirement in the final rule, without dictating what it would mean, in an individual case, for two carriers to perform terminal-area services. Consistent with the principles discussed above, in the event of a dispute, the resolution of whether a particular carrier or activity satisfies the rule's definition would be made based on case-by-case analysis.

Finally, it is unnecessary to amend the regulatory text of proposed §§ 1145.2(c) and 1145.6(a) to state, as suggested by AAR, that reciprocal switching will be prescribed only within a terminal area. (AAR Comments 27–28.) The existing definition of ''reciprocal switching agreement'' is clear—as are the *NPRM* and this final

United States, 857 F.2d 1487, 1502 (D.C. Cir. 1988) (describing the use of terminal trackage rights as a more intrusive remedy than switching).

[38] As stated in the *NPRM,* shippers may still pursue access to an alternate rail carrier that goes beyond reciprocal switching under 49 CFR parts 1144 and 1147, which also allow for continued development, including, as appropriate, the Board's reassessment of adjudicatory policies and the appropriate application of those rules in individual cases. *NPRM,* 88 FR at 63900. Moreover, the Board's action in this docket is not intended to suggest that consideration of additional reforms directed towards increasing competitive options will be foreclosed in other proceedings. *Id.*

[39] *See Midtec,* 3 I.C.C.2d at 179 (''The questions of what is a terminal area and what is switching are factual ones requiring consideration of all the circumstances surrounding a particular case.''). Commenters recognize the merit of a flexible, functional approach. (*See, e.g.,* Coal. Ass'ns Comments 5, 45 (stating that the function-based definition is consistent with precedent and forecloses carriers from evading accountability by establishing artificial geographic boundaries for terminal areas); AAR Comments 27 (acknowledging that distance is a poor indicator of whether a switch will be operationally feasible or can be integrated into existing operations); CN Comments 8–9 (noting agency's ''long history'' of assessing terminal area issues on a case-by-case basis in light of the many types of factors that are considered).)

[40] (*See* USDA Comments 7 (suggesting that the Board publish a non-exhaustive list of ''terminal areas'' to which the proposed rule would apply); AAR Reply 32–33 (explaining why USDA's proposal would be time-consuming and difficult to implement).) VPA's request for a broad ''declar[ation] that ports are terminal areas,'' (VPA Comments 1, 12), will not be granted for similar reasons. (*See, e.g.,* AAR Reply 33 n.11.)

[41] (AAR Comments 28 (stating that industries ''served by road switchers from the terminal complex'' should not be covered by the proposed rule).) Conversely, whether a shipper or receiver can be ''reached by a local train dispatched from a freight yard'' does not determine the scope of a terminal area, and the agency has properly rejected suggestions to this effect. *See Rio Grande Indus.—Purchase & Related Trackage Rts.—Soo Line R.R.,* FD 31505, slip op. at 11 (ICC served Nov. 15, 1989). As discussed above, and consistent with long-standing practice, the Board would consider the totality of pertinent facts in determining whether a particular origin or destination point is located within a terminal area. The Board anticipates that, in most instances, determining whether that point is located in a terminal area should not be time consuming or controversial.

[42] The definition of ''terminal area'' proposed and adopted in this rule is not intended to exclude from consideration all areas across the network that have some portion of main-line track, if that track is used for local movements that are incidental to a line-haul move and other requirements for a terminal area are met. *See, e.g., Midtec,* 3 I.C.C.2d at 179–80.

rule—that prescriptions will be limited to terminal areas.[43]

Some commenters state that the final rule should omit a definition of ''terminal area.'' AAR asserts that the rule does not need to define this term because agency precedent already describes how to identify a terminal area; AAR maintains that adding a definition by rule could create confusion. (AAR Comments 28–29.) CN reiterates this view. (CN Comments 30.) Some shippers also favor omitting the definition. (*See, e.g.,* Olin Comments 4 (stating that the statute does not define ''terminal area'' and that such matters ''are determined on a case-by-case basis''); PCA Comments 13–14 (same; also stating that proposed definition is unnecessary and unduly restrictive).) The Board finds that it is useful and appropriate to provide stakeholders with a concise, readily accessible definition of ''terminal area'' in the regulation itself. Accordingly, the Board will reject suggestions to omit the definition. The Board notes that this definition relies on case precedent that reflects the functional, multi-factored approach the agency has long taken in considering issues involving terminal areas, and that these determinations turn on their particular facts. *See, e.g., Midtec,* 3 I.C.C.2d at 179 (agency must consider ''all the circumstances surrounding a particular case''). The Board thus finds unpersuasive AAR's claim about the risk of ''unnecessarily (and potentially erroneously) unsettling that existing body of law.'' (AAR Comments 29.) At the same time, including a concise, accessible definition in the rule does not mean the Board will depart from its long-standing practice of conducting a case-specific analysis of the pertinent facts in each proceeding, as CN, Olin, and PCA suggest the Board should—and the Board will—continue to do. (*See* CN Comments 8–9 (referencing agency's ''long history'' of considering terminal area issues on a case-by-case basis); Olin Comments 4; PCA Comments 13.)

CN additionally expresses confusion about the meaning of the last sentence of the proposed definition of ''terminal area'' in § 1145.1. (CN Comments 29.) As proposed, that sentence states: ''A point of origin or final destination on the rail system is not suitable for a prescribed switching arrangement if the point is not integrated into *or, using existing facilities, reasonably cannot be integrated into* the incumbent rail carrier's terminal-area operation.'' *See NPRM,* 88 FR at 63913 (emphasis added). According to CN, the italicized clause might be read to suggest that a point outside of a terminal area could, in some circumstances, be suitable for a prescribed reciprocal switching agreement. As discussed above, prescriptions under part 1145 will be limited to points of origin or final destination that are located within terminal areas. The Board will revise the regulatory text to make this point clear.

The *NPRM* invited comments as to whether the reciprocal switching tariff of an alternate carrier applicable to shippers in the same area should be considered as evidence that the area is a terminal area. *NPRM,* 88 FR at 63902 n.12. AAR asserts that ''[t]here are many reasons that the existence of a tariff describing switching is not evidence of the geography of a terminal area.'' (AAR Comments 30.) Specifically, AAR says, the existence of a tariff that is not used (in AAR's terms, a ''legacy'' tariff) ''would not speak to the operational realities that define a terminal area'' because, according to AAR, it would not be indicative of ''actual switching practice that the capabilities of infrastructure within a commercially cohesive area support.'' (*Id.*) AAR also remarks that tariffs may be labeled ''reciprocal switching'' that ''do not reflect 'reciprocal switching' in the statutory sense (*i.e.,* in a terminal area).'' (*Id.*) Finally, AAR argues that even reciprocal switching tariffs that ''otherwise align with the statutory definition of reciprocal switching'' may not support the conclusion that a particular location is within a terminal area. (*Id.* at 30–31 (commenting that these tariffs ''may exist more as a matter of historical happenstance than current economic and operational reality,'' or ''may have limited scope as to shippers, destinations, commodities, or number of railcars to which they apply'').) AAR maintains that construing such tariffs as evidence of a terminal area ''risks sweeping in areas that cannot meet the Board's established definition of that term.'' (*Id.* at 31.)

To the extent that AAR is arguing that the Board should not consider the existence of such a tariff as relevant evidence at all, the Board disagrees.[44] As the Coalition Associations point out, an alternate carrier's tariff plainly is relevant. (Coal. Ass'ns Comments 46.) The publication of a reciprocal switching tariff may indicate that the carriers have the ability to engage in transfers that are incidental to a line-haul move—which could constitute useful evidence pertinent to determining whether there is a terminal area for purposes of this rule. Furthermore, carriers would always have the opportunity to demonstrate that a particular location should not be considered part of a ''terminal area,'' that a particular prescription would not be practicable (which appears to be at the core of AAR's concern), or that regulatory requirements under the rule were not otherwise met. For these reasons, the Board concludes that it is appropriate to consider the existence of a reciprocal switching tariff, applicable to shippers or receivers in the same area, in determining what constitutes a terminal area. Similarly, the Board would consider evidence, apart from the publication of a tariff, that carriers in that area were engaged in reciprocal switching arrangements.

The Board also invited comments on how to reconcile inconsistencies in tariffs. *NPRM,* 88 FR at 63902 n.12. AAR states that it is not aware of any systematic issue relating to inconsistencies that would be amenable to treatment in a general rule; it suggests that any such issues would need to be addressed on a case-by-case basis. (AAR Comments 31.) The Coalition Associations maintain that inconsistencies between incumbent and alternate carrier tariffs are only a concern when no reciprocal switching is occurring between any facilities in the terminal area—in which case, they state the Board should examine the history of interchanges between the carriers within that terminal. (Coal. Ass'ns Comments 46.) The Coalition Associations suggest that inconsistencies should otherwise be resolved in favor of a presumption that any point within the terminal area could qualify for a prescription. (*Id.*) Based on the comments received, the Board concurs with AAR that any issues that may arise concerning tariff

[43] A reciprocal switching agreement is an agreement for the transfer of rail shipments between one Class I rail carrier or its affiliated company and another Class I rail carrier or its affiliated company *within the terminal area* in which the rail shipment begins or ends its rail journey. Service under a reciprocal switching agreement may involve one or more intermediate transfers to and from yards *within the terminal area. NPRM,* 88 FR at 63913 (emphasis added); *see also, e.g., id.* at 63915 (proposed § 1145.6(b), describing switching service under the agreement as ''the process of transferring the shipment between carriers within the terminal area''); *id.* at 63909 (stating that switching service under a reciprocal switching agreement under part 1145 would occur within a terminal area).

[44] Contrary to AAR's implication, (AAR Comments 31–32), the Board is not suggesting that the publication of a tariff would be dispositive in defining the existence or scope of a terminal area. It is one piece of evidence, among others, that the Board would consider. Indeed, AAR appears to acknowledge that tariffs are useful in defining the scope of reciprocal switching services, (*id.* at 31), which is one factor, among others, that would bear upon the Board's assessment of the existence and scope of a terminal area.

inconsistencies should be resolved on a case-by-case basis.

Practicability

The Board stated in the *NPRM* that, because switching service under a prescribed reciprocal switching agreement would occur within a terminal area,[45] there is reason to conclude that those agreements would be practicable under section 11102(c). *NPRM,* 88 FR at 63909. The Board added, however, that, should a legitimate practicability concern arise, it would consider whether the switching service could be provided without unduly impairing the rail carriers' operations. *Id.* The Board also stated that it would consider an objection by the alternate rail carrier or incumbent rail carrier that the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the objecting rail carrier's ability to serve its existing customers.[46] As explained in the *NPRM,* the objecting rail carrier would have the burden of proof of establishing infeasibility or undue impairment. *NPRM,* 88 FR at 63909.[47] The Board further proposed that, if the carriers had an existing reciprocal switching arrangement in the petitioner's terminal area, the incumbent carrier would bear a heavy burden in demonstrating why the proposed reciprocal switching agreement would be operationally infeasible. *See id.* at 63902, 63915.[48]

AAR and CSXT argue that a petitioner under part 1145 should be required to address practicability in its petition. According to AAR, the Board has recognized that shippers must affirmatively address feasibility concerns in other access proceedings.[49] AAR argues that the Board should take a similar approach here and require the petition to address practicability. (AAR Comments 63–64.) AAR also states that the Board would be prevented from making ''an affirmative finding'' with respect to practicability if this issue is not addressed in the petition. (*Id.* at 63.) CSXT asserts that ''the burden is on the petitioner to prove practicability, as the advocate of agency action.'' (CSXT Comments 44.)[50] CSXT itself recognizes, however, that rail carriers are often in the best position to opine on safety and feasibility. (*Id.*)[51] CSXT suggests therefore that the Board require rail carriers to inform the petitioner during the pre-petition negotiation period whether the carriers will contest practicability and, if they intend to do so, permit the petitioner to conduct limited discovery on that issue. (CSXT Comments 44.)

The Board rejects the suggestion that practicability must be addressed in a petition filed under part 1145. Under the rule, the prescription would only occur in a terminal area, thereby lowering the likelihood of infeasibility and undue operational impact (as compared to a more expansive form of potential regulatory intervention). If an objection to practicability were raised, it would be, therefore, reasonable to require the objecting rail carrier to bear the burden of proof of showing that transfers under the proposed agreement would be infeasible. Placing this obligation on the rail carrier would also promote the RTP by allowing efficient and expeditious handling of a petition under part 1145. *See* 49 U.S.C. 10101(2), (15). The same is true with respect to carriers' obligation to demonstrate that resulting line-haul arrangements would be infeasible or would unduly impair the ability to serve other customers. For both the switching services and line-haul arrangements, the carriers—not the petitioner—would have direct knowledge of the relevant information. Notwithstanding the aforementioned, however, a petitioner may seek discovery on practicability issues after the filing of a petition—in anticipation of an objection to practicability from either the incumbent or alternate rail carrier—and the Board itself can require additional information from carriers in particular cases. There is therefore no need to provide for pre-petition discovery on practicability issues, which would create an unnecessary hurdle and delay for potential petitioners. Moreover, although AAR suggests that the Board would be prevented from making ''an affirmative finding'' with respect to practicability if this issue is not addressed in the petition, (*see* AAR Comments 63), this assertion is mistaken. Any final decision, including findings on practicability, if raised, would be issued at the conclusion of the proceeding, based on the full record before the Board. Further, due to the characteristics of a switching arrangement, as explained above and as defined and scoped by this rule, in a case where no party raised practicability as an issue, the Board would be justified in ''find[ing] [the] agreement[ ] to be practicable'' as required by the statute. 49 U.S.C. 11102(c).

Nor is it necessary for part 1145 to follow the approach in part 1147, which does require that an initial petition discuss practicability. A petition filed under part 1147 requires an advance commitment from another available railroad to provide the alternative service, *see* 49 CFR 1147.1(b)(1)(iii)—meaning the petitioner there would have direct access to information bearing on practicability considerations before the petition is filed. The advance commitment requirement is not a feature of part 1145, making it less likely that the petitioner will have access to such information at the beginning of a case.

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[45] As discussed above, *see* Terminal Areas, the last sentence of the definition of ''terminal area'' in § 1145.1 will be modified to promote clarity. However, because that modification does not expand the definition of terminal area beyond the *NPRM* or precedent, it does not impact the discussion below.

[46] *Id.; see id.* at 63915 (proposed § 1145.6(b), stating that notwithstanding paragraph (a), the Board will not prescribe a reciprocal switching agreement if the objecting carrier demonstrates that switching service under the agreement ''could not be provided without unduly impairing either carrier's operations; or the alternate carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the incumbent carrier or the alternate carrier's ability to serve its existing customers''). For purposes of consistency, § 1145.6(b) will be modified to replace ''*unduly hamper*'' with ''*unduly impair*'' (emphasis added). This modification does not substantively change the regulatory text; the terms as used in the final rule are essentially the same. ''Hamper'' is defined to mean ''to interfere with the operation of'' or ''to restrict the movement of'' and ''impair'' is defined to mean to ''diminish in function, ability, or quality.'' *See* Hamper, Merriam-Webster Dictionary, available at *www.merriam-webster.com/dictionary/hamper; see also* Impair, Merriam-Webster Dictionary, available at *www.merriam-webster.com/dictionary/impair.*

[47] Section 1145.5(d) will be modified to make clear that the burden of proof of establishing infeasibility and undue impairment will be on the objecting carrier. Evidence relating to the types of infeasibility and undue impairment referenced in the rule would be relevant in determining whether an objection to the practicability of a prescription was meritorious.

[48] Minor clarifying changes have been made in the regulatory text of § 1145.6(b) to more closely correspond to the descriptions of these concepts provided in the preamble of the *NPRM* and the final rule.

[49] (AAR Comments 63 (citing 49 CFR 1147.1(b)(1)(iii), which requires, inter alia, that a petition filed under part 1147 contain ''an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service'').)

[50] CSXT cites *Golden Cat Division of Ralston Purina Co.* v. *St. Louis Southwestern Railway* (*Golden Cat*), NOR 41550 (STB served Apr. 25, 1996), as support for this proposition. However, *Golden Cat* involved a complaint proceeding brought directly under former 49 U.S.C. 11103(a)—not the establishment of a new regulatory framework to efficiently and effectively address requests for reciprocal switching prescriptions under a defined service-based framework. Moreover, in that case, issues relating to which party bore the burden of proof on a particular issue (such as practicability) were not raised or contested, and thus were not before the agency for decision.

[51] AAR similarly recognizes that the issue of practicability ''would likely . . . be addressed in the carrier's reply'' to a petition. (AAR Comments 63.)

AAR asserts that, in assessing practicability under part 1145, the Board should apply the standards that were articulated in *Delaware & Hudson.*[52] (AAR Comments 64.) AAR's underlying assumption is that the prescription of a reciprocal switching agreement under part 1145 could have significant operational impact. AAR argues that added transfers increase operational complexity and introduce a higher risk of failure—effects that, according to AAR, could adversely affect the rail network. (*Id.*) CN argues that under the established test for practicability, relevant factors include existing track and yard usage, capacity, congestion, traffic density, operational interference, safety, the potential for unduly impairing the ability of either carrier to serve its shippers, and the impacts to other carriers, shippers, and the public. (CN Comments 18–19.)

There is, in fact, no significant difference between the standards that the ICC applied in *Delaware & Hudson* and the provisions of part 1145 on practicability. What differs, with respect to practicability, is the level of inquiry that was warranted in *Delaware & Hudson* versus the level of inquiry that will be warranted under part 1145. The reciprocal switching agreement in *Delaware & Hudson* covered all customers in the terminal area, on the tracks of the affected carriers, throughout the city of Philadelphia. It made sense in *Delaware & Hudson* for the ICC to explore, on a broad scale, the possible impacts of the proposed agreement given the wide scope of the agreement. In contrast, a reciprocal switching agreement under part 1145 would be limited in scope because it would apply only to the successful petitioner's facility.

Carriers also oppose the presumption that was proposed in the *NPRM.* Under that presumption, which the incumbent railroad would bear a ''heavy burden'' to overcome, operation under a reciprocal switching agreement would be presumed to be operationally feasible if the incumbent railroad and the alternate railroad had an existing reciprocal switching arrangement in the petitioner's terminal area. *NPRM,* 88 FR at 63915 (proposed § 1145.6(b)). CN suggests that existing voluntary reciprocal switching operations would be only one factor in determining whether a proposed agreement would be practicable. (CN Comments 18–19 (citing *Delaware & Hudson,* 367 I.C.C. at 720).) CSXT asserts that all relevant evidence should be reviewed when determining whether an agreement would be practicable; CSXT contends that the Board therefore should eliminate the use of any presumption.[53] (CSXT Comments 42–44.)

Conversely, the Coalition Associations support the presumption of operational feasibility when a reciprocal switching arrangement already exists in a petitioner's terminal area. (Coal. Ass'ns Comments 5–6, 45.) The Coalition Associations argue, however, that the Board should adopt a similar requirement for any location where the incumbent and alternate carrier interchange traffic. The Coalition Associations reason that the transfer of railcars at an interchange en route on a line haul is operationally the same as the transfer of railcars within a terminal area for a reciprocal switch. (*Id.* at 5–6.) AAR responds that the Coalition Associations' argument is untenable. (AAR Reply 57.) According to AAR, the existence of an interchange that is not associated with reciprocal switching cannot establish that it is feasible to add other switching at that interchange. (*Id.*)

The Board will retain the presumption of operational feasibility based on an existing reciprocal switching arrangement in the petitioner's terminal area. That presumption pertains only to operational feasibility of the reciprocal switch, not to other potential elements of impracticability (such as undue impairment of the incumbent carrier's operations, the infeasibility of the alternate carrier's line-haul service, or undue impairment of the incumbent rail carrier's or the alternate rail carrier's ability to serve its existing customers). An existing reciprocal switching arrangement would demonstrate that railcars could be transferred between carriers within the terminal area. The presumption is rebuttable and the carriers will have the opportunity to demonstrate that the petitioner's traffic could not reasonably be added to switching operations. Further, the Board will retain flexibility to assess all relevant information bearing on the issue of practicability. *See* 49 CFR 1145.6(b).

With respect to the Coalition Associations' proposal to presume operational feasibility at any location where the incumbent and alternate carrier interchange traffic, the Board finds that such a proposal is outside the scope of this proceeding. This rulemaking is limited to establishing criteria for the prescription of reciprocal switching agreements within terminal areas as defined in part 1145.

Some commenters argue that the Board should consider safety as part of its assessment of practicability. (*See, e.g.,* CN Comments 18–19.) The federal government's primary safety agency for freight rail transportation, FRA, and its parent department, DOT, state that the Board should consider safety in assessing a petition under part 1145 but note that, in general, they do not foresee safety concerns with reciprocal switching. (DOT/FRA Comments 3 n.3 (explaining that railroads are required to operate safely and in compliance with all applicable FRA safety regulations at all times, which would include while conducting reciprocal switching moves).) AAR agrees that compliance with relevant safety regulations and practices ''will do much to mitigate safety concerns,'' but argues that unforeseen safety issues may arise in a specific proceeding. (AAR Reply 56.) AAR suggests the Board clarify in the regulatory text that ''the Board will not find a switching arrangement to be practicable and in the public interest if it is unsafe.'' [54]

Part 1145 does not preclude the Board from considering safety in its assessment of a petition filed under part 1145. The proposed rule requires any petition for prescription of a reciprocal switching agreement to be served on FRA. *NPRM,* 88 FR at 36908 (proposed § 1145.5(c)). Therefore, FRA would receive notice and have an opportunity to comment on any petition if it deemed

[52] In *Delaware & Hudson,* the ICC stated that reciprocal switching is ''practicable and in the public interest'' when it generally meets the following criteria: ''(1) interchange and switching must be feasible; (2) the terminal facilities must be able to accommodate the traffic of both competing carriers; (3) the presence of reciprocal switching must not unduly hamper the ability of either carrier to serve its shippers; and (4) the benefits to shippers from improved service or reduced rates must outweigh the detriments, if any, to either carrier.'' *See Del. & Hudson,* 367 I.C.C. 718, 720–22.

[53] Specifically, CSXT states that ''the Board should eliminate its presumption that forced switching in a terminal area would be practicable.'' (CSXT Comments 42.) CSXT misdescribes the presumption, which applies only to operational feasibility, and arises only when the incumbent and alternate carriers have an existing reciprocal switching arrangement in the petitioner's terminal area.

[54] (*Id.* (quoting with modifications *2016 NPRM,* EP 711 et al., slip op. at 18; *see also* CN Comments 22 (asserting that a finding of practicability requires consideration of safety issues associated with the handling of traffic or the alternate route); CSXT Comments 43–44 (noting risk of accidents and employee injuries from increased handlings and safety/security concerns with hazardous materials and TIH shipments).)

BLET also raises concerns that switching ''would impair the safe operations of crews on both the host and guest railroads.'' (BLET Comments 2.) This concern, however, seems to address a trackage rights scenario as opposed to reciprocal switching, as BLET later refers to a guest railroad traversing the tracks of a host railroad. (*Id.*) The Board declines to address the issue raised by BLET here as it appears to go beyond the scope of this proceeding.

necessary. The Board would take FRA's comments into account in determining whether the proposed reciprocal switching was *practicable* and in the public interest. In light of the foregoing, it is not necessary to amend part 1145 to require a specific determination as to safety.

CRC and Metrolink express concern that a reciprocal switching agreement under part 1145 could adversely impact existing agreements between freight rail carriers and passenger rail carriers, including agreements regarding shared use of facilities, on-time performance goals, safety, and dispatching priorities. CRC and Metrolink assert that, given the potential impact reciprocal switching agreements may have on a shared rail corridor, the Board must consider the interests of passenger rail carriers in a proceeding under part 1145. (CRC Comments 4–6; Metrolink Comments 1–2.) To that end, CRC suggests that the Board modify proposed § 1145.6(b) to permit a ''potentially affected rail carrier'' to bring practicability concerns before the Board. (CRC Comments 7–8.)

The Board declines to modify proposed § 1145.6(b) as suggested by CRC. As CRC notes, freight rail carriers and passenger rail carriers already have existing shared use and/or operational agreements. There is no reason to suppose that those agreements would be nullified by the Board's prescription of a reciprocal switching agreement. To the contrary, the Board may assume that the alternate carrier under the prescribed agreement would provide line-haul service to the petitioner in accordance with the alternate carrier's operating agreements with other carriers. In all events, freight rail carriers are in a position to make the Board aware of any practicability issues involving passenger carriers.

Finally, BNSF urges the Board to consider car supply issues when weighing the practicability of a proposed reciprocal switching agreement, including the alternate carrier's ability to supply cars and how added car supply responsibilities will impact the alternate carrier's other customers. (BNSF Comments 8.) BNSF notes that its existing, market-based car-supply programs have substantial built-in lead times and argues that the Board should ensure that these programs are not adversely affected by a prescribed reciprocal switching agreement. (*Id.* at 9–10.)

Although BNSF urges the Board to consider car supply issues when considering the practicability of a reciprocal switch, the Board notes that it is possible that the petitioner and the alternate carrier will have addressed car supply issues in advance of the filing of a petition. Nevertheless, the Board reiterates that, under § 1145.6(b), the Board will not prescribe an agreement if the alternate carrier demonstrates that the provision of line-haul service to the petitioner would be infeasible or that it would unduly impair the alternate rail carrier's ability to serve its existing customers—and will consider evidence, for example, of whether the alternate carrier would be unable to accommodate the car supply needs of the petitioner in the event a reciprocal switching agreement were ordered.

Service Obligation

The Board sought comment on whether a prescription should include a minimum level of switching service, and if so, whether the Board should establish a separate and specific penalty structure to be imposed on carriers that do not meet that level of service. *NPRM,* 88 FR at 63903 n.15.

The Coalition Associations and PCA support establishing such a requirement, along with a specific penalty structure to be imposed on carriers that do not meet the customer's level of service requirements. (Coal. Ass'ns Comments 58; PCA Comments 7–8.) AAR asserts that no such requirement or ''penalty structure'' is appropriate, as the prescribed service will be subject to the common carrier obligation under 49 U.S.C. 11101, and the usual remedies for a failure to provide adequate service upon reasonable request will be available. (AAR Comments 94.)

While the Board expects movements under a prescribed reciprocal switching agreement to occur on a timely and efficient basis, the Board will not attempt through this rule to anticipate or set standards for resolving related disputes. The Board will leave enforcement of carriers' obligations under a prescribed reciprocal switching agreements to other proceedings, should a dispute arise.[55]

Procedures

Negotiations

The *NPRM* proposed that, at least five days prior to filing a petition under part 1145, the petitioner must seek to engage in good faith negotiations to resolve its dispute with the incumbent rail carrier. *NPRM,* 88 FR at 63914. Several rail carriers argue that five days is insufficient for an incumbent carrier to cure a service issue. They urge the Board to extend the negotiation period or require additional pre-filing communication between carriers and petitioners. (*See, e.g.,* AAR Comments 86; CPKC Reply 25; CSXT Comments 35; NSR Comments 11.)

NSR suggests that customers should be required to communicate with the incumbent carrier during the period of the alleged service issue upon which a petition is based. (NSR Comments 11 (stating that it is consistent with the RTP of 49 U.S.C. 10101(2) to promote the private resolution of disputes); *see* AAR Reply 67 (encouraging the Board to adopt NSR's recommendation); CPKC Reply 25 (endorsing NSR's suggestion).) Similarly, AAR suggests that shippers be required to notify an incumbent carrier of the concerns in question as soon as practicable after the 12-week period during which the carrier allegedly failed to meet a performance standard, and that shippers also be required to engage with the incumbent carrier for a reasonable period—such as four weeks—during which the incumbent carrier would be encouraged to remedy the problem.[56] (AAR Comments 88; *see* CSXT Comments 35 (endorsing AAR's recommendation).) According to AAR, allowing an incumbent carrier to cure a service issue is the most efficient approach to achieving ''the Board's ultimate objective.'' (AAR Comments 86–87.)

[55] More broadly, as described in the *NPRM* and throughout this rule, the Board has recognized that the form of intervention, the characteristics of the appropriately defined and scoped switching prescription here, the numerous protections in this rule, and other aforementioned factors enable the Board to balance the aspects of the RTP and set these performance standards in this specific context. As the Board stated in the *NPRM,* it does not view it as appropriate to apply or draw from these standards to regulate or enforce the common carrier obligation. *See, e.g., State of Montana* v. *BNSF Ry.,* NOR 42124, slip op. at 7 (STB served Apr. 26, 2013) (stating what constitutes a reasonable request depends on all relevant facts and circumstances); *Granite State Concrete Co.* v. *STB,* 417 F.3d 85, 92 (1st Cir. 2005); *Union Pac. R.R—Pet. for Declaratory Ord.,* FD 35219, slip op. at 3–4 (STB served June 11, 2009).

[56] CSXT also argues that the Board should only permit petitions for alleged service inadequacies that are ''reasonably contemporaneous with the petition and exist at the time of the petition'' because there is no compelling need for a switching prescription where a service inadequacy no longer exists. (CSXT Comments 35.) As suggested above, though, carriers have misstated the law in suggesting that the Board must find a compelling need as a condition to a prescription under section 11102(c). *See* Legal Authority. Even putting aside the applicable standard, part 1145 properly does not require demonstration of an ongoing service issue as a condition to a prescription. Given the fluid nature of rail operations, what had been an ongoing problem could be temporarily fixed or could recur. It therefore would undermine the purposes of part 1145 to require demonstration of an ongoing service issue. That approach would undermine predictability for shippers and receivers that were considering whether to file a petition under part 1145 and, by undermining predictability, would negate the incentives that part 1145 is designed to introduce.

Rail carriers also argue that an incumbent rail carrier would be better situated to cure a service issue if the Board extended the five-day negotiation period. According to UP, a 30-day negotiation period would allow the customer and carrier ''to resolve issues and make longer-term, permanent changes to address the concerns.'' (UP Comments 14.) BNSF also suggests a 30-day negotiation period and states that, during the 30-day period, Board staff from the OPAGAC or the Rail Customer and Public Assistance Program (RCPA) could assist in resolving disputes. (BNSF Comments 4–5; BNSF Reply 2–3; *see also* AAR Reply 67 (stating that the Board should encourage shippers and carriers to utilize OPAGAC).)

NSSGA responds that carriers' request for additional time to cure a service deficiency shows that carriers can improve service if threatened with the possibility of a reciprocal switching proceeding and are only interested in improving service when a shipper intends to pursue a switching prescription. (NSSGA Reply 4.) NSSGA argues that carriers can improve service at any time, that providing carriers with additional time to cure would delay service improvement, and that carriers may make only temporary improvements to avert a switching prescription. (*Id.*) AFPM also supports the proposed five-day negotiation period. (AFPM Comments 14.)

The Board rejects proposals to extend the five-day negotiation period or to require additional pre-filing communication between rail carriers and shippers or receivers, including during the period of alleged service inadequacy. As a practical matter, the Board expects that—given both the regulatory requirement that a petitioner must seek to engage in good faith negotiations to resolve its dispute and the practical dynamics of the business relationship between carriers and their customers—a shipper or receiver would have communicated with the incumbent carrier during the period of alleged service inadequacy, and parties are encouraged to seek assistance from RCPA to informally resolve disputes.[57] But requiring such communication or resolution would only impose an unnecessary hurdle on petitioners and could result in delaying service improvement. Moreover, AAR errs in asserting that the Board's ''ultimate goal'' in enacting part 1145 is merely to provide for resolution of an immediate service problem. The Board's broader goal is to create appropriate regulatory incentives for Class I railroads to achieve and to maintain higher service levels on an ongoing basis. *NPRM,* 88 FR at 63899. Requiring petitioners to seek private resolution of an ongoing service issue—which is a remedy already available to them—would not accomplish these goals.

[57] RCPA can be reached at (202) 245–0238 and *rcpa@stb.gov.*

Replies and Rebuttals

AAR argues that the Board did not explain why it proposed a 20-day period to reply to a petition, rather than a 30-day period as permitted under 49 CFR 1147.1(b)(2). (AAR Comments 89); *see NPRM,* 88 FR at 63914. AAR states that a 30-day reply period would allow an incumbent railroad to provide a well-informed pleading. (AAR Comments 89.) Similarly, Ravnitzky suggests a 30-day period for both replies and rebuttals. (Ravnitzky Comments 2); *see NPRM,* 88 FR at 63915 (proposing a 20-day period to file a rebuttal to a reply).

The proposed 20-day reply period is consistent with the Board's general regulations, which permit a party to file a reply to any pleading within 20 days after the pleading is filed, unless otherwise provided. *See* 49 CFR 1104.13. As to the rebuttal period, Ravnitzky does not explain why a period longer than 20 days is necessary. Consistent with the RTP, *see* 49 U.S.C. 10101(2), (15), the Board also finds that the 20-day deadlines will promote more efficient proceedings, reflect the guidance in the rule itself regarding the scope of available arguments, and will allow the Board to meet its target for issuing an order addressing a petition within 90 days of it being filed. *See NPRM,* 88 FR at 63908 (proposed § 1145.5(f)). Nevertheless, the Board maintains discretion to extend any deadline upon request and for good cause. *See* 49 CFR 1104.7(b).

Alternate Carriers

Rail carriers urge the Board to clarify the alternate carrier's role in a proceeding for a switching prescription under part 1145. (*See, e.g.,* AAR Comments 89; BNSF Comments 6–7; UP Comments 14–15.) BNSF argues that the Board should require petitioners to engage in pre-petition consultations with the alternate carrier to establish, before a petition is filed, whether switching would be practicable. (BNSF Comments 5–6 (proposing a 30-day pre-filing negotiation period).) BNSF also states that the Board should clarify that an alternate carrier has a right to participate in a formal Board proceeding brought under part 1145. (*Id.* at 7.) According to BNSF, such participation by the alternate carrier would ensure that a new switching prescription improves the petitioner's service without harming service to the alternate's existing customers. (*Id.*)

Other rail carriers argue that the proposed rule should require petitioners to obtain a commitment from the alternate carrier before filing a petition. (*See, e.g.,* AAR Comments 10, 90 (stating that the commitment should include a design plan, which is central to the Board's consideration of issues such as practicability, safety, and impact on other shippers).) CN, CSXT, and UP note that part 1147 requires petitioners to obtain a commitment from an alternate carrier and that, in adopting part 1147, the Board stated that an alternate carrier's participation was ''essential.'' (CN Comments 22; CSXT Comments 37–38; UP Comments 16–17); *see Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 977, 979 n.19; 49 CFR 1147.1(b)(1)(iii). CSXT states that, if cooperation by the alternate is essential under part 1147, it is essential for nonemergency cases filed under part 1145. (CSXT Comments 38.) Similarly, CN argues that the Board's reasoning in *Expedited Relief for Service Inadequacies* that '''[f]orcing a second carrier to provide service unwillingly could create safety concerns, impair service to its customers, or hurt its finances' . . . . is equally valid in the context of the current NPRM.'' (CN Comments 22 (quoting *Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 977).) UP also argues that a commitment requirement would incentivize shippers to provide alternate rail carriers with sufficient time to evaluate impacts of the proposed service and would allow the shipper and alternate carrier to negotiate about service and volume. (UP Comments 17.) Alternatively, UP suggests that the Board clarify that it would not require an alternate carrier to provide service if the carrier would need to change service plans, hire crews, or assume capital investments. (*Id.*)

ACD responds that a commitment requirement is unnecessary, as the *NPRM* already requires a switch to be practicable and in the public interest, and that a commitment requirement would delay petitions and make them more difficult to complete. (ACD Reply 5.) WCTL argues that a commitment requirement would essentially require a shipper to contract with what may be the only alternate rail carrier available, providing the alternate with ''significant leverage over the shipper and . . . little incentive to afford substantial value to the aggrieved shipper.'' (WCTL Reply 19.) Other rail users suggest that a potential alternate carrier may be unwilling to enter into an alternate

service commitment. (*See* NGFA Comments 6 (asserting that a lack of interest by the potential alternate carrier is a primary reason that few cases invoking the emergency service rules under part 1147 have not resulted in alternate carrier service); DCPC Reply 7 (stating that, absent an opportunity to compete for all or most of a shipper's business, an alternate may be unwilling to invest in and commit to alternate service).)

The Board will not adopt the suggestion that petitioners should obtain a commitment from an alternate rail carrier before filing a petition. However, for the Board to best meet its information needs and carry out the regulations, the Board will require that an alternate carrier participate in a proceeding under part 1145 by filing a reply to a petition. *See NPRM,* 88 FR at 63914 (proposed § 1145.5(c), requiring a petitioner to serve the petition on the alternate carrier);[58] *see also Revisions to Reguls. for Expedited Relief for Serv. Emergencies,* EP 762, slip op. at 11 (STB served Jan. 24, 2024). In such a reply, an alternate carrier may raise concerns pertaining to practicability. As stated in the *NPRM,* in determining whether to issue an order granting a reciprocal switching prescription, the Board would consider any alternate rail carrier's objections that the provision of line-haul service to the petitioner would be infeasible or unduly hamper the alternate carrier's ability to serve its existing customers.[59] *NPRM,* 88 FR at 63909. And if an alternate carrier needed to make certain investments to accept a petitioner's traffic, the Board would consider whether a longer minimum term for the prescription was necessary for the prescription to be practical. *Id.* at 63910. To ensure carriers have necessary information for their replies, the Board will amend its proposal to require the petitioner to identify the requested duration of the prescription of a reciprocal switching agreement and provide supporting evidence for any request for a prescription longer than the minimum term specified in § 1145.6(c).

The procedures in this rule allow an alternate carrier to meaningfully participate in a Board proceeding while reducing barriers to petitioners. Additionally, requiring an alternate carrier to file a reply to a petition will allow the Board to better assess any concerns relating to practicability and to weigh those concerns against the public interest. In short, the Board rejects rail carriers' assertions that, in the absence of a commitment requirement, an alternate carrier would be forced to offer line-haul service where there are legitimate practicability concerns that would unduly impair the alternate carrier's operations. Finally, requiring a commitment from the alternate carrier would contradict the design of part 1145, which seeks to allow the successful petitioner to choose between available rail carriers as the petitioner sees fit.

Shippers and Receivers

VPA, while noting that the Board ''has appropriately focused its proposed rulemaking on shippers and receivers of freight,'' nevertheless argues that the Board should ''modestly expand the scope'' of the entities eligible to seek a reciprocal switching prescription ''to include ports and port facilities.'' (VPA Comments 5.) VPA asserts that a port, in effect, is the originator or terminator of traffic because every rail movement involving a port either starts or ends at the port, and that ports have a need for reliable, predictable, and efficient rail service similar to that of shippers and receivers. (*Id.* at 6.) VPA also argues that poor rail service creates operational issues at ports, as was shown by the problems experienced recently at West Coast ports. (*Id.* at 6–7.) VPA asserts that any portion of a port facility that is served by only one Class I rail carrier should be eligible for relief; this, VPA argues, would be consistent with the Board's definition of ''practical physical access'' and the proposed rule's coverage of a shipper's traffic in a single eligible lane even if the shipper enjoys practical physical access to multiple carriers with respect to other lanes. (*Id.* at 7–8.)

AAR opposes VPA's request to expand eligibility to ports, arguing that shippers and receivers ''are the entities with the essential economic and operational relationships with the carrier,'' and that expanding eligibility ''would raise numerous questions about how the entities with those economic and operational relationships would properly be heard'' and would ''pose complicated issues related to data confidentiality.'' (AAR Reply 66 n.21.)

While it may be, as VPA suggests, that port facilities can bear certain similarities to shippers and receivers from an operational perspective, it is also true that they serve a distinct function as links in the national and international supply chain. (*See* VPA Comments 5 (noting that The Port of Virginia ''works hard to be an important part of the national intermodal system for the benefit of the shippers, the economy of Virginia, and the nation.'').) And the Board is sensitive to the concerns AAR raises regarding the economic and operational relationships between railroads and the shippers and receivers who are their ultimate customers and users of the supply chain of which ports are a part. Moreover, VPA has not identified any particular reason why it would not be equally effective for the shipper/receiver to petition, or how a port would implement a switch, as it is not a purchaser of common carrier rail service. Therefore, based on the comments received, the current record does not support modifying the rule to expand eligibility to ports or portions thereof. Because the Board is not modifying the rule to include ports as eligible petitioners, the other changes VPA requests need not be addressed, as they would directly flow from those modifications. (*See id.* at 8–12.)

DCPC raises whether a group of shippers in the same terminal area could file for a prescription of a reciprocal switching agreement, giving as an example a group of shippers located in an industrial park. (DCPC Comments 13.) DCPC asserts that groups of shippers served by the same incumbent railroad in the same terminal area that demonstrate inadequate service according to the established standards should be allowed to seek a prescription. (*Id.*) While the Board does not foreclose the possibility that a group of similarly situated shippers could jointly seek a prescription, it need not attempt to define in the abstract a specific set of circumstances, if one exists, wherein individual shippers each would qualify for the same relief in such a similar way that a joint petition would be appropriate. The Board therefore will consider the suitability of a joint petition on a case-by-case basis in the event such a petition is filed.

AAR urges the Board to clarify that ''if the party with the economic relationship to the carriers [*e.g.,* payor of freight] is not the same as the party with the operational relationship to the switching, they *both* need to be before the Board as both interests will be

[58] Consistent with its approach in Docket No. EP 762, *Revisions to Regulations for Expedited Relief for Service Emergencies,* the Board will require a petition to identify at least one possible rail carrier to provide alternative service. Given that a petitioner may have two or more options if it were to receive a reciprocal switching agreement prescription, the Board will amend the proposal to clarify that a petitioner can identify, and must serve the petition on, one or more alternate carriers, and each identified alternate carrier will be required to reply to the petition.

[59] As stated in the *NPRM,* the objecting carrier would have the burden of proof of establishing infeasibility or undue impairment. *NPRM,* 88 FR at 63909. The final regulatory text has been modified to clarify that the objecting rail carrier bears the burden of proving infeasibility or undue impairment. *See* 49 CFR 1145.5(d).

affected.'' (AAR Comments 91.) The Board disagrees. The real parties in interest for these regulations are the shippers and receivers that have directly experienced the service issue. Moreover, considering the business relationship between payors of freight and the shipper or receiver (to the extent those entities are different), and the costs to a shipper or receiver of bringing a case, the Board notes that petitioners would have an incentive to communicate and coordinate as necessary with the payor of freight and to avoid filing cases in which the petitioner could not pursue a switching arrangement from an economic perspective. Based on the record here, the Board sees little value in requiring another entity beyond those parties to also join in a proceeding.

Short Lines, Passenger Rail, and Commuter Rail

Under proposed § 1145.5(c), a petitioner would be required to serve the petition for prescription of a reciprocal switching agreement on the incumbent rail carrier, the alternate rail carrier, and FRA. Several commenters encourage the Board to recognize that other entities may be affected by a prescription and to require that the petition should be served on them also.

AAR argues that shippers should serve notice on short lines and passenger railroads to prevent complications, and that those parties should be permitted to submit comments on a petition if needed. (AAR Reply 65–66.) Similarly, ASLRRA argues that short lines should be notified of switches impacting their traffic—so a short line railroad scheduled to receive a shipment subject to a reciprocal switch prescription earlier in its journey should be notified of the petition as well. (ASLRRA Comments 1, 7.) CSXT supports ASLRRA's proposal to notify short lines of petitions that could affect ''joint line traffic handled by that short line.'' (CSXT Reply 14.) CSXT also argues that pre-Staggers standards for joint use of terminal facilities, which Congress ''imported'' when adopting section 11102(c), made clear that a determination as to whether a prescribed reciprocal switching is in the public interest requires consideration of the relief's impact on other parties. (*Id.* at 13.)

CRC asks the Board to add a definition of ''Potentially Affected Rail Carrier'' that would include any rail carrier—freight or passenger—that operates on track shared with one of the rail carrier parties to a prescribed reciprocal switching agreement, and to amend § 1145.5 to require that the petition be served on potentially affected rail carriers. (CRC Comments 7–8.) CSXT supports CRC's suggestion about notifying affected passenger railroads. (CSXT Reply 14.) Metrolink asks that commuter rail and intercity passenger rail entities be given notice of a proceeding and the ability to comment. (Metrolink Comments 1.) Within a case, Metrolink also asks that the Board consider impacts on passenger rail and those entities' shared-use agreements with Class I carriers. (*Id.* at 1–2.)

With respect to commenter requests for post-prescription notifications, the Board notes that voluntary reciprocal switching arrangements involving a Class I rail carrier are reflected on that carrier's public website,[60] and other rail carriers could observe that a voluntary reciprocal switching agreement is in place. Like a voluntary reciprocal switching arrangement, a prescribed reciprocal switching agreement also would be reflected on the carrier's website and observable; moreover, the fact that it was prescribed would be available on the Board's website. *See also* § 1145.6(d), as amended below. From an operations perspective, given the definitions and protections in this rule, there are substantial similarities between a voluntary reciprocal switching arrangement and one that is prescribed and their resulting impacts. As such, the record does not support requiring special notice to other rail carriers of either prescribed reciprocal switching agreements or the filing of a petition. Furthermore, a shipper or receiver may not be aware of all the rail carriers that use a shared track; it could be burdensome or nearly impossible for the petitioner to ascertain all possible rail carriers using that track because they do not have access to the applicable agreements. The Board also notes that carriers are free to notify any affected entity and consult them in formulating their replies, including in considering or addressing practicability. For those reasons, the Board declines to expand § 1145.5(c) to require notice to entities other than the incumbent carrier, the alternate carrier, and FRA. Should there be concerns with how a prescription could affect other rail carriers, the parties should raise and address them in their pleadings.

Disclosure Under 49 CFR Part 1300

Proposed § 1145.6(d) provides, in part, that upon the Board's prescription of a reciprocal switching agreement, the affected rail carriers must ''include, in the appropriate disclosure under 49 CFR part 1300, the location of the petitioner's facility, indicating that the location is open to reciprocal switching, and the applicable terms and price.'' *NPRM,* 88 FR at 63915. AAR comments that this phrasing is ambiguous and could result in confusion about the proper disclosure, as ''information about a switching agreement is not itself subject to disclosure under 49 CFR part 1300.'' (AAR Comments 95 (asserting that no provision in part 1300 describes such carrier-to-carrier agreements and that terms of switching agreements are generally not disclosed to the public).) AAR also asserts that agreements may include information about a shipper's specific lanes, which could raise confidentiality concerns for the shipper. (*Id.*) AAR argues that, in this context, the only relevant disclosure under part 1300 would be the alternate carrier's line-haul rate and terms for a movement that utilizes the switching services of the incumbent carrier. AAR suggests that ''[t]he Board may wish to refine 1145.6(d) to avoid confusion.'' (*Id.*)

This provision was intended to ensure a measure of public notice in the ordinary course of business (apart from the Board's prescription proceeding itself) that a particular location has become open to reciprocal switching. The Board acknowledges AAR's concern, however, that the *NPRM'*s reference to ''the appropriate disclosure under Part 1300'' is ambiguous and possibly confusing. For that reason, the Board is clarifying this provision to instead require that, in the event of a prescription, the incumbent carrier promptly amend its switching publication(s)[61] as appropriate to reflect the availability of reciprocal switching under the prescription.

Prioritization

USDA suggests that the Board develop a ''ranking component'' to prioritize proceedings under part 1145 based on the severity of the performance lapses and ''help expedite extraordinary cases.'' (USDA Comments 7.) The Board appreciates suggestions for potential ways to enhance the efficiency of Board proceedings. However, the type of system described by USDA would itself be time-consuming (and, in all likelihood, complicated and contentious) to develop. Moreover, the Board is not anticipating a high volume

[60] *See, e.g., https://c02.my.uprr.com/scs/index.html#/external/search* (for UP's website) and *www.bnsf.com/bnsf.was/SCRSWeb/SCRSCentralController* (for BNSF's website).

[61] Here, the term ''switching publication'' refers to the instrument used by a railroad to document for its customers and other railroads which customers are covered by a reciprocal switching agreement and the applicable terms.

of cases under part 1145 each year. *See* Paperwork Reduction Act section. The Board will defer development of any prioritization approach and will devote its resources at this time to expeditiously resolving part 1145 proceedings as they are filed.

Affirmative Defenses

The Board explained in the *NPRM* that an incumbent rail carrier shall be deemed not to fail a performance standard if the carrier demonstrates that its apparent failure to meet a performance standard was caused by conditions that would qualify as an affirmative defense. 88 FR at 63908. If the incumbent carrier makes such a showing, the Board would not prescribe a reciprocal switching agreement.[62] 88 FR at 63908. The Board set forth four affirmative defenses in proposed § 1145.3: (1) extraordinary circumstances beyond a carrier's control; (2) surprise surge in petitioner's traffic; (3) highly unusual shipment patterns; and (4) delays caused by dispatching choices of a third party. *Id.* at 63908–09. The Board further noted that defenses that do not fit within those categories would be evaluated on a case-by-case basis. *Id.* at 63908. The Board also sought comment on what other affirmative defenses, if any, should be specified in the final rule. *Id.*

Several railroads and AAR urge the Board to consider all relevant evidence that may bear on the reasons for the failure to satisfy the relevant performance standard. The carriers also assert that the incumbent railroad must have the opportunity to put the metric-based showing into case-specific context, whereby the incumbent railroad would try to establish that there was no service inadequacy. (AAR Comments 75; CSXT Comments 32; NSR Comments 7; CN Comments 25; CPKC Reply 27; NSR Reply 19–21 (proposing language that would allow for ''any defense relevant to whether there is a service inadequacy for which there is actual necessity or compelling reason for a prescribed switching agreement''); CN Reply 12 (same).) Some carriers and AAR also assert that the proposed affirmative defenses are highly restrictive, reasoning that service quality may be influenced by a variety of factors that are varied and difficult to predict. (AAR Comments 73–74; *see also* CSXT Comments 3 n.3, 9.) They urge the Board to broadly interpret the specified defenses to account for circumstances that were beyond the rail carrier's control or for which the rail carrier could not reasonably prepare. (AAR Comments 80–85; *see, e.g.,* AAR Comments 82–84 (urging an interpretation of ''surprise surge'' to include spikes in demand of shippers other than the petitioner); *see also* CSXT Comments 25 n.21.)

Some railroads and AAR propose additional affirmative defenses that would address situations they contend are likely to recur: the incumbent carrier's curing of the potential service inadequacy during the course of the proceeding, (AAR Comments 75; UP Comments 14); scheduled maintenance and capital improvement projects undertaken by the incumbent, (AAR Comments 75–76; CN Comments 24); conduct of third parties, including action or inaction by the shipper that led to failure to meet a performance standard, (AAR Comments 76–77; BNSF Comments 10–11);[63] valid embargoes, (AAR Comments 77–78); effective intermodal competition, (AAR Comments 78–79); and alternate carrier objections, (AAR Comments 79–80). In reply, the Coalition Associations state that they do not oppose the affirmative defenses proposed by AAR pertaining to third-party conduct or scheduled maintenance and capital improvements, but they oppose the defenses regarding cured service inadequacies, valid embargoes, and intermodal competition. (Coal. Ass'ns Reply 22–23.) PCA opposes AAR's proposed defenses, asserting that they are without legal support and impose barriers in obtaining relief. (PCA Reply 7.)

AFPM generally supports delineating a limited number of affirmative defenses but notes that these should be clearly defined and understood, as ambiguous affirmative defenses could weaken the usefulness of this proposal. (AFPM Comment 15.) AFPM further suggests that the ''surprise surge'' and ''highly unusual shipment patterns'' affirmative defenses are redundant and could potentially be combined. (*Id.*)

The Board will adopt one of the additional affirmative defenses proposed by commenters as part of the final rule. As noted above, the Board already proposed to include a defense for delays caused by dispatching choices of a third party. The suggestion to include, as an affirmative defense, other conduct by third parties is consistent with the reasoning for including the dispatching-related defense, to the extent that conduct is outside the control of the incumbent carrier. *See NPRM,* 88 FR at 63908–09; (*see also* AAR Comments 76–77.) As such, the Board will adopt a separate affirmative defense for third-party conduct that is outside the reasonable control of the incumbent carrier. The Board notes that several shipper groups do not oppose including this defense. (Coal. Ass'ns Reply 22–23.)

To be clear, the affirmative defense for third-party conduct will be narrowly construed to prevent this or any defense from being used as a frivolous tactic to unduly prolong or delay, or unnecessarily increase the cost of the proceeding so as to deter the current or future petitioners from bringing proceedings under this rule. This third-party conduct affirmative defense will include only conduct that had a direct, cognizable impact on the incumbent carrier's meeting the applicable performance standard, and that was outside the reasonable control of the incumbent carrier. To the extent that the impact of the conduct could not have been reasonably prevented, the defense will not apply if the incumbent carrier failed to take reasonable steps to mitigate the impact of the third-party conduct. To the extent the conduct could have been reasonably prevented, the defense will not apply if the incumbent carrier failed to take reasonable steps to prevent and mitigate the impact of the third-party conduct. As with the other affirmative defenses, the burden will be on the incumbent carrier to prove each of these elements.

The Board declines to adopt the other additional affirmative defenses proposed by commenters. The Board is adopting a number of specific affirmative defenses, designed to cover scenarios that should be considered when evaluating whether a reciprocal switching agreement should be prescribed and the Board will also, under proposed § 1145.3, consider on a case-by-case basis affirmative defenses that are not specified in the rule. Though the Board recognizes the variability of rail customers, many of the other suggested defenses undermine the underlying purposes of the rule.

As a general matter, the Board's specified affirmative defenses are focused on reasons that a carrier's service might be below a metric during the relevant 12-week period. The Board

[62] If the incumbent carrier establishes that its failure to meet a performance standard was excused by an affirmative defense, the Board could in its discretion, *see* 49 CFR 1104.11, allow the petitioner to amend its petition to address a 12-week period of service that was unaffected by the affirmative defense.

[63] In response to the Board's request for comment as to whether the definition of ''affiliated companies'' should include third-party agents of Class I carriers, *see NPRM,* 88 FR at 63902 n.9, AAR asserts that the definition should not include third parties, as it might include a Class II or Class III rail carrier serving as a handling carrier at the customer location, thus potentially assigning responsibility to a Class I carrier for failures to meet a metric that were caused by a third party. (AAR Comments 76–77.)

sees less value in potential affirmative defenses that instead focus on whether there is a service inadequacy with certain largely undefined effects based on allegations of a petitioner's particularized service needs or whether the carrier cured the cause of its failure to meet a performance standard. These types of considerations would not inform why the carrier could not meet the relevant performance standard nor would they appear to further the underlying purposes of the rule. Consideration of the presence or absence of intermodal transportation options and/or market dominance is likely to raise similar issues. *See* Legal Framework. As discussed above, part 1145 is designed to provide a shipper with an alternative rail option if the incumbent railroad's performance falls below a defined standard. The rule is not punitive; rather, it mainly serves to introduce an additional rail carrier as a means to provide the appropriate level of service while more broadly incentivizing rail carriers to avoid the drops in network performance that the carriers themselves have recognized as unacceptable. *See* Legal Framework; *see also NPRM,* 88 FR at 63900–01. Finally, the Board declines to treat as an affirmative defense information from the alternate carrier about the possible impact of the proposed reciprocal switching agreement on the alternate carrier's operations and economics. (AAR Comments 78–79.) Related concerns could be raised under the provisions in part 1145 on impracticability, including operational feasibility and undue impairment. *See* 49 CFR 1145.6(b).

The Board clarifies that the ''extraordinary circumstances'' defense in § 1145.3(a) would not be interpreted broadly to include *any* event beyond a railroad's control, as AAR suggests. (*See* AAR Comments 81.) Rather, as indicated in the *NPRM,* the extraordinary circumstances defense will be narrowly construed as applying to the type of events that would qualify a railroad for an emergency trackage rights exemption, including natural disasters, severe weather events, flooding, accidents, derailments, and washouts, though not necessarily resulting in a track outage. *See NPRM,* 88 FR at 63908, 49 CFR 1180.2(d)(9).

The Board appreciates the carriers' suggestion to include ''scheduled maintenance and capital improvement projects'' as an affirmative defense and recognizes that several shipper interests do not oppose such an addition, but the Board finds that such instances are better addressed on a case-by-case basis. The Board does not intend for the rule to disincentivize capital investment and in fact expects that this rule will help promote investments necessary for adequate service. However, the Board observes that the nature of ''scheduled'' maintenance and capital improvement projects suggests that carriers have a degree of control over their execution, and the Board expects carriers to exercise that control with reasonable consideration of shippers' service levels.

Lastly, the Board clarifies that the affirmative defense pertaining to a surprise surge in a petitioner's traffic is distinct from the affirmative defense regarding a petitioner's highly unusual shipment patterns. For the former, a surprise surge is defined by rule as an increase in traffic by 20% or more during the 12-week period in question (compared to the 12 weeks prior for non-seasonal traffic or the same 12-week period during the previous year for seasonal traffic), without timely advance notification from the shipper. *See* § 1145.3(b). In contrast, a shipment pattern might be considered highly unusual if a shipper projected traffic of 120 cars in a month and 30 cars per week, but due to a plant outage for three weeks, the shipper then requests shipment of 120 cars in a single week. *See* § 1145.3(c). Thus, the former would apply to an unexpected increase in traffic of 20% or more over the 12-week period in question, whereas the latter would apply to other types of atypical shipping patterns involving a single week within the 12-week period.

Compensation

The *NPRM* sought comment on two methodologies that the Board could use to set compensation under a reciprocal switching agreement under proposed part 1145, in the event that the affected rail carriers failed to reach agreement on compensation within a reasonable time, as contemplated in 49 U.S.C. 11102(c). Both proposed methodologies would establish a fee based on the incumbent carrier's cost of performing services under the reciprocal switching agreement, as determined by the carrier's embedded and variable costs of providing that service. *NPRM,* 88 FR at 63909.

> *Cost of Service.* One proposed methodology is to set reciprocal switching fees based on the cost-of-service approach that has been used in past cases on switching fees. *See, e.g., Increased Switching Charges at Kan. City, Mo.-Kan.,* 344 I.C.C. 62 (1972). This approach could either use the ICC Terminal Form F, 9–64, Formula for Use in Determining Rail Terminal Freight Service Costs (Sept. 1964), or the Board's Uniform Rail Costing System (URCS) to develop the cost of service.
>
> *SSW Compensation.* The other proposed methodology would adapt the Board's ''SSW Compensation'' methodology to reciprocal switching fees.[64] The Board noted in the *NPRM* that, while SSW Compensation is used primarily in trackage rights cases, where one rail carrier operates over another rail carrier's lines, many of the principles that inform the methodology would apply in the reciprocal switching context as well.

NPRM, 88 FR at 63910.

AAR and NSR assert that, as under part 1147, the Board should take a case-by-case approach to setting fees under part 1145. AAR and NSR reason that the Board plays a limited role in setting compensation under section 11102(c) and that cases in which the Board would need to set compensation would be rare. (NSR Comments 15, 17; AAR Comments 92; *see also* CSXT Comments 52.) AAR also suggests that the methodologies proposed in the *NPRM* would be insufficient to achieve appropriate compensation. AAR contends that compensation based on cost of service would fail to account for differential pricing and revenue adequacy, including the ability of rail carriers to make investments necessary to meet demand. (AAR Comments 92–93 (citing *Intramodal Rail Competition,* 1 I.C.C.2d 822, 835 (1985)); *see also* NSR Comments 15–16.) CSXT adds that neither of the proposed methodologies would enable carriers to recover their full fixed and common costs. (CSXT Comments 52–53.) AAR also asserts that the Board should analyze the impact of part 1145 on revenue adequacy before deciding how to set compensation under part 1145. (AAR Comments 92.) With respect to the SSW Compensation methodology, AAR and NSR assert that the *NPRM* provides no clear explanation for how a methodology that is used to develop trackage rights fees could be used to calculate a reciprocal switching rate. (AAR Comments 94; NSR Comments 16–17.)

The Coalition Associations support the Board's use of the SSW Compensation methodology, (Coal. Ass'ns Comments 59), and suggest that

[64] The SSW Compensation methodology, which has been used by the Board for setting trackage rights compensation, involves calculating the sum of three elements: (1) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (2) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (3) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. *See St. Louis SW Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1987), 5 I.C.C.2d 525 (1989) (*SSW Compensation III*), 8 I.C.C.2d 80 (1991), and 8 I.C.C.2d 213 (1991), *aff'd sub nom. Union Pac. Corp.* v. *ICC,* 978 F.2d 745 (D.C. Cir. 1992), *cert. denied,* 508 U.S. 951 (1993).

the SSW Compensation methodology could be adapted for setting reciprocal switching fees as follows: To develop the incumbent carrier's variable costs of transporting the petitioner's traffic between the origin or destination and the point of transfer with the alternate carrier, the Board would use the incumbent carrier's URCS Phase III model. (*Id.,* V.S. Crowley/Fapp 9.) To develop the incumbent carrier's fixed costs of providing the service in question, the Board would use either URCS or a modified STB Average Total Cost (ATC) revenue division methodology. (*Id.*) Finally, under the Coalition Associations' approach, the interest rental component would be based on system average return on investment per car-mile, multiplied by the number of miles that were involved in the reciprocal switching movement. (*Id.,* V.S. Crowley/Fapp 17–20.)

AAR disagrees with the Coalition Associations' proposal because it attempts to set fees based on the incumbent carrier's fully allocated costs, an approach that AAR claims contradicts the Board's precedent. (AAR Reply 70.) According to AAR, approaches that are based on fully allocated costs of service inappropriately use depreciated historic costs rather than forward-looking costs. AAR also argues that these approaches fail to account for revenue adequacy and the ability to engage in demand-based differential pricing. (*Id.* at 70–71.)

LyondellBasell stresses the need for an efficient regulatory process to set a reciprocal switching fee, noting that, while the regulatory process to set compensation is underway, a petitioner that has successfully obtained a reciprocal switching prescription would bear a provisional fee either as a pass through or as part of the alternate carrier's rate for line-haul service. (LyondellBasell Comments 3–4.) According to LyondellBasell, this outcome would discourage use of the reciprocal switching agreement. (*Id.* at 4.) LyondellBasell further asserts that the incumbent carrier would have an incentive to demand an excessive reciprocal switching fee as an indirect means to retain the petitioner's traffic and to apply differential pricing to that traffic. (*Id.* at 3.)

PCA asks the Board to set reciprocal switching fees at levels that facilitate effective, aggressive competition and improved service. (PCA Comments 14–15.) PCA also requests that the final rule incorporate the *NPRM's* finding that it would be inappropriate to use a methodology that would allow the incumbent carrier to recover any loss in profits that the incumbent carrier incurred as a result of losing the petitioner's line-haul service to the alternate carrier. (*Id.* at 15.)

Ravnitzky proposes that, unless otherwise agreed by the parties or determined by the Board based on compelling evidence, the Board should establish a default reciprocal switching fee based on the average cost of providing switching service in similar circumstances. (Ravnitzky Comments 2.)

The Coalition Associations urge the Board to clarify that, even when the carriers agree to a reciprocal switching fee, the petitioner may challenge that fee before the Board using the same methodology that the Board adopts for setting reciprocal switching fees itself. (Coal. Ass'ns Comments 60.) AAR replies that there is no legal basis for allowing the petitioner to challenge a reciprocal switching fee that was mutually agreed upon by the carriers. (AAR Reply 69.) AAR reasons that the Board has no role in establishing a reciprocal switching fee unless the carriers fail to reach agreement within a reasonable period. (*Id.*) AAR further reasons that shippers may not challenge a division of rates between carriers. (*Id.*)

The Board encourages rail carriers that are party to a Board-prescribed reciprocal switching agreement to reach agreement on compensation within a reasonable period, as contemplated in section 11102(c). The Board has concluded that, if the carriers fail to do so, it is appropriate to determine the compensation methodology on a case-by-case basis because the relevant circumstances in a particular case might warrant the use of one methodology over the other.

While the Board thus declines to choose a single methodology by rule, the Board expects that, in individual cases, the two proposed methodologies will be considered in establishing compensation. As stated in the *NPRM,* reciprocal switching fees that allow the incumbent carrier to recover its cost of service are consistent with longstanding practice.[65] While the Board has accounted for differential pricing in rate reasonableness proceedings, the Board has consistently viewed it as appropriate to set reciprocal switching fees based on the direct cost of providing service and not include any lost profits from lost line-haul service. *See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.,* FD 33388, slip op. at 13 (STB served May 20, 1999) (considering the actual cost of providing a switching service in approving a switching fee). AAR's assertion that reciprocal switching fees should also account for differential pricing appears to be a variation on AAR's assertion that fees for reciprocal switching should account for lost profits, an assertion that the Board fully rejects. *See NPRM,* 88 FR at 63909. To compensate the incumbent carrier for that loss would seem to defeat the purpose of introducing a competing carrier and associated legislative objectives and could be tantamount to rewarding the incumbent carrier for inadequate service. *See id.*

With respect to the SSW Compensation methodology, the Board continues to find that, in some cases, this might inform the Board's determination of the appropriate compensation. The SSW Compensation methodology is a flexible approach that can be (and has been) modified to account for the particular facts of each case, including difficulties in valuation, various types of costs, and the specific nature and extent of the line's use. *See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.,* 3 S.T.B. 196, 344–45 (1998); *Ark. & Mo. R.R.* v. *Mo. Pac. R.R.,* 6 I.C.C.2d 619, 622–27 (1990), *aff'd sub nom. Mo. Pac. R.R.* v. *ICC,* 23 F.3d 531 (D.C. Cir. 1994); *SSW Compensation III,* 5 I.C.C.2d at 529. This methodology therefore might be useful when there is a significant difference between the incumbent carrier's historic costs and the value of the facilities that would be used for reciprocal switching. The Board remains open to evidence and argument on these points as they apply to a particular case. The Board notes that the facilities that are used to perform reciprocal switching within a terminal area, the value of which might appropriately be considered under the SSW Compensation methodology, are far more limited in geographic scope compared to the facilities that would be used to provide the line-haul. However, the Board reiterates that it would be inappropriate to set reciprocal switching fees to allow the incumbent carrier to

[65] *NPRM,* 88 FR at 63909; *see Increased Switching Charges at Kan. City, Mo.,* 356 I.C.C. 887, 890 (1977) (''[T]he cost of performing the service is the most important factor in determining the justness and reasonableness of a proposed switching charge.''); *Intramodal Rail Competition,* 1 I.C.C.2d 822, 834 (1985) (noting the ''increasing trend for carriers to price each element of their services, including switching, in accordance with its cost''). In *Intramodal Rail Competition,* the ICC stated that compensation for reciprocal switching would be determined on a case-by-case basis. *Id.,* 1 I.C.C.2d at 835. The ICC declined to adopt a proposed methodology that set a price ceiling for reciprocal switch rates because the ICC, in considering the agency's prior costing methodology (Rail Form A), assessed at that time that it did not have ''a satisfactory accounting method of allocating the substantial joint and common costs in the rail industry.'' *Id.*

recover any lost profits associated with line-haul service to the petitioner, as discussed above. *See NPRM,* 88 FR at 63909.

The Board declines to address the Coalition Associations' request (1) to clarify that a petitioner could challenge a reciprocal switching fee that was mutually agreed upon between the carriers, and (2) to identify what methodology the Board would use in such a case. The associated issues are outside the scope of this proceeding.

Duration and Termination

Duration

The Board proposed that a prescribed agreement under part 1145 would ordinarily have a term of two years from the date on which reciprocal switching operations thereunder began and could have a term of up to four years if the petitioner demonstrated that the longer minimum term was necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs. *NPRM,* 88 FR at 63910. The Board stated that it was essential that the duration of a prescribed agreement be ''sufficiently long to make alternative service feasible and reasonably attractive to potential alternate carriers.'' *Id.* The Board sought comment on whether a minimum term longer than two years and/or a maximum term longer than four years is necessary to make the proposed rule practicable and effective. *Id.*

AAR and some rail carriers assert that a two-year term would be disproportionate to the 12 weeks of service that constituted the basis for the order. (AAR Comments 96; CN Comments 26; CSXT Comments 49.) AAR and CSXT state that the Board should determine the initial duration of a prescribed switching agreement on a case-by-case basis and tailor the remedy to the service problem to ensure that the term corresponds to the actual need that the shipper has shown. (AAR Comments 97; CSXT Comments 50.) CN asserts that a lengthy prescription term with no option for earlier termination would be contrary to the public interest of addressing a ''service inadequacy at present'' and may disincentivize investment in the rail network because of increased uncertainty regarding volumes, density, potential impact on revenues, and return on investment. (CN Comments 26.)

AAR asserts that one year is sufficient to make alternative service attractive and feasible to potential alternate carriers, as an attractive alternate would most likely involve integrating the shipper's lane into the alternate carrier's existing traffic, using existing assets. (AAR Comments 97–98; *see also* CN Comments 26–27 (proposing a presumption that a switching order would be one year in duration).) BNSF argues that, where a switch is practicable, a two-year duration is sufficient to meet the Board's goal. (BNSF Comments 15.)

AAR asserts that the Board should make clear that authorizing a term longer than two years would apply only in cases where such a term is absolutely necessary to remedy the service inadequacy shown, such as situations involving a particularly persistent service failure that would be expected to last for a long time. (AAR Comments 98–99.) BNSF contends that any situation where it would take two years (or more) for an alternate carrier to make service feasible cannot, by definition, satisfy the statutory requirement that switching be practicable. (BNSF Comments 15.)

Shipper interests assert that a five-year minimum term is necessary to provide sufficient incentive for an alternate carrier to make the investment to implement the switch. (Coal. Ass'ns Comments 47 (also proposing a ten-year maximum term); DCPC Comments 11 (same); EMA Comments 3; NSSGA Comments 4; PRFBA Comments 10; *see also* AFPM Comments 16 (supporting a two-year minimum term but removing any maximum term so that the prescription remains in place until the service inadequacy is resolved); Ravnitzky Comments 2 (proposing a four-year term).)

The Coalition Associations argue that, in considering the minimum term, the Board should look to the duration of rail contracts for competitive traffic, which may be longer than three years, as the carrier has an incentive to ''lock up'' competitive traffic for an extended period. (Coal. Ass'ns Comments 48.) The Coalition Associations further note that a longer period may be required for the alternate carrier to recover its investment in competitive rail traffic, as such traffic ''tends to have lower rates.'' (*Id.*) The Coalition Associations also assert that, given the narrow scope of the rule, lower volumes of traffic would likely move under the prescription, thus requiring a longer term to justify an alternate carrier's investment of time and resources. (*Id.*) DCPC asserts that the prescription duration should be based on the complexity of the switching operation and the financial commitment required on behalf of the alternate carrier. (DCPC Comments 11.)

The Board will modify the proposed rule such that, in prescribing a reciprocal switching agreement, the Board shall prescribe a minimum term of three years and may prescribe a longer term of service up to five years, depending on what is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs.[66] As noted by the Coalition Associations, the duration of rail contracts for competitive traffic provides useful guidance as to the term of an arrangement that would make alternative rail service feasible and attractive to a potential alternate rail carrier. (Coal. Ass'ns Comments 48.) To this end, the Board finds that a term of three-to-five years would be an adequate duration to facilitate a commercial rail option through prescription of a reciprocal switching arrangement. (*See* Coal. Ass'ns Comments 48 (noting that contracts for competitive rail service may be longer than one to three years); Coal. Ass'ns Reply 24 (asserting that ''the alternate railroad must have the opportunity to compete for and serve the eligible traffic for a typical contract cycle of at least two years and potentially longer depending upon the volume of traffic and any investment requirements''); *see also* DCPC Comments 11 (proposing a five-year minimum term); EMA Comments 3 (same); NSSGA Comments 4 (same); PRFBA Comments 10 (same); Ravnitzky Comments 2 (proposing a four-year prescription term).) At the same time, the Board does not conclude that a five-year minimum term is necessary, as the Coalition Associations and others suggest. The flexibility to prescribe a three-to-five-year term is sufficient to achieve the Board's goal in providing a shipper a rail option consistent with commercial practices.

[66] BNSF comments that the Board should ''clarify that an alternate carrier has a reasonable time period from when the prescription order is entered to establish regular linehaul service.'' (BNSF Comments 7.) BNSF asserts that, although the *NPRM* contemplates a ramp-up period of six months for a ''substantial volume of traffic,'' even less ''substantial'' volumes of new traffic may take some time to be incorporated into the alternate carrier's network (to account for, *e.g.,* possible hiring and training of new crews or qualifying existing crews on new service territories), and the actual amount of ramp-up time needed may turn on many factors that need to be considered. (*Id.* at 8 (citing *NPRM,* 88 FR at 63910 n.36).) BNSF urges that any final rule should allow the Board to design a switching remedy that effectively addresses these issues. (BNSF Comments 8.) As noted in the *NPRM,* the Board recognizes that the legitimate business needs of an alternate carrier (including, among other things, the possible need to hire, train, and/or qualify crews) can bear on the appropriate duration of a reciprocal switch prescription. *See NPRM,* 88 FR at 63910 & n.36. Accordingly, the final rule provides a range within which the Board may set the duration of a reciprocal switch prescription so as to take the relevant considerations into account.

While rail carriers argue that a prescription term should correspond to the time needed to remedy a service inadequacy, the duration of a prescribed reciprocal switching agreement reflects what the Board considers at this time sufficient to introduce competition through a commercial rail option in the petitioner's case and incentivize adequate service throughout the rail industry in general. For the same reason, the duration of a prescribed agreement need not be proportionate to the 12-week period that served as the basis for the Board's prescription.

Moreover, the Board finds that a set time period promotes transparency and certainty for petitioners and carriers and therefore helps ensure the effectiveness of the rule. Setting a clear minimum helps petitioners, who are served by a single rail carrier, better assess whether to incur the costs of bringing a case and changing carriers, (Coal. Ass'ns Comments 50–52), and it helps alternate carriers make complex business decisions about investments needed to provide service on a relatively short-term basis. Meanwhile, a clear maximum helps incumbent carriers plan their businesses and reduces negative effects, if any, that may come from intervention, relative to an indefinite switching arrangement.

Termination Process

Under the timetable set forth in the *NPRM,* the incumbent rail carrier may file a petition to terminate no more than 180 days and no less than 120 days before the end of the prescribed period. *NPRM,* 88 FR at 63915.[67] The Board would endeavor to issue a decision on a petition to terminate within 90 days from the close of briefing. *Id.* If the Board does not act within 90 days from the close of briefing, the prescribed agreement would automatically terminate at the end of the original term. *Id.* If the Board is unable to act within that time period due to extraordinary circumstances, the prescribed agreement would be automatically renewed for an additional 30 days from the end of the current term. *Id.* In such cases, the Board would issue an order alerting the parties to the extraordinary circumstances and the renewal. *Id.*

AAR and some rail carriers assert that the incumbent carrier should be allowed to seek termination once it establishes adequate service. (AAR Comments 101–02 (proposing that, to terminate a switching order, the incumbent demonstrate ''materially changed circumstances'' if it has addressed the circumstances that led to the imposition of a switching order); CN Comments 28–29 (proposing that a switching order automatically terminate ''absent a showing of some enduring actual necessity or compelling reason and practicability put forth by the petitioner''); CSXT Comments 51.) BNSF argues that the switching prescription should automatically terminate after two years, and if the petitioner would like to extend the switching prescription past two years, the petitioner should be required to demonstrate, at the end of the term, that an extension would be in the public interest. (BNSF Comments 15.)

The Coalition Associations express the need for adequate time for a shipper to transition its operations from an alternate carrier to the incumbent carrier upon termination of a switch prescription. (Coal. Ass'ns Comments 50–52.) They assert that time is needed for a shipper to, among other things, negotiate a new contract with the incumbent carrier, update the shipper's internal systems, and assess the need for fleet and supply adjustments. (*Id.*) Given these concerns, the Coalition Associations propose: (1) allowing a switch prescription to continue in effect until 30 days after the Board serves a decision that grants a petition to terminate; and (2) moving the window for the incumbent to file a petition to terminate, so that a petition can be filed no more than 210 days and no less than 150 days before the end of the prescribed period. (*Id.*)

The Board recognizes that a shipper needs adequate lead time prior to the end of a prescription arrangement to switch its operations from the alternate carrier to the incumbent carrier. To this end, the Board will modify the rule by requiring a petition to terminate to be filed no less than 150 days before the end of the prescription period.[68] In doing so, should the Board issue a decision granting a petition to terminate within 90 days from the close of briefing (or not issue a decision within 90 days, such that the prescribed agreement automatically terminates at the end of the prescription period), a shipper would have at least 30 days to transition its operations prior to the expiration of a prescription. (*See* Coal. Ass'ns Comments 50 (noting that, under the proposed process, a Board decision may be issued with only eight days left before the switch prescription expired).) Similarly, the Board will modify the rule to allow for the prescribed agreement to continue in effect until 30 days after the Board serves a decision that grants a petition to terminate or after the end of the prescription period, whichever is later.[69]

The Board declines to adopt the modifications proposed by rail carriers that would allow the incumbent carrier to petition to terminate at any time once it has established adequate service or allow a prescribed agreement to automatically terminate absent a showing of compelling need by the shipper. Rail carriers assert that these proposals are consistent with the notion that a prescription must correspond to a remedial need. However, as discussed, the purpose of the rule is to provide for a rail option as a means to avoid drops in network performance, both with respect to a given petitioner when the incumbent carrier's service failed to meet a performance standard and more generally throughout the network. As noted, the transparency and certainty of a set time range for a switching arrangement are important components for incentivizing performance. Indeed, the duration of three-to-five years is appropriate to securing a rail option as a means to address service issues; the possibility of earlier termination would be less consistent with providing that option and therefore could undermine the purposes of this rule. As also noted in the *NPRM,* the prescription of a reciprocal switching agreement does not prevent the incumbent rail carrier from competing to keep its traffic and attempting to win back the traffic by voluntary agreement of the petitioner at any time during the prescription period. *NPRM,* 88 FR at 63910.

[67] Under proposed § 1145.7, a reply to the petition to terminate would be due within 15 days of the filing of the petition, and a rebuttal may be filed within seven days of the filing of the reply. *NPRM,* 88 FR at 63915. AAR urges the Board to allow more time for the incumbent carrier to reply to a shipper's objections to termination. (AAR Comments 104.) The Board will extend the rebuttal period and finds ten days to be sufficient and consistent with the streamlined process set forth in the rule.

[68] The Board declines to adopt the Coalition Associations' proposal to allow a petition to terminate to be filed 210 days before the end of the prescription term. As proposed in the *NPRM,* a petition to terminate may not be filed more than 180 days before the end of the prescription term so that such petitions are not filed prematurely. 88 FR at 63910. Thus, the final rule provides for a 30-day window of time to file a petition to terminate rather than a 60-day window.

[69] AAR requests that the Board explain the circumstances under which it would extend its timeframe for deciding a pending request for termination. (AAR Comments 104–05.) While the Board finds it unnecessary to delineate specific extraordinary circumstances under which additional time would be required, the Board emphasizes that it expects such circumstances, by their very nature, to arise infrequently, if ever. If the Board does not decide the termination proceeding within 90 days from the close of record, and does not issue an extension order, the switching arrangement will automatically terminate. *See NPRM,* 88 FR at 63910.

Termination Standard

As set forth in the *NPRM,* the Board would grant a petition to terminate a prescribed agreement if the incumbent rail carrier demonstrates that, for a consecutive 24-week period prior to the filing of the petition to terminate, the incumbent rail carrier's service for similar traffic on average met the performance standard that provided the basis for the prescription. *NPRM,* 88 FR at 63915. Under the proposed rule, this requirement includes a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area. *Id.* The Board defines ''similar traffic'' as the broad category type (*e.g.,* manifest traffic) to or from the terminal area that is affected by the prescription. *Id.* at 63910.

AAR proposes that, rather than examining ''similar traffic,'' as defined in the rule, the Board should consider the incumbent carrier's performance on any traffic that would cast light on the relevant question before the Board, *i.e.,* whether the carrier has addressed the causes of the prior service shortcoming in such a way to assure adequate service for the traffic then subject to the prescription. (AAR Comments 103.) AAR also proposes that, in a petition to terminate, the rule should require the incumbent to demonstrate that it has met the performance standard over a 12-week period rather than a 24-week period, as, AAR argues, a 24-week period is disproportionate to the 12-week period that served as the basis for the prescription. (*Id.*) AAR states that the language of the standard is ambiguous and requests that the Board clarify that it will grant a termination petition if the carrier's performance for similar traffic on average satisfies the specific service metric that triggered the initial switching prescription (rather than with respect to multiple metrics) during the 24-week period immediately prior to filing the petition. (*Id.* at 103–04.)

The Coalition Associations urge the Board to adopt a narrower definition of ''similar traffic,'' depending on which of the service metrics is being measured, as the proposed definition could lead to ''irrelevant comparisons.'' (Coal. Ass'ns Comments 55.) The Coalition Associations assert that, for the OETA and transit time standards, ''similar traffic'' should be defined as other manifest traffic moving between the terminal where the reciprocal switch occurs and the terminal or local serving yard at the other end of the movement of the switched traffic. (*Id.* at 55–56.) For the ISP service metric, the Coalition Associations assert that only the shipper's own traffic is relevant because the incumbent still provides ISP service for switched traffic. (*Id.* at 56.) The Coalition Associations also propose modifying the rule to require the incumbent carrier to demonstrate compliance with all three standards for similar traffic, reasoning that otherwise the Board could terminate a switch prescription when the incumbent was providing service that would merit a prescription. (*Id.* at 54–55.) AAR opposes this proposal, reasoning that a termination proceeding should be focused on whether the particular service inadequacy that formed the basis of the initial prescription has been remedied. (AAR Reply 79.) AAR asserts that the Board's determination of whether a prescription was warranted for other reasons would be more readily answered in the context of the Board's evaluation of a new petition. (*Id.*)

The Board declines to modify its proposed definition of ''similar traffic.'' While AAR urges the Board to consider *any* traffic relevant to its inquiry, (*see* AAR Comments 103), the Board finds that the incumbent carrier's performance with respect to ''similar traffic,'' as defined in the *NPRM,* provides a strong indication as to whether the incumbent has demonstrated its commitment and ability to provide adequate service, as shown in its service with similar traffic. *NPRM,* 88 FR at 63910. The Board notes that parties having a clearer, common understanding of similar traffic is consistent with the expedited nature of a termination proceeding. The proposed definition also makes it more likely that the incumbent carrier will have a relevant pool of operational data on which to base its petition; limiting what the Board would consider to be ''similar traffic,'' as proposed by the Coalition Associations, (*see* Coal. Ass'ns Comments 55–56), may hamper an incumbent carrier's ability to provide a meaningful representation of its current operations.

The Board will, however, modify the standard for a petition to terminate by requiring an incumbent carrier to demonstrate that it has met all three performance standards for similar traffic on average, rather than only the performance standard that provided the basis for the prescription. As the Coalition Associations note, it would undermine the goal of the rule to terminate a prescribed agreement when an incumbent carrier is providing service that would otherwise warrant a reciprocal switching prescription. (*See* Coal. Ass'ns Comments 54–55.) Moreover, it would be inefficient for the Board to terminate a prescription, only to then have the shipper file a new petition based on operational shortcomings that would have otherwise come to light in the termination proceeding.

The Board will also modify the rule such that the Board would grant a petition to terminate a prescribed agreement if the incumbent rail carrier demonstrates that its service for similar traffic met performance standards for the most recent 12-week period prior to the filing of the petition to terminate, rather than the prior 24-week period. The Board finds that a 12-week period is sufficient to provide the Board an accurate representation of the incumbent carrier's operations, and that it is reasonable to ''harmonize'' the time period that serves as the basis for the prescription to the period examined for purposes of a petition to terminate, as AAR suggests. (*See* AAR Comments 103.) The Board clarifies that this 12-week time period shall be the most recent 12-week period prior to the filing of a petition to terminate.[70]

Automatic Renewal

Under the proposed rule, in the event the incumbent rail carrier does not timely file a petition for termination, or files such a petition and fails to sustain its burden of proof, the prescribed reciprocal switching agreement would automatically renew for the same period as the initial prescription. *NPRM,* 88 FR at 63910. The Board sought comment on whether, alternatively, the renewal should be for only one additional year. *Id.*

AAR and some rail carriers assert that automatic renewal is not consistent with the need for a switching order to address an actual necessity or compelling need. (AAR Comments 99; CN Comments 27–28; CSXT Comments 50.) AAR proposes that, rather than automatic renewal, the Board should provide for an orderly opportunity for the shipper to show that the term of the switching order should be extended, with no break in service. (AAR Comments 100; *see also* CSXT Comments 50 (asserting that the petitioner should bear the burden of establishing a continuing compelling need that justifies ongoing forced

[70] The Board notes that nothing in this rule prevents a shipper/receiver from informing the Board of any changes in relevant circumstances during the pendency of the petition to terminate. The Board may consider such information when determining whether the incumbent railroad has met its burden to demonstrate that the prescription is no longer warranted.

switching); CN Comments 28 (proposing automatic termination absent a showing of some enduring actual necessity or compelling reason and practicability put forth by the petitioner).) AAR asserts that, if the Board declines to remove the automatic renewal provision, ''it should limit the automatic renewal to the period of the initial prescription or a single additional year, whichever is shorter,'' to ''give the incumbent carriers more frequent opportunities to seek to terminate the prescription.'' (AAR Comments 101.)

The Coalition Associations support automatic renewal for the same duration as the initial term, noting that the feasibility and attractiveness of handling a shipper's traffic to an alternate carrier is directly related to the potential contract duration, whether access to that traffic is via an initial or renewed switch prescription. (Coal. Ass'ns Comments 57; *see also* Coal. Ass'ns Reply 24 (''Automatic renewal for the same term keeps in place the competitive incentives to improve service until the incumbent carrier firmly establishes its ability both to achieve and maintain adequate service.'').)

Under the final rule, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew at the end of its term for the same period as the initial prescription. However, the Board will modify the proposed rule so that, if a petition to terminate is denied, the Board will determine, on a case-by-case basis, the appropriate renewal period based on the evidentiary record, but for a duration no longer than the initial prescription. This will allow the Board to account for the unique circumstances presented in a particular termination proceeding. (*See* CN Comments 28.) At the end of the renewed term, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew for the same number of years as the renewed term.[71]

While AAR and rail carriers argue that automatic renewal is inconsistent with the need for a prescription to address an actual necessity or compelling need, the purpose of the rule, as discussed, is to introduce a second rail option when there is sufficient cause based on application of the performance standards in part 1145. Automatically renewing the prescribed agreement, absent a petition to terminate, furthers this goal and is consistent with rule's placement on the incumbent railroad of the burden of demonstrating that the prescription is no longer warranted. Further, the Board reiterates that nothing in the rule prevents the incumbent carrier from competing to keep its traffic or attempting to win back the traffic by voluntary agreement during the prescription period. *See NPRM,* 88 FR at 63910.

Other Issues

Permanent Prescription

The Board sought comment on whether the Board should prescribe a reciprocal switching agreement on a permanent basis when an incumbent rail carrier had been subject to a prescription under part 1145 and when, within a specified time after termination of the prescribed agreement, that carrier again failed to meet a performance standard under part 1145 (without demonstrating an affirmative defense or impracticability as provided for in part 1145). *NPRM,* 88 FR at 63910. The Coalition Associations support the imposition of a permanent prescription following a subsequent failure, as such a provision would serve as a safeguard against an incumbent carrier who may ''deploy resources'' to meet the termination criteria but subsequently remove those resources upon the prescription terminating. (Coal. Ass'ns Comments 57.) AAR asserts that a permanent prescription would ''go well beyond what is necessary to remedy the identified inadequacy.'' (AAR Comments 100.)

The Board declines at this time to adopt a provision that would impose a permanent switching order following a subsequent failure by the incumbent carrier. The Board is not persuaded that ''gamesmanship'' by an incumbent carrier is likely, particularly given that the termination process will require proof that incumbent carrier's operations for similar traffic meet all three standards set forth in this rule for a 12-week period.

Access to Data

The Coalition Associations propose to require the incumbent carrier to provide the shipper with all data for ''similar traffic'' that are relevant to the standards the incumbent must satisfy to terminate a prescription, and assert that this should be the same type of data the incumbent carrier is required to provide to a shipper under proposed § 1145.8(a). (Coal. Ass'ns Comments 53.) AAR urges the Board to reject this proposal, arguing that it is unnecessary, burdensome, and raises significant confidentiality concerns. (AAR Reply 78.) The Board anticipates that an incumbent carrier seeking termination will provide the Board with the relevant data to support its petition to terminate. As noted in the *NPRM,* in a termination proceeding, the shipper/receiver has the right to access and examine the facts and data underlying a carrier's petition to terminate, subject to an appropriate protective order. *NPRM,* 88 FR at 63910. The Board will determine on a case-by-case basis whether any deadlines in the procedural schedule should be adjusted in an individual proceeding based on, for example, time needed to resolve a potential discovery dispute involving a shipper's effort to obtain data from the carrier relevant to a termination petition. The Board expects any discovery requests to be narrowly tailored to the issues presented and that the parties will work diligently to resolve any disputes. To the extent a dispute is brought to the Board, the Board will work expeditiously to resolve it and minimize any potential delay affecting the expected timing of a decision as provided in this rule.

Contract Traffic

In the *NPRM,* the Board requested comments about the application of the proposed rule to traffic that is the subject of a rail transportation contract under 49 U.S.C. 10709. The Board sought comment on ''all legal and policy issues relevant to this question.'' *NPRM,* 88 FR at 63909. In addition, the Board posed two main questions. First, the Board sought ''comment on whether the Board may consider the performance data described above, based on service that a carrier provided by contract, as the grounds for prescribing a reciprocal switching agreement that would become effective after the contract expired.'' *Id.* Related to this first question, the *NPRM* sought comment on ''whether the Board may require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer's request.'' *Id.* Second, the Board requested comment on ''when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires.'' *Id.* The Board noted that the D.C. Circuit had held, under a different statutory scheme, that the Board was not authorized to order a carrier to file a

[71] BNSF seeks clarification as to whether automatic renewal would apply only to the original term prescribed and not a term established by renewal under proposed § 1145.7. (BNSF Comments 15 n.7.) The Board clarifies that a prescribed agreement would continue to automatically renew until the incumbent seeks, and the Board grants, termination or until the prescribed agreement automatically terminates under § 1145.7(f). As discussed, automatic renewal is consistent with the placement of the burden on the incumbent railroad when formulating a petition to terminate.

common carrier tariff more than a year before contract service was expected to end. *Id.* (citing *Burlington N. R.R.* v. *STB,* 75 F.3d 685, 687 (D.C. Cir. 1996)). The Board asked whether any similar ''legal or policy issues'' should be considered when determining how far in advance of contract expiration, if at all, the Board may prescribe reciprocal switching that would go into effect after expiration. *Id.*

Use of Contract Service Data To Determine Whether an Incumbent Carrier Failed To Meet a Performance Standard

With respect to the first question, AAR and all Class I rail carriers oppose the use of performance data for contract service as the basis for determining that an incumbent carrier is not meeting the performance standards and therefore prescribing a reciprocal switching agreement that would become effective when the contract expires.[72] Their main argument is that 49 U.S.C. 10709 prohibits the use of performance data regarding contract service for this purpose. The subsections of section 10709 relevant to their arguments provide that a party to a contract entered into under section 10709 has no duty in connection with services provided under the contract other than those duties the contract specifies and the contract and transportation under such contract, is not subject to title 49, subtitle IV, part A], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of part A. The only remedy for any alleged breach of a contract is an action in an appropriate State court or United States district court, unless the parties otherwise agree.

AAR and several carriers argue that, in light of section 10709(b), the Board may not use performance data for contract traffic as the basis for finding that the performance standards were not met and prescribing post-expiration reciprocal switching because doing so would create a new ''duty''—compliance with the performance standards—that is not ''specified by the terms of the contract.'' (*See, e.g.,* AAR Comments 34; BNSF Comments 12; AAR Reply 1–2, 6–7; CN Reply 14; NSR Reply 4; CPKC Reply 31.) Also, AAR and several carriers argue that evaluating the performance of an incumbent carrier under contract as a basis for reciprocal switching would violate section 10709(c)(1) because it would make the contract traffic ''subject'' to the rule and section 11102(c)(1) and because a reciprocal switching petition would amount to a ''challenge[]'' to contract transportation before the Board. (*See, e.g.,* AAR Comments 33; CN Comments 50–52; AAR Reply 1, 6–7; CN Reply 13–14; NSR Reply 4–5.) CN says that the statutory bar on regulation of ''transportation'' under contract also bars challenges to the ''terms and conditions'' related to that transportation, including allegations of failure to provide adequate service. (CN Comments 52 (citing *Ameropan Oil Corp.* v. *Canadian Nat'l Ry.,* NOR 42161, slip op. at 2, 4 (STB served Apr. 17, 2019)).) In addition, AAR and several carriers argue that reciprocal switching would be a regulatory ''remedy'' for poor performance, which they say would violate section 10709(c)(2)'s requirement that the ''exclusive remedy'' for any alleged breach of contract is an action in court. (*See, e.g.,* CN Comments 51; NSR Comments 19; AAR Reply 7; CN Reply 14; CPKC Reply 31; NSR Reply 5.) In light of section 10709, AAR argues, a shipper under contract may pursue reciprocal switching only by allowing the contract to expire, using common carrier service, and then seeking reciprocal switching if the common carrier service fell short of the performance standards. (AAR Comments 36.)

AAR argues that its position is consistent with the two cases cited in the *NPRM, Burlington Northern* and *FMC Wyoming Corp.* v. *Union Pacific Railroad,* FD 33467 (STB served Dec. 16, 1997). (AAR Comments 36–37; AAR Reply 12–14.) AAR distinguishes *FMC Wyoming*—in which the Board indicated that it could require a railroad to establish a common carrier rate when the contract was set to expire ''in a matter of weeks,'' *FMC Wyo.,* FD 33467, slip op. at 3 n.7—on the ground that ordering a carrier to establish a rate does not ''require any examination of the service provided under the contract,'' whereas ''ordering switching under the Proposed Rule plainly would'' require such examination. (AAR Comments 36–37.) Regarding *Burlington Northern,* AAR says that the D.C. Circuit accepted as a general principle that the Board lacks authority over contract traffic and that, therefore, the only issue before the court was whether the statute that required carriers to file a common carrier rate could overcome section 10709's jurisdictional bar, specifically when the contract was expected to expire in ''more than a year.'' (AAR Reply 12–14.) Here, AAR explains, there is no statute that arguably could overcome section 10709. (*Id.*)

AAR and several carriers also say that applying the proposed rule to traffic that is subject to a transportation contract is bad policy, primarily because they say it would interfere with contract negotiations. (*See, e.g.,* AAR Comments 33–34; BNSF Comments 13; CN Comments 53; NSR Comments 19–20; AAR Reply 16–17; CPKC Reply 33–34.) AAR and CPKC argue that the proposed rule would deny a contracting shipper the option to forgo performance guarantees in exchange for something that the shipper might value more, such as lower rates. (AAR Comments 33–34; CPKC Reply 33–34; *see also* NSR Comments 19–20 (arguing that the rule will require contracting parties to adjust the rate to reflect the ''risk'' that reciprocal switching may be prescribed based on performance); BNSF Comments 13 (''contract parties often consider service levels as part of their economic analysis'').)[73] AAR and several carriers contend that the availability of reciprocal switching based on contract performance would deter carriers from entering contracts, which they say would contravene Congress's intent to promote the use of rail transportation contracts. (BNSF Comments 13; NSR Comments 18–19; AAR Reply 11; BNSF Reply 4.) CN highlights language in the legislative history of section 10709's predecessor that said that ''[r]ail carriers and shippers should be free to negotiate and enter into contracts without concern'' about regulatory interference. (CN Comments 53 (quoting H.R. Rep. No.

[72] (*See* AAR Comments 32–37; BNSF Comments 12–13; CN Comments 50–54; CSXT Comments 8; NSR Comments 17–20; AAR Reply 6–18; BNSF Reply 4–5; CN Reply 12–17; CPKC Reply 30–34; CSXT Reply 7 n.14; NSR Reply 3–9.) Although UP did not mention the contract issue specifically, it joined the opening and reply comments of AAR in their entirety. (*See* UP Comments 1; UP Reply 1 n.1.)

[73] AAR, CN, and CPKC also argue that, because of how the metrics work, using contract data as the basis for reciprocal switching could deter carriers from negotiating contracts that ensure *better* performance. AAR presents a hypothetical example of a contract that requires a railroad, in exchange for a premium rate, to move shipments in half the time it had moved similar shipments in the past. (AAR Comments 34.) When the contract expires and the carrier reverts to its usual transit time, the higher level of performance under contract would become the baseline against which to compare the subsequent common carrier service, creating a risk that the carrier would fail the ''service consistency'' metric. (*Id.*) AAR says that ''no carrier would enter into such a contract,'' as least without insisting on more concessions from the shipper. (*Id.* at 34–35; *see also* CN Comments 53–54 (stating that comparing contract data with non-contract data is especially problematic with the transit time metric); CPKC Reply 34 (stating that comparing contract service with post-expiration service is particularly problematic for contracts that require premium service levels).)

96–1035, at 58 (1980)).) NSR suggests that ''[e]ven unresolved questions'' about the application of the proposed rule to contract traffic could deter the use of contracts. (NSR Comments 20.)

Shippers and shipper organizations that address the contract issue argue that the Board can and should use an incumbent carrier's contract performance data as the basis for post-expiration reciprocal switching prescriptions.[74] The Coalition Associations argue that using contract performance data for this purpose is consistent with section 10709 because it would not amount to regulating or interpreting the contract, nor would it modify any party's contractual obligations or purport to find that the contract violates the law. (Coal. Ass'ns Comments 10; *see also* Coal. Ass'ns Reply 6, 9; WCTL Reply 12–13.) In response to AAR's and the carriers' argument that using contract performance as a basis for post-expiration reciprocal switching would violate section 10709(b) by imposing an additional ''duty'' on the contracting carrier, the Coalition Associations say that the proposed rule would not require the carrier to provide ''any specific level of contract service.'' (Coal. Ass'ns Reply 9.)[75] The Coalition Associations also say that there is no conflict with section 10709(c)(2) because ''Board is not proposing to decide any dispute about contract restrictions that prevent a shipper from using a prescribed switch.'' (Coal. Ass'ns Comments 12 n.11.)

The Coalition Associations make an additional statutory interpretation argument regarding section 10709. They point out that 49 U.S.C. 10705 says that the Board may require a rail carrier to include substantially less than the entire length of railroad in a through route only in certain limited situations, including when required under sections 10741, 10742, or 11102. (Coal. Ass'ns Reply 7.) The Coalition Associations note that section 10741 expressly states that it shall not apply to contracts covered by section 10709, whereas section 11102 (which includes the reciprocal switching provision) and section 10742 have no such statement. (*Id.*) Thus, the Coalition Associations argue, the ''clear inference'' is that the statutory scheme provides that the Board can consider contract transportation when exercising its authority under section 11102. (*Id.*)

The Coalition Associations and other commenters argue that there is precedent for the Board's use of contractual performance data to address service issues. The Coalition Associations and ACD claim that in two decisions—*Midtec* and *Vista Chemical Company* v. *Atchison, Topeka & Santa Fe Railway,* 5 I.C.C.2d 331 (1989)—the ICC considered evidence regarding contract service when deciding whether to prescribe reciprocal switching. (Coal. Ass'ns Comments 11; ACD Reply 3.) The Coalition Associations also point to two decisions involving the fluidity of the rail network in which the Board specifically said that it would examine contract and non-contract traffic. (Coal. Ass'ns 11–12 n.10 (citing *U.S. Rail Serv. Issues,* EP 724, slip op. at 7 (STB served Dec. 30, 2014), and *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4), slip op. at 17 (STB served Nov. 30, 2016)).) They also point out that the Board's 1998 decision adopting 49 CFR parts 1146 and 1147 said that ''where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts.'' (Coal. Ass'ns Comments 11–12 n.10 (quoting *Expedited Relief for Serv. Inadequacies,* 3 S.T.B. at 976).) WCTL says that the Board ''routinely evaluates the details of rail transportation contracts when considering the reasonableness of rates provided for common carrier service,'' (WCTL Reply 13–14 (citing cases)), and the Coalition Associations similarly argue that the Board ''will consider contract traffic data in the exercise of its rate review regulatory authority,'' (Coal. Ass'ns Comments 10 n.6 (citing *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 83 (STB served Sept. 5, 2007))).[76]

Shipper organizations also make policy arguments in favor of considering contract performance data as the basis for post-expiration reciprocal switching. They say that the overwhelming majority of rail traffic moves under contract and that the proposed rule will provide little benefit to the overall rail network if contract traffic is excluded. (*See, e.g.,* Coal. Ass'ns Reply 5, 9; AFPM Comments 15; WCTL Comments 2–3, 5; ACD Reply 2.) The Coalition Associations say that the contract questions are ''existential'' for any proposal to address inadequate rail service and that ''the Board's entire proposal would be meaningless'' if contract performance cannot be considered. (Coal. Ass'ns Reply 5.)[77] The Coalition Associations also claim that excluding contract performance would set a precedent that would render the alternative reciprocal switching standards in 49 CFR parts 1144 and 1147 ''similarly useless.'' (Coal. Ass'ns Reply 5.) Shipper organizations say that the path proposed by AAR and the carriers—that shippers should allow their rail contracts to expire, accept common carrier service, and wait to see if the carrier meets the performance standards—would be so cumbersome that the proposed rule would rarely, if ever, be used. (*See* Coal. Ass'ns Reply 5–6; WCTL Reply 14–15; ACD Reply 2.) Shipper organizations also explain that railroads do not segregate services and facilities between contract and common carrier traffic, and any proposal to improve the fluidity of the national rail network needs to consider contract traffic performance. (*See* Coal. Ass'ns Reply 8.) AFPM argues that, because facilities often are used for both contract and tariff traffic, it will be ''very difficult for a shipper to show specific poor service only applies to . . . just the tariff shipments.'' (AFPM Comments 15–16; *see also* Coal. Ass'ns Reply 8 (arguing that metrics are necessarily intertwined for common carrier and contract traffic, which ''renders it impractical and unnecessary, if not impossible, to filter for any of these traffic types''); DCPC Comments 3, 5 (discussing logistical problems that limiting the rule to non-contract traffic

[74] (*See, e.g.,* Coal. Ass'ns Comments 9–20; AFPM Comments 15–16; DCPC Comments 5; FRCA/NCTA Comments 4; NMA Comments 7; WCTL Comments 4–5; Coal. Ass'ns Reply 5–10; ACD Reply 2–3; Dow Reply 5; WCTL Reply 6–7, 12–15.)

[75] The Coalition Associations note that the Board said that it does not view it as appropriate to ''apply, or draw from'' the rule's proposed performance standards to regulate or enforce the common carrier obligation. (Coal. Ass'ns Reply 9 (quoting *NPRM,* 88 FR at 63902).) They argue that ''[i]f this proposal does not impose any duty upon common-carrier service, it does not impose any duty upon contract service either.'' (Coal. Ass'ns Reply 9.)

[76] Although the Coalition Associations' discussion of *Burlington Northern* focuses primarily on the second question raised in the *NPRM* (how long in advance of contract expiration the Board may consider a reciprocal switching petition), their arguments suggest that they view *Burlington Northern* as irrelevant to the first question. (*See* Coal. Ass'ns Comments 16–18.) They argue that *Burlington Northern* was not based on section 10709 and that the balancing of carrier and shipper interests in that statutory scheme has no parallel in the reciprocal switching context. (Coal. Ass'ns Comments 16.)

[77] The Coalition Associations propose that if the Board cannot definitively conclude that the proposed rules allow consideration of contract performance, it should reopen Docket No. EP 711 (Sub-No. 1). (Coal. Ass'ns Reply 47–48.) The Coalition Associations also propose modifications that aim to address potential problems with the proposal in the *2016 NPRM.* (Coal. Ass'ns Reply 47–52.)

would create in industries that ship both contract and non-contract traffic)).

Numerous shippers and shipper organizations respond to the arguments made by AAR and the carriers about the purported effects that relying on contract performance data will have on contract negotiations. They argue that shippers, especially captive shippers, are at a disadvantage in contract negotiations with railroads, with contracts often presented on a take-it-or-leave-it basis. (*See, e.g.,* AFPM Comments 15; DCPC Comments 5.) [78] As a result, they say, contractual commitments to maintain a minimum level of service are virtually non-existent. (*See, e.g.,* Coal. Ass'ns Reply 8 n.10; NMA Comments 7; AFPM Comments 15; Dow Reply 5.) DCPC notes that the Board has not defined the word ''contract,'' and it says that some purported contracts are rates published in a non-distribution tariff with ''Contract'' stamped on the title page. (DCPC Comments 5; DCPC Reply 3.) [79] DCPC objects to the railroads' use of this type of ''non-signatory 'Contract' '' and says that contracts ''should be agreed to and signed by all parties to the agreement.'' (DCPC Reply 3.) Some shipper organizations support the proposed rule in part on the ground that the potential for a reciprocal switch will help them in contract negotiations with railroads. (AFPM Comments 16; FRCA/NCTA Comments 4.)

After considering the comments, the Board will not use incumbent carriers' contract performance data as the basis for reciprocal switching prescriptions under part 1145. Using contract performance data as the basis for reciprocal switching under the rule would attach the potential for a regulatory consequence to the carriers' failure to meet Board-specified numerical performance standards while under contract, which the Board views as inconsistent with the limitations that section 10709 imposes. Given the particular design of part 1145, this would effectively create a ''duty'' that was not present in the contract, which does not reasonably align with section 10709(b)'s statement that contracting parties shall have ''no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.'' Shipper organizations are correct that the availability of reciprocal switching would not *require* carriers under contract to comply with the performance standards, (*see, e.g.,* Coal. Ass'ns Reply 9). Even for non-contract traffic, part 1145 does not create a service standard with which carriers must comply; rather, it identifies the service levels under which the Board concludes it is appropriate to consider the introduction of an additional line-haul carrier as a means to address service concerns. *See* Legal Framework. But with regard to traffic moving under contract, the application of part 1145 would introduce a new incentive for carriers to meet those standards, even if their contracts contain different performance requirements or none at all based on negotiated bargaining.[80] Even though the Board recognizes that the potential for future application of a regulation may influence contract negotiation and compliance already, the likely effect on the carriers' incentives if the prescription of a reciprocal switch under part 1145 could be based on contract traffic would be specific and significant enough to implicate section 10709(b).[81] For similar reasons, the Board also agrees with carriers that basing reciprocal switching on contract traffic raises concerns under section 10709(c)(1), which says that contracts and contract transportation ''shall not be subject'' to the entirety of Part IV of the Act, which includes the reciprocal switching statute. Creating numerical standards that apply to contract performance, and prescribing reciprocal switching when performance fell short of the standards, would be tantamount to subjecting the contract transportation to the reciprocal switching statute.[82]

The Coalition Associations' argument based on 49 U.S.C. 10705 is not persuasive. Section 10705 provides that the Board may require a rail carrier to include in a through route substantially less than the entire length of railroad only in certain limited situations, including when required under 49 U.S.C. 10741, 10742, or 11102. The Coalition Associations point out that section 10741 (a discrimination provision) specifically states that the provision shall not apply to contracts described in section 10709, in contrast to section 11102, which is silent as to section 10709 contracts. (Coal. Ass'ns Reply 7–8.) Relying on the principle that ''where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'' the Coalition Associations argue that the lack of a reference to contracts in section 11102 should be interpreted as an intentional congressional choice to allow the Board to apply reciprocal switching to contract traffic. (*Id.* at 7–8 & n.8 (quoting *Russello* v. *United States,* 464 U.S. 16, 23 (1983)).) But inferences based on the statutory structure are appropriate only when the statute's meaning is not clear from the statutory text. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.,* 34 F.4th 1, 9 (D.C. Cir. 2022) (explaining that statutory interpretation begins ''with the language of the statute itself'' and then, ''if necessary,'' ''may turn to other customary statutory interpretation tools, including structure, purpose, and legislative history'' (quoting *Genus Med. Techs. LLC* v. *FDA,* 994 F.3d 631, 637 (D.C. Cir. 2021))). Section 10709 is clear that the Board may not add duties to the contract or subject contract transportation to ''this part,'' which includes section 11102. In light of this language, it is unnecessary to make inferences based on the statute's structure.

The cases cited by shipper organizations where the agency discussed contract performance in

[78] AFPM says that ''almost three quarters of AFPM members are captive shippers,'' with the result that railroads have all the leverage and the resulting contracts are ''tremendously advantageous'' for the railroads. (AFPM Comments 15.)

[79] DCPC says railroads contend that this kind of purported contract ''becomes binding when the shipper moves traffic on the rate,'' but the shipper has little choice because the rate is presented on a take-it-or-leave-it basis. (DCPC Reply 3.)

[80] Several shipper organizations emphasize that many contracts lack any performance standards. (Coal. Ass'ns Reply 8 n.10; NMA Comments 7; AFPM Comments 15.) But the fact that a contract does not address an issue does not open the door to regulation of that issue. *See, e.g., Ameropan Oil Corp.,* NOR 42161, slip op. at 4 (''[W]here transportation is provided pursuant to a contract, the Board lacks regulatory authority over the terms and conditions related to that transportation, *whether or not explicitly addressed in the contract.*'') (emphasis added).

[81] As noted above, the Coalition Associations argue that if applying the performance standards to common carrier service does not create a duty under the common carrier statute (which they claim is what the *NPRM* meant when it said that the Board would not ''apply, or draw from'' the performance standards to enforce the common carrier obligation), applying the performance standards to contractual service would not create a ''duty'' under section 10709(b) either. (Coal. Ass'ns Reply 9 (quoting *NPRM,* 88 FR at 63902).) This argument misconstrues the *NPRM.* The Board's point was that finding that a carrier violated the common carrier obligation could have consequences beyond a reciprocal switching prescription, such as an obligation to pay compensation to a private party, and, for these and other reasons described in this rule, the proposed rule is not intended (and it would not be appropriate) to apply or draw from these standards to expose carriers to those additional consequences.

[82] Because other provisions of section 10709 bar the application of the rule to contract performance, the Board need not decide whether considering performance during the term of a contract would violate section 10709(c)(2) by creating a non-judicial ''remedy'' for an alleged breach of contract. (*See* CN Comments 51, NSR Comments 19; AAR Reply 7; CN Reply 14; CPKC Reply 31; NSR Reply 5.)

connection with (and ultimately denied) reciprocal switching requests are clearly distinguishable and do not support the conclusion that the Board should use contract performance as the basis for a post-expiration reciprocal switching order under the proposed rule. (*See* Coal. Ass'ns Comments 11; ACD Reply 3.) First, neither *Midtec* nor *Vista Chemical* considered section 10709 (or its predecessor, 49 U.S.C. 10713). Cases in which the Board did not consider the potential implications of section 10709 do not provide meaningful guidance as to the proper interpretation or application of that section. *See, e.g., Cent. Power & Light Co.* v. *S. Pac. Transp. Co.,* 1 S.T.B. 1059, 1074–75 (1996).

Second, *Midtec* and *Vista Chemical* do not stand for the proposition that the Board may prescribe a reciprocal switching agreement based on a determination that a carrier provided inadequate service during the term of a contract. In those cases, the Board considered whether the carrier's commercial practices, as reflected in contracts offered by the carrier, contradicted an allegation that the carrier had engaged in anticompetitive conduct. *See, e.g., Midtec,* 3 I.C.C. at 183; *Vista Chemical,* 5 I.C.C.2d at 338–39. If the agency had prescribed a reciprocal switching agreement in those cases (which it did not), presumably it would have arisen out of a finding of anticompetitive conduct, not out of a determination that the carrier's contract service was inadequate.

In *Midtec,* the shipper asked the ICC to impose a reciprocal switching agreement under part 1144, which provides in relevant part for the prescription of a reciprocal switching agreement based on anticompetitive conduct. The shipper's alleged ground was that the incumbent Chicago and North Western Transportation Company (CNW) was engaging in ''monopolistic'' conduct. *Midtec,* 3 I.C.C.2d at 172. CNW argued that its commercial conduct demonstrated that it did not behave in an anticompetitive manner, pointing out the fact that it had been willing to ''initiate and concur in joint rate proposals and rate reductions in tariffs or rail transportation contracts.'' *Id.* at 183. The ICC agreed, based on CNW's evidence, that ''[t]his is hardly the picture of a monopolist indifferent to the needs of its shipper.'' *Id.* This type of general consideration of the incumbent's commercial conduct in respect of contracts—as one piece of evidence regarding whether the incumbent was acting in an anticompetitive manner that might warrant reciprocal switching—is very different from shippers' proposal here that the Board rely on part 1145's numerical standards for performance under contract as the basis for a reciprocal switching prescription.

Similarly, in *Vista Chemical,* the shipper asked the ICC to prescribe reciprocal switching under part 1144. *Vista Chemical,* 5 I.C.C.2d at 331. The ICC considered whether the incumbent carrier was likely to engage in anticompetitive conduct, taking into account any past anticompetitive conduct by the incumbent. *Id.* at 337–42. The ICC noted that the incumbent carrier had offered contracts at reduced rates and had shown a willingness to amend contracts to make them more favorable to shippers. *Id.* at 338–39. Based on this and other evidence that the incumbent carrier had not engaged in anticompetitive conduct, the ICC declined to prescribe the proposed reciprocal switching agreement. The ICC therefore did not reach the question of whether the agency could have prescribed the proposed agreement under part 1144 based on a determination that the incumbent carrier's contract rates were excessive. Without the ICC having reached that question, nothing in *Vista Chemical* suggests that the Board may apply performance standards to contract traffic as the basis for prescribing a post-termination reciprocal switching agreement.

Nor do *United States Rail Service Issues,* EP 724 (STB served Dec. 30, 2014), and *United States Rail Service Issues—Performance Data Reporting,* EP 724 (Sub-No. 4) (STB served Nov. 30, 2016) support the shipper organizations' position. (*See* Coal. Ass'ns Comments 11 n.10.) Those decisions required reporting of data regarding contract traffic to the Board as part of overall network reporting,[83] but they did not take further action that would regulate contract traffic. In the 2014 proceeding in Docket No. EP 724, BNSF opposed certain proposals made by a party to the proceeding on the ground that ''[t]he Board does not have authority to impose service recovery obligations on BNSF that would over-ride'' contractual obligations. BNSF Reply 13, *U.S. Rail Serv. Issues,* EP 724 (Nov. 3, 2014). While the Board acknowledged that this was a ''significant concern'' and that ''[section] 10709 could have an impact on the scope of any prospective relief,'' it also explained that ''[t]he national rail system carries both regulated and non-regulated traffic and the Board necessarily must look to the fluidity of that network.'' *U.S. Rail Serv. Issues,* EP 724, slip op. at 7. The Board's order required production of data to the Board but did not adopt the farther-reaching service recovery obligations that were the primary focus of BNSF's objections. *Id.* In the 2016 proceeding in Docket No. EP 724 (Sub-No. 4), the Board adopted a final rule requiring Class I railroads to report certain service performance metrics. AAR objected to the requirements on the ground that most coal transportation takes place under contract, but the Board responded that this argument ''does not take into account our statutory responsibility to advance the goals of the RTP, which . . . includes monitoring service in order to ensure the fluidity of the national rail network.'' *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4), slip op. at 18 (citing 49 U.S.C. 10101(3), (4)). The Board went on to say: ''The Board is not asserting jurisdiction regarding the rights and obligations of shippers and carriers associated with coal moving under contracts; rather, the Board is taking action to gain a better understanding of and insight into the general flow of traffic on the system.'' *Id.*

Neither decision supports the use of contract performance data as the basis for prescribing a reciprocal switching agreement under part 1145. Both decisions merely affirm that the Board itself may collect general network data that may include contract movements for the purpose of monitoring and understanding network fluidity. Indeed, the 2014 decision in Docket No. EP 724 cautions that section 10709 will limit the scope of prospective relief that the Board can provide with respect to contract traffic, describing this issue as a ''significant concern.'' *U.S. Rail Serv. Issues,* EP 724, slip op. at 7. Thus, the Board recognized that, even though it has broad authority to monitor contract traffic, its authority to order relief with respect to contract traffic, even to promote network fluidity, is far more limited.

The Coalition Associations also argue that language in the Board's decision in *Expedited Relief for Service Inadequacies* supports their position that the Board's actions to promote network fluidity may extend to contract traffic. (Coal. Ass'ns Comments 11–12 & n.10.) In that decision, the Board said that:

> As for transportation that is provided under a rail transportation contract, AAR is correct that we cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract. 49 U.S.C.

[83] The Board has authority to require carriers to report information pursuant to 49 U.S.C. 1321 and 49 U.S.C. 11145(a)(1).

10709(b), (c). However, where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts. Moreover, there may be other instances where it is possible and appropriate to exercise our broad regulatory authority to ensure that traffic can move, as in the recent *UP/SP Service Order.* Thus, we are not inclined to disavow in advance any possible exercise of jurisdiction. Such jurisdictional issues are best left to a case-by-case examination and, again, our assertion of jurisdiction in any specific case will be subject to judicial review.

Expedited Relief for Serv. Inadequacies, 3 S.T.B. at 976.[84]

The Board disagrees that this passage from the Board's 1998 decision in *Expedited Relief for Serv. Inadequacies* supports the Coalition Associations' position. First, the proposed rule here is not designed to provide ''temporary emergency service'' in situations where ''no transportation is being provided,'' so that language has little relevance here. Second, regarding the Board's statements that it would not ''disavow in advance any possible exercise of jurisdiction'' and that it would consider such issues via a ''case-by-case examination,'' the Board does not foresee any situations where it would order reciprocal switching under the proposed rule based on the failure of contract traffic to meet the performance standards for the reasons discussed above. Accordingly, the Board does not need to preserve a ''case-by-case examination'' of this sort with respect to contract traffic under this rule.

Nor do *Burlington Northern* and *FMC Wyoming* support the use of contract performance data as a basis for post-expiration reciprocal switching. Taken together, these cases suggest that the Board can require a carrier to establish a common carriage rate while still under contract—as long as the contract would expire ''within a matter of weeks,'' *FMC Wyo.,* slip op. at 3 n.7, rather than ''more than a year,'' *Burlington N.,* 75 F.3d at 688.[85] But requiring a carrier to file a tariff rate prior to expiration does not attach any regulatory consequences to the carrier's conduct while under contract. Thus, it is not analogous to the use of contract performance data for reciprocal switching, which conflicts with section 10709 precisely because it creates consequences for contractual performance.

The Board's use of contract data in ''Three Benchmark'' rate cases also does not support the use of contract data as the basis for a reciprocal switching prescription under the proposed rule. (*See* Coal. Ass'ns Comments 10 n.6; WCTL Comments 4–5; WCTL Reply 13–14.) The Coalition Associations point to language in *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), in which the Board decided that it would look to contract traffic rates to establish a benchmark to determine the maximum lawful rate for the challenged movement in rate cases.[86] (Coal. Ass'ns Comments 10 n.6.) The use of contract rates for this purpose in rate cases is distinguishable from the possible use of contract performance data under the proposed rule. In rate cases, the Board uses contract traffic data as the basis for possible regulatory consequences for similar common carrier traffic, not for the traffic moving under contract. In contrast, using contract traffic data as the basis for reciprocal switching under part 1145 would attach potential regulatory consequences based on performance under the contract itself. Similarly, in the cases that WCTL cites, (*see* WCTL Reply 13–14), the Board looked to contract traffic only as evidence and not as the basis for regulatory action with respect to that traffic. *See W. Fuels Ass'n, Inc.* v. *BNSF Ry.,* NOR 42088, slip op. at 38–39 (STB served Sept. 10, 2007); *Ariz. Elec. Power Coop., Inc.* v. *BNSF Ry.,* NOR 42113, slip op. at 25 (STB served Nov. 22, 2011).

The Board appreciates the concerns of shippers and shipper organizations that the Board's decision not to consider the performance of contract traffic may limit the impact of the proposed rule.[87] As these commenters have noted, a large percentage of rail traffic is shipped under contract, and the rule will be less effective at promoting overall network fluidity if poor contract traffic performance is beyond the direct reach of the rule. (*See, e.g.,* Coal. Ass'ns Reply 5, 9; AFPM Comments 15; WCTL Comments 2–3, 5; ACD Reply 2.)[88] The Board also recognizes the concerns of shipper organizations that excluding contract performance data will create a cumbersome path for contract shippers to take advantage of the rule, requiring them to allow their contracts to expire and accept a period of common carrier service before becoming potentially eligible to seek relief under the rule. (*See* Coal. Ass'ns Reply 5–6; WCTL Reply 14–15; ACD Reply 2.) Congress has limited the Board's statutory authority with respect to contract traffic, as discussed above.[89] To the extent the

[84] In its 2024 decision revising its emergency service regulations, the Board said that it saw ''no reason to revisit'' its statements about contract traffic in *Expedited Relief for Serv. Inadequacies. Expedited Relief for Serv. Emergencies,* EP 762, slip op. at 28.

[85] In the ICC decision that led to the D.C. Circuit decision in *Burlington Northern,* the ICC found that ordering Burlington Northern to file a common carrier rate while still under contract would not violate the former 49 U.S.C. 10713 (the predecessor to section 10709). *W. Tex. Utils. Co.* v. *Burlington N. R.R.,* NOR 41191, slip op. at 4 (ICC served Oct. 14, 1994). The ICC reasoned that it could order carriers to file common carrier rates while still under contract because this was an exercise of authority with respect to future common carrier transportation, not over contract transportation. *Id.* at 4 & n.9. The D.C. Circuit's ruling did not specifically address the ICC's conclusion about section 10713, instead finding that other components of the statutory scheme limited the ICC's ability to order the filing of common carrier rates more than a year before the contract expires. The D.C. Circuit did not, however, suggest that section 10713 or any other provision requires the Commission to wait until *after* expiration to issue such an order.

[86] In that case, carriers argued that contract movements ''cannot be easily compared with a challenged common carrier movement.'' *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 82 (STB served Sept. 5, 2007). The Board rejected the argument, observing that contract rates may provide useful information as to the maximum lawful rate and that excluding contract rates may, in some cases, ''leave insufficient movements in the Waybill Sample to perform a statistically meaningful comparison analysis.'' *Id.* at 83.

[87] The Board does not agree with the Coalition Associations, however, that ''the Board's entire proposal would be meaningless'' if contract performance cannot be considered. (*See* Coal. Ass'ns Reply 5.) The Board's jurisdiction is focused on common carrier traffic by congressional design; thus, if the rule can achieve its objectives with respect to common carrier traffic, this would make it worthwhile.

[88] Several shipper organizations argue that common carrier traffic and contract traffic are so intertwined that the rule would be difficult to administer if contract traffic is excluded. (*See, e.g.,* AFPM Comments 15–16; Coal. Ass'ns Reply 8; DCPC Comments 3, 5.) To the extent that these commenters are concerned that it will be difficult to filter the performance of common carrier traffic from that of contract traffic, (*see* AFPM Comments 15–16; Coal. Ass'ns Reply 8), the Board does not share this concern. It is reasonable to expect that shippers will have access to the information they need to know which of their traffic moves under contract and which moves under common carriage, as that is a key factor for Board regulation in general. DCPC argues that shippers will find it difficult to ensure that contract shipments are never inadvertently moved via the alternate carrier because ''for various reasons, whenever people are involved in a process, mistakes happen.'' (DCPC Comments 3.) In light of section 10709, the extension of the rule to contract traffic is not a viable solution to this problem, to the extent it exists.

[89] DCPC suggests that the Board should apply part 1145 to contracts because the term ''rail contract'' is not defined and that railroads sometimes publish rates in non-distribution tariffs, with the word ''contract'' on the title page, that railroads deem binding ''when a shipper moves traffic on the rate,'' even when the shipper has not signed or otherwise agreed to the terms. (DCPC Reply 3; *see also* DCPC Comments 5.) DCPC's concern is beyond the scope of this proceeding. *See Rail Transp. Conts. Under 49 U.S.C. 10709,* EP 676, slip op. at 5 (STB served Jan. 22, 2010) (determining that the Board will ''continue to address on a case-by-case basis the issue of whether a document constitutes'' a contract

rule achieves its objectives with respect to common carrier traffic, the Board expects that it will improve network performance overall, which could benefit contract shippers in this interconnected industry. The Board notes that many trains haul both common carrier and contract traffic, and a congested yard or line can degrade the performance of both types of traffic, whether hauled together or separately. Incentives for the reliability and consistency of common carrier transportation may therefore positively affect both types of traffic by promoting the fluidity of shared facilities.

Requiring a Carrier To Provide Performance Data to a Shipper During the Term of a Contract

Related to the first question, the Board requested comment in the *NPRM* on whether the agency may require a railroad to provide performance metrics to a rail customer during the term of a contract upon that customer's request. *NPRM*, 88 FR at 63909. AAR argues that requiring a rail carrier to provide information to a customer while under contract is barred by section 10709(b) because that would add an additional ''duty'' to the carrier's existing contractual obligation. (AAR Comments 35–36; AAR Reply 14–15.) AAR argues that, if a shipper wants a carrier to provide metrics for performance under contract, then it can bargain for them in contractual negotiations. (AAR Comments 36.) Although AAR recognizes that the Board's decision in *Demurrage Billing Requirements,* EP 759, did not distinguish between contract and common carrier traffic when it required carriers to provide information to their customers in demurrage invoices, AAR says that the decision contains no discussion of section 10709 and is therefore a ''drive-by jurisdictional ruling[]'' that has ''no precedential effect.'' (AAR Reply 15 (quoting *Steel Co.* v. *Citizens for a Better Env't,* 523 U.S. 83, 91 (1998)).)

The Coalition Associations argue that because the Board has authority, in their view, to consider contract performance data when deciding whether to prescribe reciprocal switching, it follows that the Board has authority to require carriers to provide performance data to contract customers. (Coal. Ass'ns Comments 13.) The Coalition Associations point to *Demurrage Billing Requirements,* EP 759, as precedent for requiring railroads to provide information to contract customers, noting that one item required on demurrage invoices is OETA, which is also one of the performance metrics under this rule. (Coal. Ass'ns Comments 13–14.) WCTL notes that the Board requires railroads to provide data to the Board regarding contract service pursuant to 49 U.S.C. 11145 and suggests that requiring them to provide data about contract service to shippers is no different. (WCTL Reply 14.) In addition, WCTL argues that providing data is permitted by section 10709 because it does not fall within the definition of ''transportation'' under 49 U.S.C. 10102. (WCTL Reply 14.)

The Board need not address whether it has statutory authority to require carriers to provide, to the relevant customer, data regarding the railroad's performance under a contract. Because the Board will not prescribe reciprocal switching under part 1145 based on performance during the term of a contract, the Board sees no basis to require railroads to provide the data in question to customers that are not eligible to file a petition under the rule. Though the Board values open communication between carriers and shippers generally and encourages carriers to voluntarily provide performance data relevant to transportation under contract, in this proceeding commenters did not identify any purpose for requiring the provision of contract performance data other than using it as the basis for a petition under part 1145.

Whether a Reciprocal Switching Petition May Be Filed Prior to Contract Expiration

Regarding the second question in the *NPRM*—''when, prior to the expiration of a transportation contract between the shipper and the incumbent carrier, the Board may prescribe a reciprocal switching agreement that would not become effective until after the contract expires''—the Board received only a few comments. AAR asserts that the Board cannot consider a prescription for reciprocal switching until the contract has expired (and any petition must be based on common carrier service that the shipper received after expiration). (*See* AAR Comments 36.) WCTL proposes that, ''consistent with practice in maximum rate cases,'' the rule should allow shippers to seek agency reciprocal switching relief within the final calendar quarter of any given rail transportation contract's term.'' (WCTL Comments 4.) The Coalition Associations propose a schedule that would allow contract shippers to file petitions while the contract is in effect, and the reciprocal switching prescription, if granted, would go into effect no more than one year from the date of the shipper's petition. (Coal. Ass'ns Comments 19.) This would allow shippers to file up to one year before contract expiration and receive the full benefit of the prescription. (*Id.* at 19–20.) CN opposes the Coalition Associations' proposal on the ground that a petition filed one year before the contract expires ''will have no bearing on whether service to that shipper is inadequate one year later.'' (CN Reply 16–17.)

Given the Board's decision not to rely on performance that occurs during the term of a contract as the basis for a prescription under part 1145, it is unnecessary to consider how far in advance of contract termination the Board may issue such a prescription. Because a prescription under part 1145 must be based on common carrier transportation performance, shippers will need to petition under part 1145 after contract termination and after experiencing service under common carriage for at least 12 weeks.

Other Issues

Commenters made additional contract-related suggestions that were not directly related to one of the questions above: (1) allowing reciprocal switching prescriptions to go into effect before contract termination, with respect to volume that exceeds the shipper's minimum volume commitment as specified in a contract; and (2) treating contractual provisions that preclude the application of reciprocal switching relief as violations of the common carrier obligation.[90]

First, the Coalition Associations ''perceive an implicit assumption'' in the *NPRM* that ''the existence of a contract forecloses any reciprocal switching until the contract has expired.'' (Coal. Ass'ns Comments 15.) They argue that this assumption is incorrect because ''many rail contracts do not contain 100% volume commitments,'' and, absent such a commitment, ''there more than likely is some volume that a shipper can tender to an alternate carrier even before its contract with the incumbent carrier expires.'' (*Id.*) Similarly, NMA argues that ''absent any type of minimum annual volume guarantee or exclusive

under section 10709 or a tariff). Consistent with this case-by-case approach, a shipper may seek a determination from the Board as to whether a particular arrangement is not a section 10709 contract, notwithstanding how the document is labeled.

[90] In addition, the Coalition Associations suggested reopening Docket No. EP 711 (Sub-No. 1) as a way of addressing contract performance, given that they view the application of part 1145 to contract performance as ''fraught with appellate risk.'' (Coal. Ass'ns Reply 47–48.) The Board addresses this proposal in the Introduction.

use guarantee with the incumbent,'' a shipper could ''maintain its contract with the incumbent railroad'' and still ''ship with the alternative carrier.'' (NMA Comments 7.) CPKC responds that even if the contract does not specifically prohibit the use of an alternate carrier, the Board cannot prescribe a reciprocal switching agreement that would go into effect during the term of a contract because it would need to base such a prescription on contract performance data. (CPKC Reply 30–33.)

The Board will not extend part 1145 to allow prescribed reciprocal switching agreements to go into effect prior to the expiration of a contract, even with respect to a volume of traffic that exceeds the contract minimum. Doing so would require the Board to use contract performance as the basis for action under part 1145, which, as the Board has explained, is inconsistent with section 10709. Moreover, the *NPRM* did not propose allowing reciprocal switching prescriptions to go into effect during the term of a contract. *See NPRM,* 88 FR at 63909 (asking whether the Board may consider performance data as the grounds for a reciprocal switching agreement ''that would become effective *after the contract expired,*'' and when the Board may prescribe a reciprocal switching agreement ''that would not become effective until *after the contract expires*'' (emphasis added)).[91]

Second, FRCA and NCTA argue that: ''It may become appropriate to consider whether new contracts that preclude the application of reciprocal switching relief for inadequate service are consistent with 49 U.S.C. [] 11101(a) ('Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.').'' (FRCA/NCTA Comments 4.) This suggestion arises in connection with their observation that ''the *NPRM* proposal may become a baseline against which parties negotiate contracts.'' (*Id.*) AAR says that the Board should reject this proposal because ''it comes with no substantive rationale,'' and ''it is unclear why a carrier's contract terms about whether one shipper could seek a switching order would create a danger of the carrier violating its common carrier obligation to other shippers.'' (AAR Reply 17–18.) This issue is beyond the scope of this proceeding. Indeed, FRCA and NCTA do not appear to argue that the Board should act on their proposal in the final rule, framing it instead as something that ''may become appropriate'' in the event that the *NPRM* proposal becomes a baseline against which parties negotiate contracts. (FRCA/NCTA Comments 4.)

Exempt Traffic

In the *NPRM,* the Board noted that ''some transportation that has been exempted from Board regulation pursuant to 49 U.S.C. 10502 could be subject to an order providing reciprocal switching under part 1145.'' *NPRM,* 88 FR at 63909. The Board explained that it retains ''full jurisdiction to deal with exempted transportation, which includes considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part.'' *Id.* The Board further explained that it is ''well established that the Board can revoke the exemption at any time, in whole or in part, under section 10502(d),'' and that the Board ''would do so to the extent required.'' *Id.*

Comments from railroads and AAR focus primarily on three arguments. First, they contend that the Board cannot use performance metrics from the incumbent carrier's exempt traffic as the basis for reciprocal switching prescriptions. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.) Even if the Board revokes the exemption, they argue, the Board cannot rely on pre-revocation performance data as the basis for a reciprocal switching prescription because this would amount to unlawful retroactive regulation. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.) Instead, they say, a shipper must petition for partial revocation of an exemption to the extent necessary to permit reciprocal switching, and then, if the Board grants partial revocation, the shipper may file a petition for reciprocal switching in the future based solely on the incumbent carrier's post-revocation performance. (*See, e.g.,* AAR Comments 41; CN Comments 56; BNSF Comments 13; AAR Reply 23; BNSF Reply 5.) In support of this argument, they rely on *Pejepscot Industrial Park—Petition for Declaratory Order,* 6 S.T.B. 886 (2003), and *Sanimax USA LLC* v. *Union Pacific Railroad* (*2022 Sanimax Decision*), NOR 42171 (STB served Feb. 25, 2022), both of which concluded that the Board could not award damages for conduct that took place while the relevant traffic was exempt. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.)

Second, AAR and some railroads argue that the Board cannot grant partial revocation to allow reciprocal switching based solely on a carrier's failure to meet the performance standards. (*See, e.g.,* AAR Comments 37; AAR Reply 19–20; CPKC Reply 36.) They contend that poor service does not by itself demonstrate that revocation is necessary to carry out the RTP of 49 U.S.C. 10101, as required by the statutory standard for revocation in 49 U.S.C. 10502(d). (*See, e.g.,* AAR Reply 19–20; CPKC Reply 36.) AAR also contends that poor service is not enough to establish that the carrier abused its market power, which AAR says is a required showing for revocation. (*See* AAR Reply 19; *see also* BNSF Reply 5 n.2 (citing cases that discuss the significance of market power in revocation proceedings).) Third, AAR and several railroads reject the arguments of some shippers that the Board could revoke exemptions to the extent necessary to permit reciprocal switching in the final rule, as opposed to in a separate proceeding in the future. (*See, e.g.,* AAR Reply 20–23; BNSF Reply 6; CPKC Reply 34–35.)

Shipper organizations that commented on the issue argue that shippers of exempt traffic should be able to obtain a reciprocal switching prescription without the need for cumbersome proceedings, and they offer various suggestions regarding how the Board could facilitate this. FRCA and NCTA argue that the Board should partially revoke an exemption whenever the performance of exempt traffic becomes ''inadequate,'' because poor service demonstrates that market forces are insufficient to carry out the RTP and to protect shippers from the abuse of market power. (FRCA/NCTA Comments 4.) PCA as well as AF&PA and ISRI urge the Board to revoke certain exemptions[92] in the final rule to the extent necessary to allow reciprocal switching, because this would ensure that shippers will not need to initiate time-consuming revocation proceedings

[91] NMA appears to argue that the *NPRM* did provide notice of this option, stating: ''The STB noted such a scenario in the Decision when it stated that the petitioner, *i.e.,* the shipper, would not be required to rely on the alternate carrier for any portion of the petitioner's traffic during the term of the prescription.'' (NMA Comments 7 & n.17 (citing *NPRM,* 88 FR at 63901).) This statement, which appears outside the contract section of the *NPRM* and makes no reference to contracts, is not enough to provide notice that the Board was contemplating reciprocal switching agreements that would go into effect prior to expiration.

[92] Specifically, AF&PA and ISRI argue for partial revocation of exemptions for certain forest and paper products and scrap metal commodities, as well as the boxcar exemption to the extent it covers transportation of these commodities, and PCA argues for partial revocation of the hydraulic cement exemption. (AF&PA/ISRI Comments 6; PCA Comments 10.) PCA and DCPC, as well as AF&PA and ISRI, also urge the Board to revoke certain exemptions in their entirety, although not necessarily as part of the final rule. (PCA Comments 10; AF&PA/ISRI Reply 15; DCPC Reply 3.)

before they can pursue reciprocal switching. (PCA Comments 10; AF&PA/ISRI Comments 6–7, 10–15.)[93] AF&PA and ISRI argue that partially revoking these exemptions in the final rule would be a logical outgrowth of the *NPRM.* (*See* AF&PA/ISRI Comments 6–7; AF&PA/ISRI Reply 13–15.)[94]

Moreover, AF&PM and ISRI reject the contention that consideration of pre-revocation performance as a basis for reciprocal switching is impermissibly retroactive. (AF&PA/ISRI Reply 10–13.) They point out that the Board's *2022 Sanimax Decision* said that ''prospective relief,'' unlike damages, may be based on pre-revocation facts. (AF&PA/ISRI Reply 12 (citing *2022 Sanimax Decision,* NOR 42171, slip op. at 4).) They argue that reciprocal switching is prospective because it ''would only affect *future* movements and *future* competition between the incumbent and the alternate carrier.'' (AF&PA/ISRI Reply 11; *see also* NSSGA Reply 6 (''[T]he Board has recognized that past periods of exempt service may be rightly considered in future proceedings.'').)

Finally, some shipper organizations suggest that the Board could prescribe a reciprocal switching agreement with respect to some exempt traffic *without* partially revoking the exemptions, because the ''commodities may have been exempted for reasons related to competition,'' but ''that rationale should not extend to this rule which is by contrast explicitly designed to address universally poor service.'' (*See* NSSGA Comments 5; EMA Comments 4–5; PRFBA Comments 5.) AF&PA and ISRI point out that in *PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd.* (*June 2006 PYCO Decision*), FD 34802 et al. (STB served June 21, 2006), the Board announced that it could order alternative rail service with respect to exempt traffic when traffic consists of a mix of regulated and exempt commodities and it would not be practical to provide separate service for the two types of traffic. (AF&PA/ISRI Reply 11–12 (citing *June 2006 PYCO Decision,* FD 34802 et al., slip op. at 1, 3–4).)[95]

First, the Board will not, as a general matter, prescribe reciprocal switching or require the production of data under § 1145.8(a) with respect to exempt traffic unless it first revokes the exemption at least to the extent necessary to do so. Although NSSGA, EMA, and PRFBA suggest that the Board may prescribe reciprocal switching with respect to exempt commodities that were exempted ''for reasons related to competition'' rather than service issues, (NSSGA Comments 5, EMA Comments 4–5, PRFBA Comments 5), the Board's commodity exemptions do not make such a distinction. Rather, the commodity exemptions apply to all of Subtitle IV of Title 49 of the U.S. Code, except where otherwise indicated in the exemption or required by statute. Because the reciprocal switching statute, 49 U.S.C. 11102, falls within Subtitle IV, regulations promulgated under this provision generally cannot be applied to these commodities, regardless of the original rationale for the exemption or the purposes of this rule. The only exception is the boxcar exemption, which expressly retains Board regulation with respect to reciprocal switching.[96] With respect to the production of data, the Board will not require carriers to provide performance data for exempt traffic because, as discussed below, the Board will not rely on the performance of exempt traffic as the basis for reciprocal switching under the rule.

As AF&PA and ISRI point out, the Board ordered alternative rail service with respect to exempt traffic in the *PYCO* matter. (*See* AF&PA/ISRI Reply 11–12 (citing *June 2006 PYCO Decision,* FD 34802 et al., slip op. at 1, 3–4).) In *PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd.* (*January 2006 PYCO Decision*), FD 34802 (STB served Jan. 25, 2006), without addressing the presence of exempt commodities because it had not been raised by the parties, the Board initially issued an emergency service order under 49 U.S.C. 11123 and 49 CFR part 1146 that covered a mix of exempt and regulated traffic without revoking the exemption. *See January 2006 PYCO Decision,* FD 34802, slip op. at 9. After the exemption issue was raised, the Board extended the emergency service order, stating that when ''the rail traffic at issue consists of both regulated and exempt commodities and it would not be practical to provide separate service for the two types of traffic,'' it could ''order alternative rail service as to all of the shipments.'' *See June 2006 PYCO Decision,* FD 34802 et al., slip op. at 4. Nevertheless, the Board revoked the exemption to the extent necessary to order alternative rail service, *id.,* and did so again in a subsequent alternative rail service order under 49 U.S.C. 11102(a) and part 1147, *PYCO Indus.—Alt. Rail Serv.—S. Plains Switching, Ltd.* (*November 2006 PYCO Decision*), FD 34889 et al., slip op. at 5–6 (STB served Nov. 21, 2006). At most, the *PYCO* decisions indicate that when it is not practical to separate exempt and regulated traffic, the Board could consider issuing an order that affects traffic generally rather than abstaining from regulating the non-exempt traffic, particularly in emergency situations. But it is significant that the Board ultimately revoked the exemption in *PYCO* after the issue was raised. For purposes of part 1145, shippers in a *PYCO*-like situation (with movements that involve both exempt and regulated traffic) should generally obtain revocation before filing a petition for a prescription.[97]

Second, the Board will not partially revoke any exemptions as part of this final rule, as some shipper organizations have requested. (PCA Comments 10; AF&PA/ISRI Comments 6–7, 10–15.) AF&PA and ISRI argue that the *NPRM*'s statement that the Board ''would'' revoke exemptions ''to the extent required,'' *NPRM,* 88 FR at 63909, along with the *NPRM*'s statements indicating that the Board was assessing how to deal with exempt traffic, are sufficient to justify a partial revocation to carve out reciprocal switching in the final rule. (AF&PA/ISRI Reply 13–15.) It was not the Board's intent to propose an exemption revocation in this proceeding, nor did the *NPRM* identify any specific exemptions that it intended to revoke. Thus, the Board concludes that partial revocation in the final rule would not be an appropriate option.[98]

[93] AF&PA and ISRI argue that the procedure proposed by carriers—requiring shippers to petition for revocation, wait at least 12 weeks until the newly regulated service fell short of a performance metric, and then petition for reciprocal switching—would ''effectively exclude[]'' shippers of exempt traffic from the benefits of the rule. (AF&PA/ISRI Reply 15.)

[94] AF&PA and ISRI also argue that if the Board does not partially revoke these exemptions in the final rule due to concerns that it is not a logical outgrowth of the *NPRM,* the agency should issue a supplemental notice of proposed rulemaking or open a new sub-docket to address the issue. (AF&PA/ISRI Reply 15.)

[95] As AF&PA and ISRI acknowledge, the Board in *PYCO* revoked the exemption even though it said that revocation was not necessary. (AF&PA/ISRI Reply 12 (citing *June 2006 PYCO Decision,* FD 34802 et al.).) But AF&PA and ISRI note that the Board initially prescribed alternative rail service without revocation, ''and the Board never stated that that decision was in error.'' (*Id.*)

[96] *See* 49 CFR 1039.14(b)(3). The Board may therefore require the production of data and prescribe reciprocal switching with respect to any traffic that is subject only to the boxcar exemption.

[97] Nothing would prevent shippers with *PYCO*-like mixed traffic from seeking a partial revocation with respect to their exempt traffic to the extent necessary so that the Board can order reciprocal switching with respect to the non-exempt traffic. Shippers would not need to wait until a service issue arises to file such a petition.

[98] AF&PA and ISRI say that if the Board is concerned that partial revocation is not a logical

Continued

As discussed below, however, the Board is exploring future actions that would facilitate swifter access to part 1145 for petitioners with exempt commodities.

Third, regarding the standard the Board will use to evaluate petitions for partial revocation to the extent necessary to permit a prescription of a reciprocal switching agreement, (*see* AAR Comments 37; AAR Reply 19–20; CPKC Reply 36), the Board concludes that a rail carrier's likely failure to meet a performance standard (based on data available from carrier online platforms or other sources) would be strong evidence to support partial revocation, but parties would be allowed to present counterbalancing evidence to demonstrate why partial revocation would not be warranted. The statutory standard for revocation provides that the Board may revoke an exemption when it finds that regulation ''is necessary to carry out the transportation policy of section 10101 of this title.'' 49 U.S.C. 10502(d). Although the statements in the *NPRM* about the RTP of section 10101 could provide support for revocation, *see, e.g., NPRM,* 88 FR at 63898, 63900, 63901, the Board would not prevent parties from making other arguments in revocation proceedings to develop a fuller record. Accordingly, in a proceeding to adjudicate a petition for partial revocation (either in a specific case or on a commodity-wide basis), the Board will consider other evidence that the affected parties believe is relevant regarding whether revocation is necessary to carry out the RTP. Failure to meet a performance standard would be relevant to this inquiry, but it would not necessarily be dispositive.[99] Moreover, evidence of poor service may be relevant to this inquiry even if it would not establish that a rail carrier likely has failed to meet a performance standard. For example, a period of bad service could be relevant to a revocation inquiry even if it would not be long enough to cause a carrier to fail a performance standard.

In addition to RTP evidence, parties in some revocation proceedings also submit evidence regarding whether revocation is necessary to address the potential for abuse of market power. *See, e.g., Sanimax USA LLC* v. *Union Pac. R.R.,* NOR 42171, slip op. at 3, 5 (STB served Nov. 2, 2021). Although the market power inquiry is not required by the statute, the Board may consider and has considered such evidence in case-specific revocation proceedings, and the potential for abuse of market power generally weighs in favor of granting revocation.[100] *See generally Exclusion of Demurrage Regul. From Certain Class Exemptions,* EP 760, slip op. at 6–7 (STB served Feb. 28, 2020). FRCA and NCTA argue that the existence of service inadequacies is sufficient proof that regulation is necessary to protect shippers from abuse of market power, (*see, e.g.,* FRCA/NCTA Comments 4), and carriers retort that service inadequacies might occur for reasons unrelated to market power, (*see, e.g.,* AAR Reply 19–20). Service inadequacies certainly can be indicative of market power, but there may also be other evidence in specific cases. Accordingly, in case-specific revocation proceedings, the Board will consider any relevant evidence submitted by the parties, including evidence, if any, about the existence of (and potential for abuse of) market power.[101]

Fourth, should the Board partially revoke an exemption, the Board clarifies that it will not rely on pre-revocation performance as the basis for a prescription of a reciprocal switching agreement under this rule. As noted above, AAR and several carriers argue that the Board cannot rely on pre-revocation performance as the basis for a prescription under part 1145 because this would amount to retroactive regulation. (*See, e.g.,* AAR Comments 37–41; CN Comments 55–56; BNSF Comments 13–14.) AF&PA and ISRI respond that the Board has considered pre-revocation conduct as the basis for relief in other cases and that reciprocal switching is prospective in nature. (AF&PA/ISRI Reply 10–13.) Given the specific features of this rule, the Board concludes that using pre-revocation data as the basis for a prescription would be retroactive in a way that raises fairness concerns. Although AF&PA and ISRI are correct that the Board has relied on pre-revocation conduct in the past as the basis for relief, the Board will not do so here because of how closely the rule links specific pre-revocation conduct to post-revocation relief.

In *Pejepscot* and *Sanimax,* the Board said that pre-revocation conduct cannot be the basis for damages under the common carrier obligation. *Pejepscot,* 6 S.T.B. at 892–93, 899; *2022 Sanimax Decision,* NOR 42171, slip op. at 4. In *Pejepscot,* the Board reasoned that the railroad's conduct while an exemption was in effect could not have violated the common carrier obligation and that, therefore, the Board could not award damages for violation of the common carrier obligation based on that conduct. *Pejepscot,* 6 S.T.B. at 892–93, 899. *Pejepscot* says that the appropriate path for a shipper in such circumstances is to obtain partial revocation, after which the carrier could be liable for violations of the common carrier obligation based on post-revocation conduct. *Id.* at 893 n.15. Like *Pejepscot, Sanimax* held that a shipper is not entitled to ''relief, including damages,'' for conduct that occurred prior to the Board's revocation of the exemption. *2022 Sanimax Decision,* NOR 42171, slip op. at 4. *Sanimax* explained that ''[p]ermitting regulatory relief for the period the exemptions were in effect'' would be ''contrary to the principle that retroactive application of administrative determinations is disfavored,'' noting that there is a presumption against actions that would ''increase a party's liability for past conduct, or impose new

outgrowth of the *NPRM,* it should issue a supplemental notice of proposed rulemaking or open a new sub-docket to clarify that the Board is contemplating revoking the exemptions in the final rule. (AF&PA/ISRI Reply 15.) As discussed below, the Board will deal separately with any possible exemption revocations and avoid unnecessary delays to the implementation of this rule.

[99] Reliance on a railroad's past conduct as a basis for revocation is not impermissibly retroactive, and carriers do not contend otherwise. Congress expressly gave the Board the power to revoke exemptions and placed no limitations on the type of evidence that the Board may consider when determining whether regulation is necessary to carry out the RTP. Accordingly, the Board must be able to examine carrier actions as the basis for revocation.

[100] The Board has issued exemption revocation decisions without mentioning market power. *See Exclusion of Demurrage Regul. from Certain Class Exemptions,* EP 760, slip op. at 6–7. Nothing in this decision should be construed to suggest that a shipper or receiver needs to argue, let alone prove, that a carrier has market power to succeed on its petition to revoke an exemption.

[101] In the *PYCO* decisions, the Board relied on poor service as the basis for revocation, stating in one decision that ''[w]e view SAW's rail service as having been so inadequate as to amount to an abuse of market power,'' and that revocation will ''ensure the continuation of a sound rail system to meet the needs of the shipping public,'' consistent with 49 U.S.C. 10101(4). *June 2006 PYCO Decision,* FD 34802 et al., slip op. at 4; *see also November 2006 PYCO Decision,* FD 34889 et al., slip op. at 5 (relying on the analysis in the June 21, 2006 decision as the basis for revocation). There were myriad service issues considered in the *PYCO* decisions, based on the record developed by the parties in that case. *See, e.g., January 2006 PYCO Decision,* FD 34802, slip op. at 5 (explaining that the carrier had significantly reduced the number of cars that the shipper could load per day, that the carrier had halted shipping entirely for a six-day period without an adequate explanation, and that the service was so bad that the shipper would need to ''curtail or close operations'' if there was no improvement). There was also evidence that the railroad was not likely to take measures to improve future service. *See, e.g., June 2006 PYCO Decision,* FD 34802 et al., slip op. at 5–6 (describing evidence that the carrier appeared to be unable and unwilling to provide adequate service in the future). Thus, while the *PYCO* proceedings show that bad service can be the basis for revocation under some circumstances, they do not suggest that the Board should treat failure to satisfy a performance standard as dispositive in a partial revocation proceeding.

duties with respect to transactions already completed.'' *Id.* (quoting *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 280 (1994)).

Although AF&PA and ISRI correctly point out that *Sanimax* left the door open to some consideration of pre-revocation conduct in connection with ''prospective relief,'' (*see* AF&PA/ISRI Reply 12–13), there are important differences between how pre-revocation conduct would be used under part 1145 and how *Sanimax* contemplated that it would be used. In *Sanimax,* the Board said that ''UP's actions prior to [revocation] may be relevant to the Board's ultimate determination about what kind of prospective relief is warranted, if any.'' *2022 Sanimax Decision,* NOR 42171, slip op. at 4. *Sanimax* explains that the Board's ''broad'' discovery regulations allow parties to ''obtain discovery on any matter that is relevant'' and that some ''relevant facts giving rise to the complaint'' may have occurred prior to revocation. *Id.* But, although reciprocal switching under the rule is ''prospective'' in some respects,[102] the rule's numerical performance standards establish a more direct link between pre-revocation conduct and post-revocation regulatory consequences that would have hallmarks of retroactive regulation. If the Board adopts AF&PA and ISRI's approach, pre-revocation performance would be a decisive factor that would serve as the direct basis for a prescription of a reciprocal switching agreement, effectively creating new legal consequences for pre-revocation conduct. This would go beyond merely looking at pre-revocation conduct to the extent it ''may be relevant'' to the scope of prospective relief; rather, it effectively ''[p]ermit[s] regulatory relief for the period the exemptions were in effect.'' *See 2022 Sanimax Decision,* NOR 42171, slip op. at 4.[103]

The two *PYCO* decisions on which AF&PA and ISRI rely, (AF&PA/ISRI Reply 11–12), do not compel the conclusion that the Board should rely on pre-revocation conduct as the basis for a prescription under part 1145. In those decisions, the Board relied on pre-revocation conduct as the basis for prescribing alternative rail service under parts 1146 and 1147.[104] But, under its part 1147 regulation, the Board did so primarily as part of a broader inquiry into the incumbent railroad's conduct, acknowledging the carrier did not oppose PYCO's request for temporary alternative service on the merits. *November 2006 PYCO Decision,* FD 34889 et al., slip op. at 2. In both decisions, the Board determined that service was not likely to improve—a determination that was based primarily on the fact that the incumbent carrier all but refused to serve the petitioner—and ordered prospective relief under parts 1146 and 1147. *See June 2006 PYCO Decision,* FD 34802 et al., slip op. at 5–6; *November 2006 PYCO Decision,* FD 34889 et al., slip op. at 4–5.[105] In contrast, under shippers' proposed application of part 1145, the Board would focus on a single aspect of the railroad's pre-revocation conduct—failure to satisfy a performance standard—and would use that conduct as the very basis for prescribing a reciprocal switching agreement rather than a piece of evidence that supports predictions about future conduct. In effect, in contrast to the *PYCO* rulings, applying part 1145 to pre-revocation performance would specifically create consequences for that past performance.

The Board understands that this determination means that a shipper or receiver would need to obtain partial revocation of the exemption, and then wait until the newly regulated service fell short of the performance standards in part 1145, before filing a petition under part 1145. To mitigate impediments arising from this two-step process, petitions for partial revocation filed in furtherance of part 1145 cases will be prioritized in order to resolve them expeditiously. Moreover, the Board intends to explore whether it should partially revoke all exemptions, on its own initiative, to allow for reciprocal switching petitions, as is currently the case for the boxcar exemption. *See* 49 CFR 1039.14(b)(3) (expressly allowing for regulation of reciprocal switching for rail transportation of commodities in boxcars).[106]

Class II Carriers, Class III Carriers, and Affiliates

The Board proposed to limit prescriptions under part 1145 to situations in which the incumbent rail carrier is a Class I carrier or, for purposes of the industry spot and pull standard, an affiliated company[107] that serves the relevant terminal area. *NPRM,* 88 FR at 63907. The Board explained that the service data the Board had been examining in Docket No. EP 770 (Sub-No. 1) focused on Class I rail carriers and that the Board has not received as many informal or formal complaints about smaller carriers. *Id.* Moreover, the Board noted that data collection may be more burdensome for Class II and Class III rail carriers, as they have not been submitting service-related data to the Board under performance metrics dockets, such as Docket Nos. EP 724 (Sub-No. 4) and EP 770 (Sub-No. 1). *Id.* at 63907–08. Nevertheless, the Board sought comment on whether proposed part 1145 should be broadened to include Class II and Class III rail carriers that are providing inadequate service. *Id.* at 63908.

Some shipper groups fear that the Board's proposal is too limited. NMA asserts that, for a number of its members, the interchanging Class III rail carrier is not affiliated with a Class I rail carrier. (NMA Comments 5.) ACD raises similar concerns, noting that a sizeable

[102] Part 1145 is ''prospective'' in that it is not designed to punish carriers for poor performance or compensate shippers for losses incurred due to poor performance, but rather is intended ''to help ensure that the transportation system as a whole meets the public need.'' *NPRM,* 88 FR at 63902. And, as AF&PA and ISRI point out, reciprocal switching prescriptions ''would only affect *future* movements and *future* competition between the incumbent and the alternate carrier.'' (AF&PA/ISRI Reply 11.)

[103] The Board granted the parties' joint motion for voluntary dismissal in the *Sanimax* proceeding on February 15, 2024. *Sanimax USA LLC* v. *Union Pac. R.R.,* NOR 42171 (STB served Feb. 15, 2024). At the time of dismissal, the Board had not granted prospective relief or addressed in further detail how pre-revocation conduct can be used when determining prospective relief.

[104] Because the *PYCO* decisions partially revoked the exemptions and ordered alternative service in the same decision, they necessarily relied on pre-revocation conduct as the basis for the alternative service. *See June 2006 PYCO Decision,* FD 34802 et al. (partially revoking the exemption to the extent necessary to grant emergency relief under 49 U.S.C. 11123 and 49 CFR part 1146 *and* ordering emergency alternative service in the same decision); *November 2006 PYCO Decision,* FD 34889 et al. (same, with respect to alternative service under 49 U.S.C. 11102(a) and 49 CFR part 1147).

[105] The alternative rail service regulations at issue in the *PYCO* decisions, 49 CFR 1146.1 and 1147.1, require the petition to explain why the incumbent is unlikely to provide adequate rail service in the future. *See* 49 CFR 1146.1(b)(1)(ii) (requiring the petitioner to provide ''the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with the petitioner's current transportation needs within a reasonable time''); part 1147.1(b)(1)(ii) (same, with minor wording differences).

[106] The Board also notes that its NPRM proposing to revoke certain exemptions in their entirety remains under consideration. *See Rev. of Commodity, Boxcar, & TOFC/COFC Exemptions,* EP 704 (Sub-No. 1) (STB served Mar. 23, 2016); *see also Rev. of Commodity, Boxcar, & TOFC/COFC Exemptions,* EP 704 (Sub-No. 1) (STB served Sept. 30, 2020) (requesting comment on an approach developed by the Board for use in considering revocation issues).

[107] For purposes of the *NPRM* and the proposed regulatory text, the Board proposed that ''affiliated companies'' has the same meaning as ''affiliated companies'' in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A): ''*Affiliated companies* means companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are under common control with, the accounting carrier.'' The Board also sought public comment as to whether its definition should also include third-party agents of a Class I carrier. *NPRM,* 88 FR at 63902 n.9.

portion of its members ''receive rail deliveries through short line railroads that take cargo from Class I railroads and are then delivered to a shared railyard.'' (ACD Comments 2.) It asserts that these members are effectively captive and experience many of the same issues addressed in this rulemaking. (*Id.*) NMA also suggests that Class I railroads could limit access to what would otherwise be an effective interchange location. (NMA Comments 6.) Similarly, PCA claims that exempting short lines from these rules may create perverse incentives for Class I carriers to include a short line as their agent in the transportation shipments to avoid the rules altogether. (PCA Comments 15–16; *see also* VPA Comments 8 (seeking clarification of definition of ''affiliated companies'' to specifically include belt railroads in which a Class I carrier has controlling authority).) ACD, NMA, and PCA therefore ask that the Board permit petitioners to seek a prescription based on a short line's service. However, in light of the Board's concerns about smaller railroads being required to comply with the data reporting obligations, ACD suggests that another option could be to limit the application of the rules only to Class II rail carriers, excluding Class III rail carriers. (ACD Comments 2.)

Some groups also argue that the Board should allow a Class II or Class III rail carrier to be an alternate carrier. For example, PCA argues that the Board should allow a reciprocal switching agreement to be prescribed under part 1145 where a Class I railroad provides origin or destination service, but a short line railroad is able to participate in a reciprocal switching arrangement. (PCA Comments 15; *see also* DCPC Comments 12.) ACD adds that short line railroads have historically provided superior service compared to Class I railroads and that it believes short lines would be more receptive to accepting its members' smaller shipments. (ACD Comments 2.)

AAR and ASLRRA oppose permitting a petition under part 1145 to be filed against a short line. ASLRRA asserts that none of the shipper comments cite legal authority or facts supporting their position, only anecdotal conclusory statements. (ASLRRA Reply 6–8.) ASLRRA also argues that there have been very few complaints about the service provided by short lines, that imposing the metrics outlined in the *NPRM* would be burdensome on the short lines, and that short lines provide good service based on local connections with their shippers. (*Id.*) In response to suggestions that an alternate carrier could be a Class II or Class III railroad, AAR suggests that, rather than departing from the *NPRM* and complicating the proposed rule, the Board should simply recognize that part 1147 can be invoked to address the highly unusual situations in which a shipper might want reciprocal switching to a Class II or Class III railroad. (AAR Reply 36; *see also* ASLRRA Reply 5.)

ASLRRA also proposes a definition for ''affiliated companies'' to ensure Class II and III rail carriers are not ''inadvertently covered'' under the new regulations:

> Affiliated companies means companies or persons that directly or indirectly through one or more intermediaries control, or are controlled by, or are under common control with the accounting carrier. . . . [A]n affiliated company is one that is included in a Class I railroad's annual combined rail reporting to the STB and that acts as an operating division of [a Class I] railroad.

(ASLRRA Comments 6.) [108] ASLRRA is also concerned that including the term ''third-party agent'' in the definition of ''affiliated companies'' could theoretically capture any short line that contracts with a Class I railroad to provide functions such as switching services or haulage, which would blatantly contradict the exclusion of Class II and Class III short line railroads from the rule. It asserts that the term ''third-party agent'' is too amorphous and uncertain and should not be included. (ASLRRA Comments 5–7.)

The Board will not extend its rule to permit a petitioner to seek prescription of a reciprocal switching agreement based on a Class II or Class III rail carrier's service. While there are surely times when short line railroads provide a lower level of service, they are historically not a significant source of the service problems this rule seeks to address, and the record here has not demonstrated a need to expand part 1145 to include the smaller carriers.[109] *See NPRM,* 88 FR at 63907; (*see also* ACD Comments 2.) As proposed in the *NPRM,* the final rules adopted here generally will not apply to Class II and Class III rail carriers, except to the extent those carriers are ''affiliated companies'' as defined in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).[110] For example, the final rule will not apply to a Class II and III rail carrier where a Class I rail carrier holds a stake but the Class II or III carrier is not an affiliated company of the Class I rail carrier (*e.g.,* the New York, Susquehanna & Western, Railway Corporation or the Indiana Rail Road Company). The Board therefore does not agree with ASLRRA that the definition of ''affiliated companies'' should be revised.[111] As such, the definition of ''affiliated companies'' that was proposed in the *NPRM* will be adopted. The Board will gain experience with this final rule before considering whether to expand the definition to include Class II, Class III, or third-party agents of a Class I carrier.

The Board also will not prescribe a reciprocal switching agreement under part 1145 if the alternate line haul carrier would be a Class II or Class III rail carrier, other than Class II or Class III carriers that are affiliated companies of a Class I carrier. To allow an unaffiliated Class II or Class III rail carrier to serve as an alternate line haul carrier would raise a question of fairness in applying part 1145; a Class I railroad could lose its line haul to a Class II or Class III carrier under part 1145, but the Class II or Class III carrier would not be subject to the same possibility under part 1145. This determination is not meant to address whether a shipper could seek prescription of a reciprocal switching agreement under part 1144 or

[108] To the extent a regulation would permit a switch involving an affiliated company, BMWE argues that the Board should limit the meaning of ''affiliated company'' to subsidiaries or affiliates that are themselves Class I railroads (or are covered by a Class I railroad collective bargaining agreement). (BMWE Comments 4.) BMWE's argument, however, seems to stem from its belief that a Class II or Class III railroad would participate in a switch over the tracks of a Class I railroad or operate over the tracks of a Class I railroad. (*Id.*) BLET also raises concerns about Class II and Class III railroads operating on Class I lines and how that could infringe on collective bargaining rights, (BLET Comments 3), but these organizations' concerns seem to relate to trackage rights rather than reciprocal switching. The Board notes, however, that the Board may impose employee protective conditions on a reciprocal switching order under 49 U.S.C. 11102(c)(2).

[109] ASLRRA also explains that a reciprocal switching prescription resulting in the loss of revenue from even one customer could be financially difficult for short lines because of their light density operations, high infrastructure costs, and smaller number of customers. (ASLRRA Comments 4.) However, if an independent Class II or independent Class III rail carrier is providing poor service, shippers can seek relief under parts 1146 and 1147.

[110] As to PCA's concern that the final rule will create perverse incentives for Class I rail carriers to include a short line as their agent to avoid the rule altogether, the Board finds that scenario unlikely. However, the Board would consider such arguments if they were more developed based on a specific situation.

[111] VPA asks that the Board clarify the definition of ''affiliated companies'' to specifically include belt railroads in which a Class I carrier has controlling authority.'' (VPA Comments 8.) Nothing on the face of the definition excludes belt line railroads, where other conditions in the definition are met. A separate question—one to be addressed on a case-by-case basis, based on the facts of the case at hand—is whether the Board could prescribe a reciprocal switching agreement that would require a belt line railroad to switch traffic with a given Class I carrier.

part 1147 where the alternate carrier would be a Class II or Class III rail carrier.

Labor

AAR suggests that the *NPRM* is unclear on how labor's interests would be taken into account and who would bear the cost of labor protection requirements. (AAR Comments 94.) AAR asserts that, if the Board does not address those matters in this proceeding, it should do so in individual cases. (*Id.* at 95.) Labor interests also raise concerns about reciprocal switching prescriptions. For example, TTD asserts that reciprocal switching can interfere with labor agreements in some cases and cause the dislocation of existing operating employees. (TTD Comments 1.) SMART–TD also expresses concern about the specifics of how reciprocal switching prescriptions would work within the boundaries of its long-established collectively bargained agreements, and how it could be done without treading on the seniority rights that have long been established in the industry's workforce. (SMART–TD Comments 2.)

The Board appreciates these concerns but does not anticipate that the prescription of a reciprocal switching agreement would frequently conflict with the scope clauses of a collective bargaining agreement. Under 49 U.S.C. 11102(c)(2), the Board may require a prescribed agreement to contain provisions for the protection of the interests of affected employees. The Board will consider on a case-by-case basis whether any such provision is appropriate based on the facts of that case.

Environmental Matters

CSXT argues that the potential additional car handlings, yard activity, and transit delays from a Board-ordered switch could lead to more emissions and environmental impacts.[112] (CSXT Comments 48.) It asserts that declines in network efficiency due to more switching could also push traffic to trucks. (*Id.* at 48–49.) CSXT further argues that switching could also alter traffic patterns for toxic by inhalation/poisonous by inhalation (TIH/PIH) traffic or prompt high-volume shippers to add significant new traffic to alternative routes, which could trigger the Board's thresholds for environmental review. (*Id.* at 49.) It claims that the Board should require environmental documentation for switching with the potential to create significant environmental effects pursuant to 49 CFR 1105.6(d).

Environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321–4370m-11, for operational changes is only required where the Board's thresholds for environmental review would be met. The thresholds for assessing environmental impacts from increased rail traffic on rail lines are an increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least eight trains per day. 49 CFR 1105.7(e)(5)(i). For rail lines located in areas that are in nonattainment status under the Clean Air Act (42 U.S.C. 7401–7671q), the threshold for air quality analysis is an increase in rail traffic of at least 50% (measured in gross ton miles annually) or an increase of at least three trains per day. 49 CFR 1105.7(e)(5)(ii). Here, however, the Board doubts that a shipper choosing to reroute its traffic to an alternate carrier based on a Board prescription would result in enough rerouted traffic to reach any of these thresholds. Most switches would likely involve additional cars per day rather than additional trains per day.[113] Moreover, because a prescription under this rule would ''involve interchange between two carriers,'' it would be ''closely analogous'' to an order providing for the common use of rail terminals, which is categorically excluded from environmental review under 49 CFR 1105.6(c)(3). *Cape Cod & Hyannis R.R.—Exemption from 49 U.S.C. Subtitle IV,* FD 31229, slip op. at 2 (ICC served Mar. 25, 1988).[114]

For these reasons, the Board will not require specific environmental documentation for proceedings under part 1145 unless a showing is made in a particular case that there is enough potential for environmental impacts to warrant an environmental review. *See* 49 CFR 1105.6(d). Nevertheless, petitioners bringing cases under part 1145, and/or alternate carriers, should address whether environmental review may be needed under § 1105.7(e)(5) at the outset of the proceeding if they have reason to believe the case has the potential for environmental impacts.

Environmental Review

The final rule is categorically excluded from environmental review under 49 CFR 1105.6(c).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop. Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The final rule is directed at Class I railroads and their affiliated companies. As such, the regulations will not impact a substantial number of small entities.[115] Accordingly, pursuant to 5 U.S.C. 605(b), the Board again certifies that the regulations will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

[112] CSXT does not contest that the rulemaking itself is categorically excluded from environmental review. *See NPRM,* 88 FR at 63911 (citing 49 CFR 1105.6(c)).

[113] The Board also doubts that there would be an increase in truck traffic based on prescriptions under part 1145. As discussed in Performance Standards, a number of shippers seeking reciprocal switching reform do so because poor rail service forces them to ship by truck. The better service that could be created by a prescription could therefore lead to less truck traffic, as shippers that experienced rail service problems gain a new rail alternative. And, while CSXT raises concerns about TIH/PIH traffic, as noted in the Practicability section, carriers will be handling traffic subject to existing safety and health regulations. FRA itself, who will be served with all petitions, notes that, in general, it does not foresee safety concerns with reciprocal switching. (DOT/FRA Comments 3 n.3.)

[114] Indeed, the Board may explore whether to propose revising its environmental regulations specifically to include prescriptions made under part 1145 as categorically excluded from environmental review under 49 CFR 1105.6(c).

[115] For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a ''small business'' as including only those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regul. Flexibility Act,* EP 719 (STB served June 30, 2016). Class III rail carriers have annual operating revenues of $46.3 million or less in 2022 dollars. Class II rail carriers have annual operating revenues of less than $1.03 billion but more than $46.3 million in 2022 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1–1; *Indexing the Ann. Operating Revenues of R.Rs.,* EP 748 (STB served June 29, 2023).

Paperwork Reduction Act

The Board sought comments in the *NPRM* pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3) about the impact of the collection for the Reciprocal Switching for Inadequate Service Regulations (OMB Control No. 2140–00XX), concerning: (1) whether the collections of information, as added in the proposed rule, and further described in Appendix B, are necessary for the proper performance of the functions of the Board, including whether the collections have practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. *NPRM,* 88 FR at 63911–12.

In the *NPRM,* the Board estimated that the proposed requirements would add an hourly annual burden of 2,564 hours for six respondents, all Class I railroads. *NPRM,* 88 FR at 63916–17. This estimate consisted of the cumulative total of five types of filings required to collect information and allow the Board to implement the reciprocal switching regulations under part 1145. First, the Board anticipated that the requirement for the Class I railroads to update their internal data collections systems in order to standardize and harmonize them with the proposed reporting requirements would add an estimated total one-time hourly burden of 480 hours across all six Class I rail carriers. *NPRM,* 88 FR at 63912, 63916. Second, the weekly reports on service reliability and industry ISP were estimated to require an annual hour burden of approximately 1,248 hours. *NPRM,* 88 FR at 63916. Third, requests for individualized service data by shippers or receivers were estimated to require approximately 36 hours. *NPRM,* 88 FR at 63912, 63916. In calculating this estimate, the Board assumed that the Class I rail carriers could provide this information by making a minimal number of selections within a computer program once their systems had been updated. Fourth, petitions to initiate a reciprocal switching agreement were estimated to require approximately 700 hours, and fifth, the petitions to terminate a prescription were estimated to require about 100 hours. *NPRM,* 88 FR at 63912, 63916.

The Board received comments from AAR and a number of carriers addressing the Board's burden analysis for two types of collections of information under the PRA.

First, UP challenges the *NPRM's* estimate of 480 hours (80 hours per carrier) for the ''one-time update to data collection software to standardize with the Board's data definition for service reliability and industry spot and pull.'' As noted above in the Implementation section, UP estimates that between one and two years would be required to complete the design, programming, and testing of such systems before they could be implemented. (UP Comments 18.) Similarly, as also discussed in that section, CSXT contends that ''designing and implementing such a platform could take a year.'' (CSXT Reply 16.) As a result, both carriers argue that the required system updates will constitute a significant undertaking, estimating broadly one to two years of burden hours as opposed to the 480 hours estimated in the *NPRM.*[116]

For the reasons explained in the Implementation section, the Board disagrees with UP's stated concern that an entirely new system will be needed to meet the reporting requirements of this rule and similarly disagrees with CSXT's assertion that it will take a year to update its existing software. It is true that the new rule creates a standardized definition of OETA for purposes of part 1145. But, because the railroads' systems already have the code in place to measure OETA (under the demurrage definition), the new definition of OETA should require limited changes to their system codes. Therefore, to meet the new rules, the only change that should be required is an update to the OETA and ISP definitions within the railroads' existing software.

In their conclusory claims about the need for extreme alternatives—creating a whole new system or engaging in a year-long software update—UP and CSXT fail to provide a reasonable basis for the Board to update its estimate of hourly burdens based on either carrier's actual system requirements. Even so, upon further consideration, the Board recognizes that the update of definitions may require more time to edit, test, and implement than estimated in the *NPRM.* For example, the Board recognizes that the change will require some coding, testing, and validity checks upon updating their current software, and that the estimates in the *NPRM* may not have accounted for some of the complexities raised by UP and other railroads. Thus, the Board will revise estimates upwards to reflect that additional complexity. The estimated one-time hourly burden for an update to the carriers' systems will increase from 480 hours (80 hours per carrier) to 1,440 hours (240 hours per carrier). *See Table—Changes in Total Burden Hours from the NPRM to Final Rule.*[117]

Second, CN, CSXT, and UP challenge the data disclosure requirement of proposed § 1145.8(a) (concerning shipper/receiver requests for data from railroads) as vague and overly broad. (CN Comments 35; CSXT Comments 39; UP Reply 3; *see also* CPKC Comments 2 (claiming that its systems are not set up to generate shipper and commodity-specific lane-by-lane statistics but not providing hourly burden data).) As proposed, this information collection would require Class I rail carriers to respond to requests for individualized service data from shippers and receivers. The Board addresses the railroads' broad arguments in the Data Production to an Eligible Customer section and is modifying those requirements.

AAR contends that the estimates in the *NPRM* significantly underestimate the burden to Class I carriers of responding to requests for data from shippers and receivers. (AAR Comments 110.) AAR fails to provide specific hourly estimates to support its contentions, and there is also little or no data in the carriers' comments to support what hourly burden might be required. At the same time, in the adopted regulations, the Board is modifying the data disclosure requirements that were proposed in § 1145.8(a) to make the written data request more limited and specific. These modifications should address AAR's concern about workload burden. In addition, out of an abundance of caution, the Board will increase its estimate of the annual number of written data requests to 72 (12 per carrier) and its estimate of the hourly burden per request to 16 hours. The total estimate for written requests is

[116] Despite UP's and CSXT's general estimate that the proposed rule will take them one to two years to implement, the railroads fail to provide a specific estimate of burden hours.

[117] In *Demurrage Billing Requirements,* the Board recognized a similar one-time burden, which included the time Class I carriers would need to undertake the software redesign necessary to provide minimum information to be included on or with Class I carriers' demurrage invoices. *See Demurrage Billing Requirements,* EP 759, slip op. at 34–35. While the Board estimated a burden of 80 hours per respondent in that case, the Board recognizes that the one-time update in this reciprocal switching rule may pose a greater level of complexity. As noted, the individual burden per carrier is being adjusted to 240 hours, for a total of 1440 hours.

therefore increased to 1,152 hours. *See Table—Changes in Total Burden Hours from the NPRM to Final Rule.*

TABLE—CHANGES IN TOTAL BURDEN HOURS FROM THE NPRM TO FINAL RULE

Type of Filing	NPRM	Final Rule
	Total burden hours	Total burden hours
One-time update to data collection software to standardize with the Board's data definition for service reliability and ISP	480	1,440
Weekly reporting on service reliability and ISP (new 49 CFR 1145.8(b))	1,248	1,248
Written request identifying the specific 12-week period and lane and response to request for individualized service data (new 49 CFR 1145.8(a))	36	1,152
Petition for Prescription of a Reciprocal Switching Agreement (new 49 CFR 1145.5)	700	700
Petition to Terminate Prescription of a Reciprocal Switching Agreement (new 49 CFR 1145.7)	100	100
Total Burden Hours	2,564	4,640

This collection, along with the comments from AAR and the railroads and the Board's response, will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. That submission will also address the comments discussed above as part of the PRA approval process.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

Table of Commenters

Alliance for Chemical Distribution ACD
American Forest & Paper Association and the Institute of Scrap Recycling Industries AF&PA/ISRI
American Fuel & Petrochemical Manufacturers AFPM
American Petroleum Institute API
American Short Line & Regional Railroad Association ASLRRA
Association of American Railroads AAR
U.S. Senators Baldwin and Capito
Brotherhood of Locomotive Engineers and Trainmen BLET
Brotherhood of Maintenance of Way Employes Division/IBT, et al. BMWE
BNSF Railway Company BNSF
Canadian National Railway Company CN
Canadian Pacific Kansas City Limited CPKC
Cargill, Incorporated Cargill
Celanese Corporation Celanese
The Coalition Associations Coal. Ass'ns[118]
Commuter Rail Coalition CRC
CSX Transportation Company, Inc. CSXT
Diversified CPC International, Inc. DCPC
U.S. Department of Transportation and the Federal Railroad Administration DOT/FRA
The Dow Chemical Company Dow
Essential Minerals Association EMA
Freight Rail Customer Alliance and the National Coal Transportation Association FRCA/NCTA
Glass Industry Supply Chain Council GISCC
Glass Packaging Institute GPI
International Warehouse Logistics Association IWLA
Lyondell Chemical Company, et al. LyondellBasell
Metrolink Metrolink
National Grain and Feed Association NGFA
National Mining Association NMA
National Stone, Sand, and Gravel Association NSSGA
Dr. James Nolan
Norfolk Southern Railway Company NSR
Olin Corporation Olin
Portland Cement Association PCA
Private Railcar Food and Beverage Association, Inc. PRFBA
Michael Ravnitzky Ravnitzky
Transportation Division of the International Association of Sheet Metal, et al. SMART–TD
Transportation Trades Department, AFL–CIO TTD
Union Pacific Railroad Company UP
United States Department of Agriculture USDA
Virginia Port Authority VPA
Western Coal Traffic League WCTL

List of Subjects in 49 CFR Part 1145

Common carrier, Freight, Railroads, Rates and fares, Reporting and recordkeeping requirements, and Shipping.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the **Federal Register**.

2. This decision is effective on September 4, 2024.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

BOARD MEMBER PRIMUS, concurring:

The final rule adopted today is unlikely to accomplish what the Board set out to do under the statute's authorization of reciprocal switching that is ''practicable and in the public interest.'' *See* 49 U.S.C. 11102(c). And, despite my urging, the Board is not taking action to improve access to the statute's other prong, addressing reciprocal switching that is ''necessary to provide competitive rail service.'' *Id.* I am voting for the final rule because something is better than nothing. But there is far less ''something'' here than I had hoped there would be.

This final rule relies on service performance standards, which the incumbent carrier must fail during a 12-week period before a petitioner can seek a reciprocal switching order. The *NPRM* requested comment as to whether the Board may consider performance data based on service provided under a contract. *NPRM,* 88 FR at 63909. In this way, the *NPRM* left open the possibility that a petitioner would already know, before taking any steps towards filing its petition (aside from requesting the data), that 12 weeks of data are available to demonstrate failure under one of the performance standards.

The same is not true, however, with respect to the final rule. A large proportion of rail traffic moves under contract, and the final rule establishes that the Board will not prescribe a reciprocal switching agreement under part 1145 based on performance that occurs during the term of a contract. *See* 49 U.S.C. 10709. In other words, a customer receiving substandard service under a contract cannot seek relief under part 1145. A prospective petitioner would instead need to shift from transportation under a contract to transportation under a tariff and then

[118] The Coalition Associations include the American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League. The Board refers to these organizations as the Coalition Associations except when citing to one of their filings.

receive 12 weeks of substandard service before it could seek relief. Changing from contract to tariff transportation is something that rail customers generally prefer to avoid, as tariff rates can be substantially higher than contract rates. *See, e.g.,* Occidental Chem. Corp. Comments 2–3, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715; PPG Indus., Inc. Comments 3–4, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715.

A would-be petitioner under the final rule could incur this ''tariff premium'' indefinitely; 11 weeks into the customer's payment of tariff rates, for example, the carrier's average performance for the period could move above the threshold before falling again. Depending on the magnitude of this blip in the data, the 12-week period could effectively begin again. Rather than incurring the costs of tariff transportation indefinitely—before knowing whether a reciprocal switching petition is even a possibility—I expect contract customers will simply avoid trying to use part 1145.[1]

The decision opines that, ''if the rule can achieve its objectives with respect to common carrier traffic, this would make it worthwhile.'' As the decision acknowledges, however, only a small percentage of traffic moves in common carrier service. And part 1145 does not even apply to all common carrier traffic; the traffic must also be non-exempt, among other requirements.[2] Because the decision ''clarifies that [the Board] will not rely on pre-revocation performance as the basis for a prescription of a reciprocal switching agreement under this rule,'' customers whose transportation is exempt will face obstacles similar to those of contract customers should they wish to seek reciprocal switching. Such a customer would need to obtain partial revocation of the exemption—litigation that may be costly and time-consuming in itself, given the Board's statement that ''parties would be allowed to present counterbalancing evidence to demonstrate why partial revocation would not be warranted'' [3]—before potentially usable performance data even begins to accrue. Similar to contract customers, a customer who litigates and wins a partial revocation would do so unaware of whether it would ever become eligible to file a petition attempting to obtain reciprocal switching.

I disagree with the conclusion that aiming so low is worthwhile, given that the Board could have implemented the public interest prong without the deterrent effect I have described. *See 2016 NPRM,* slip op. at 17–18 (proposing a ''practicable and in the public interest'' test that did not require 12 weeks of performance data). And that is not to mention the fact that the Board is ''choosing to focus reciprocal switching reform on service issues at this time,'' while deferring to some uncertain future date any action on the competitive rail service prong. *Cf. id.,* slip op. at 19, 21–23 (proposing a ''necessary to provide competitive rail service'' test).

Contrary to an assertion in the decision above, the final rule therefore does not provide most rail customers with a reasonably predictable and efficient path toward a prescription under section 11102(c). I also do not share the optimism reflected in the decision's expectation that part 1145 will be a significant step in incentivizing Class I railroads through competition to achieve and maintain higher service levels on an ongoing basis. Rather, the Board's action is likely to have far less benefit than it intends.

This is a missed opportunity. Almost 13 years after the National Industrial Transportation League filed its petition for rulemaking with regard to reciprocal switching, the Board is adopting rules that do nothing with respect to the statute's competitive rail service prong and may not do very much under the public interest prong. We should do more, we should do better, and we should do it without letting another decade pass.

[1] The decision refers to concerns that this process will be ''cumbersome,'' a term that understates the final rule's expectation that prospective petitioners would pay the ''tariff premium'' for an undetermined period of time based on a chance that they might eventually become eligible to file a petition that attempts to secure reciprocal switching. (*See* Coal. Ass'ns Comments 13 (''[I]f the Board could not consider rail performance metrics for contract transportation, that effectively would neutralize the use of reciprocal switching to address the adequacy of rail service, given the large proportion of rail traffic that moves pursuant to contracts. A contract shipper currently experiencing service below the service thresholds in the proposed rules would have to wait for its contract to expire and then ship pursuant to tariff rates while waiting to see if its service improves.''); Coal. Ass'ns Reply 5–6, 47–52 (reiterating these concerns and asking the Board to reopen Docket No. EP 711 (Sub-No. 1)—the docket containing the *2016 NPRM*).)

[2] According to the decision, part 1145 is expected to improve network performance overall, which could benefit contract shippers in this interconnected industry. But this speculation—relying, for example, on the idea that the rule will promote the fluidity of shared facilities—loses sight of just how small the pool of potentially eligible traffic will be. As the decision itself points out, ''only a relatively small portion of all Class I movements are even potentially eligible for a prescription under part 1145,'' because the rule excludes not only contract and exempt traffic, but also shippers and receivers that are served by more than one Class I railroad or are outside a terminal area.

[3] The Board's stated intent to prioritize petitions for partial revocation filed in furtherance of part 1145 cases will have limited effect if the counterbalancing evidence, permitted under today's decision, is sufficiently voluminous or complex.

Jeffrey Herzig,
Clearance Clerk.

Final Rule

■ For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, of the Code of Federal Regulations by adding part 1145 to read as follows:

PART 1145—RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Sec.
1145.1 Definitions
1145.2 Performance standards
1145.3 Affirmative defenses
1145.4 Negotiations
1145.5 Procedures
1145.6 Prescription
1145.7 Termination
1145.8 Data

Authority: 49 U.S.C. 1321 and 11102

§ 1145.1 Definitions.

The following definitions apply to this part:

Affiliated companies has the same meaning as ''affiliated companies'' in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

Cut-off time means the deadline for requesting service during a service window, as determined in accordance with the rail carrier's established protocol.

Delivery means when a shipment is actually placed at a designated destination or is constructively placed at a local yard that is convenient to the designated destination. In the case of an interline movement, a shipment will be deemed to be delivered to the receiving carrier or its agent or affiliate when the shipment is moved past a designated automatic equipment identification reader at the point of interchange or is placed on a designated interchange track, depending on the specific interchange that is involved. For purposes hereof, constructive placement of a shipment at a local yard constitutes delivery only when:

(1) The recipient has the option, by prior agreement between the rail carrier and the customer, to have the rail carrier hold the shipment pending the recipient's request for delivery to the designated destination and the recipient has not yet requested delivery; or

(2) The recipient is unable to accept delivery at the designated destination.

Designated destination means the final destination as specified in the bill

of lading or, in the case of an interline movement, the interchange where the shipment is transferred to the receiving carrier, its agent, or affiliated company.

Incumbent rail carrier means a Class I rail carrier that currently provides line-haul service to the petitioner to or from the point of origin or final destination that would be covered by the proposed reciprocal switching agreement.

Lane means a shipment's point of origin and designated destination. Shipments of the same commodity that have the same point of origin and the same designated destination are deemed to travel over the same lane, regardless of which route(s) the rail carrier uses to move the shipments from origin to destination. In the case of an interline movement, the designated destination is the designated interchange.

Manifest traffic means shipments that move in carload or non-unit train service.

Original estimated time of arrival or *OETA* means the estimated time of arrival that the incumbent rail carrier provides when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from a delivering carrier.

Petitioner means a shipper or a receiver that files a petition hereunder for prescription of a reciprocal switching agreement.

Planned service window means a service window for which the shipper or receiver requested local service, provided that the shipper or receiver made its request by the cut-off time for that window.

Practical physical access means a feasible line-haul option on a rail carrier, including but not limited to: direct physical access to that carrier or its affiliated company; an existing switching arrangement between an incumbent rail carrier and another rail carrier; terminal trackage rights; or contractual arrangement between a local rail carrier and a line-haul carrier.

Receipt of a shipment means when the preceding rail carrier provides a time stamp or rail tracking message that the shipment has been delivered to the interchange.

Reciprocal switching agreement means an agreement for the transfer of rail shipments between one Class I rail carrier or its affiliated company and another Class I rail carrier or its affiliated company within the terminal area in which the rail shipment begins or ends its rail journey. Service under a reciprocal switching agreement may involve one or more intermediate transfers to and from yards within the terminal area.

Service window means a window during which the incumbent rail carrier offers to perform local service (placements and/or pick-ups of rail shipments) at a shipper's or receiver's facility. A service window must be made available by a rail carrier with reasonable advance notice to the shipper or receiver and in accordance with the carrier's established protocol. For purposes of this part, a service window is 12 hours in duration, beginning at the start of the work shift for the crew that will perform the local service, without regard to whether the incumbent rail carrier specified a longer or shorter service window.

Shipment means a loaded railcar that is designated in a bill of lading.

Similar traffic means traffic that is of the same broad type (manifest traffic or unit train) as the traffic that is governed by a prescribed reciprocal switching agreement, and is transported by the incumbent rail carrier or its affiliated company to or from the terminal area in which transfers occur under the prescribed reciprocal switching agreement.

Terminal area means a commercially cohesive area in which two or more railroads engage in the local collection, classification, and distribution of rail shipments for purposes of line-haul service. A terminal area is characterized by multiple points of loading/unloading and yards for such local collection, classification, and distribution. A terminal area (as opposed to main-line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards. A point of origin or final destination on the rail system must be within a terminal area to be eligible for a prescription under this part.

Time of arrival means the time that a shipment is delivered to the designated destination.

Transit time means the time between a rail carrier's receipt of a shipment, upon either the tender of the bill of lading to that rail carrier or the rail carrier's receipt of the shipment from a delivering carrier and the rail carrier's delivery of that shipment to the agreed-upon destination. Transit time does not include time spent loading and unloading cars.

§ 1145.2 Performance standards.

The performance standards in this section apply only to petitions for prescription of a reciprocal switching agreement under this part.

(a) *Service reliability (original estimated time of arrival).* The service reliability standard applies to shipments that travel as manifest traffic. The service reliability standard measures a rail carrier's success in delivery of a shipment from its original or interchange location by the original estimated time of arrival, accounting for the applicable grace period. Determination of a rail carrier's compliance with the service reliability standard is based on all shipments from the same original or interchange location to the same delivery location over a period of 12 consecutive weeks. A rail carrier meets the service reliability standard when *A/B* ratio is greater than or equal to 70%, where *A* is the number of shipments that are delivered within 24 hours of the original estimated time of arrival, and *B* is the total number of shipments.

(1) A car that is delivered more than 24 hours before or after its OETA will not be considered as being delivered within 24 hours of OETA.

(2) Once a carrier has communicated an original estimated time of arrival to a customer, that time will not be changed by any subsequent changes to the original trip plan of the car, no matter what the cause of the changed trip plan may be.

(b) *Service consistency (transit time).* The service consistency standard applies to shipments in the form of a unit train and to shipments that travel as manifest traffic. The service consistency standard measures a rail carrier's success over time in maintaining the transit time for a shipment. A rail carrier fails the service consistency standard if it fails either the standard in paragraph (b)(1) of this section or the standard in paragraph (b)(2) of this section, with both paragraphs being subject to paragraph (b)(3) of this section.

(1) *Year-to-year comparison. A* is more than 20% longer than *B,* where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during the previous year.

(2) *Multi-year comparison. A* is more than 25% longer than *B,* where *A* is the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks, and *B* is the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during any of the previous three years.

(3) A carrier will not fail the service consistency standard if the increase in

transit time between *B* and *A* is 36 hours or less, notwithstanding the percentages stated in paragraphs (b)(1) and (b)(2) of this section.

(c) *Lanes.* Compliance with the performance standards in paragraphs (a) and (b) of this section is determined separately for each lane of traffic to or from the petitioner's facility. Shipments of the same commodity from the same point of origin to the same designated destination are deemed to travel over the same lane, without regard to the route between the point of origin and designated destination. In the case of an interline movement, the designated destination is the designated interchange.

(d) *Empty railcars.* (1) For private or shipper-leased railcars, a rail carrier fails to meet the service consistency standard in paragraph (b) of this section if the rail carrier's average transit time for delivering empty cars to a designated destination over a 12-week period increases by more than 20% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week period during the previous year or by more than 25% compared to average transit time for delivering empty cars to the same designated destination during the same 12-week periods during any of the previous three years. However, notwithstanding the previous sentence, a carrier will not fail the service consistency standard if the increase in average transit time for delivering empty cars is 36 hours or less.

(2) A rail carrier's failure to meet a performance standard as provided in this paragraph (d) provides the basis for prescribing a reciprocal switching agreement that governs both the delivery of the empty cars and the delivery of the associated shipments of loaded cars.

(e) *Industry spot and pull.* The industry spot and pull standard measures a rail carrier's success in performing local placements (''spots'') and pick-ups (''pulls'') of loaded railcars and unloaded private or shipper-leased railcars at a shipper's or receiver's facility during the planned service window. The industry spot and pull standard does not apply to unit trains or intermodal traffic.

(1) A rail carrier meets the industry spot and pull standard if, over a period of 12 consecutive weeks, the carrier has a success rate of 85% or more in performing requested spots and pulls within the planned service window, as determined based on the total number of planned service windows during that 12-week period.

(2) Failure to spot constructively placed cars that have been ordered in by the cut-off time applicable to the customer for a planned service window is included as a failure in calculating compliance with the industry spot and pull standard.

(3) Failure to spot ''spot on arrival'' railcars for a planned service window results in a missed service window only if the railcars arrived at the local yard that services the customer and are ready for local service before the cut-off time applicable to the customer.

(4) If a rail carrier cancels a service window other than at the shipper's or receiver's request, that window is included as a failure in calculating compliance with the industry spot and pull standard.

(5) When a rail customer causes a carrier to miss a planned service window, that window will not be considered a miss in determining the success rate under this paragraph (e).

(6) If a rail carrier reduces the frequency of its local service to a shipper's or receiver's facility, and if rail carrier cannot demonstrate that reduction is necessary based on a commensurate reduction in customer demand, then the industry spot and pull standard increases to a success rate of 90% for two years.

(f) The performance standards in paragraphs (a) and (b) of this section apply to movements within the United States and to the U.S. portion of movements between the United States and another country, in the latter case when the carrier's general practice with respect to such movements is to record receipt or delivery of the shipment at a point at or near the U.S. border (including where the carrier receives the shipment from or delivers the shipment to an affiliated carrier).

§ 1145.3 Affirmative defenses.

An incumbent rail carrier shall be deemed not to fail a performance standard in § 1145.2 if any of the conditions described in this section are met. The Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section.

(a) The rail carrier experiences extraordinary circumstances beyond the carrier's control, including but not limited to unforeseen track outages stemming from natural disasters, severe weather events, flooding, accidents, derailments, and washouts. A carrier's intentional reduction or maintenance of its workforce at a level that itself causes workforce shortage, or, in the event of a workforce shortage, failure to use reasonable efforts to increase its workforce, would not, on its own, be considered a defense for failure to meet any performance standard. A carrier's intentional reduction or maintenance of its power or car supply, or failure to use reasonable efforts to maintain its power or car supply, that itself causes a failure of any performance standard would not, on its own, be considered a defense.

(b) The petitioner's traffic increases by 20% or more during the 12-week period in question, as compared to the preceding 12 weeks (for non-seasonal traffic) or the same 12 weeks during the previous year (for seasonal traffic such as agricultural shipments), where the petitioner failed to notify the incumbent rail carrier at least 12 weeks prior to the increase.

(c) There are highly unusual shipments by the shipper during any week of the 12-week period in question. For example, a pattern might be considered highly unusual if a shipper projected traffic of 120 cars in a month and 30 cars per week, but the shipper had a plant outage for three weeks and then requested shipment of 120 cars in a single week.

(d) The incumbent rail carrier's failure to meet the performance standard is due to the dispatching choices of a third party.

(e) The incumbent rail carrier's failure to meet the performance standard was directly caused by the conduct of a third party. This defense will be narrowly construed to avoid undue delay of the proceeding and unnecessary litigation costs. When presenting a defense under this paragraph (e), the incumbent rail carrier must prove that such conduct was outside its reasonable control. The incumbent rail carrier must also prove that it took reasonable steps to prevent and mitigate the impact of the third-party conduct or, if the impact could not be reasonably prevented, that the incumbent carrier took reasonable steps to mitigate the impact of the third-party conduct.

§ 1145.4 Negotiations.

At least five days prior to petitioning for prescription of a reciprocal switching agreement hereunder, the petitioner must seek to engage in good faith negotiations to resolve its dispute with the incumbent rail carrier.

§ 1145.5 Procedures.

(a) If a shipper or a receiver believes that a rail carrier providing it service failed to meet a performance standard described in § 1145.2, it may file a petition for prescription of a reciprocal switching agreement.

(b) The petition must include the information and documents described in this paragraph (b).

(1) Confirmation that the petitioner attempted good faith negotiations as required by § 1145.4, identify the performance standard the railroad failed to meet over the requisite period of time, identify the requested duration of the prescription of a reciprocal switching agreement, and provide evidence supporting its claim and requested prescription.

(2) Identification of at least one possible rail carrier to provide alternative service.

(3) Identification of any relevant switching publications of the incumbent rail carrier and the potential alternate carrier(s).

(4) A motion for a protective order that would govern the disclosure of data that the rail carrier provided to the petitioner under this part.

(c) The petition must have been served on the incumbent rail carrier, the alternate rail carrier(s), and the Federal Railroad Administration.

(d) A reply to a petition is due within 20 days of a completed petition. The burden of proof of establishing infeasibility and/or undue impairment is on the rail carrier (either the incumbent or the alternate) that is objecting to the petition.

(e) A rebuttal may be filed within 20 days after a reply to a petition.

(f) The Board will endeavor to issue a decision on a petition within 90 days from the date of the completed petition.

§ 1145.6 Prescription.

(a) The Board will prescribe a reciprocal switching agreement under this part if all the conditions in this paragraph (a) are met.

(1) For the lane of traffic that is the subject of the petition, the petitioner has practical physical access to only one Class I carrier that could serve that lane.

(2) The petitioner demonstrates that the incumbent rail carrier failed to meet one or more of the performance standards in § 1145.2 with regards to its shipment.

(3) The incumbent rail carrier fails to demonstrate an affirmative defense as provided in § 1145.3.

(b) Notwithstanding paragraph (a) of this section, the Board will not prescribe a reciprocal switching agreement if the incumbent rail carrier or alternate rail carrier demonstrates that the agreement is not practicable, including: switching service under the agreement, *i.e.,* the process of transferring the shipment between carriers within the terminal area, could not be provided without unduly impairing either rail carrier's operations; switching service under the agreement would be operationally infeasible; or the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly impair the incumbent rail carrier or the alternate rail carrier's ability to serve its existing customers. If the incumbent rail carrier and alternate rail carrier have an existing reciprocal switching arrangement in a terminal area in which the petitioner's traffic is currently served, the proposed operation is presumed to be operationally feasible, and the incumbent rail carrier will bear a heavy burden of establishing why the proposed operation should not qualify for a reciprocal switching agreement due to infeasibility.

(c) In prescribing a reciprocal switching agreement, the Board shall prescribe a term of service of three years, provided that the Board may prescribe a longer term of service of up to five years if the petitioner demonstrates that the longer minimum term is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs.

(d) Upon the Board's prescription of a reciprocal switching agreement under this part, the affected rail carriers must set the terms of the agreement and offer service thereunder within 30 days of service of the prescription and notify the Board within 10 days of when the carriers offered service that the agreement has taken effect. Additionally, the incumbent carrier must promptly amend its switching publication(s) as appropriate to reflect the availability of reciprocal switching under the prescription.

(e) If the affected carriers cannot agree on compensation within 30 days of the service of the prescription, then the affected rail carriers must offer service and petition the Board to set compensation.

§ 1145.7 Termination.

(a) If the incumbent carrier does not timely file a petition for termination, a prescription hereunder automatically renews at the end of the term established under § 1145.6(c). Automatic renewal is for the same term as the original term of the prescription. If the Board denies a petition to terminate the prescription, it will determine, on a case-by-case basis, the appropriate renewal term based on the evidentiary record, not to exceed the original term of the prescription. At the end of the renewal term, if the incumbent carrier does not timely file a petition for termination, the prescribed agreement will automatically renew for the same number of years as the renewed term.

(b) The Board will grant a petition to terminate a prescription if the incumbent rail carrier demonstrates that, for the most recent 12-week period prior to the filing of the petition to terminate, the incumbent rail carrier's service for similar traffic on average met all three performance standards under this part. This requirement includes a demonstration by the incumbent carrier that it has been able to meet, over the most recent 12-week period, the performance standards for similar traffic to or from the relevant terminal area.

(c) The incumbent rail carrier may submit a petition to terminate a prescription not more than 180 days and not less than 150 days before the end of the current term of the prescription.

(d) A reply to a petition to terminate is due within 15 days of the filing of the petition.

(e) A rebuttal may be filed within 10 days of the filing of the reply.

(f) The Board will endeavor to issue a decision on a petition to terminate within 90 days from the close of briefing.

(1) If the Board does not act within 90 days from the close of briefing, the prescription automatically terminates at the end of the current term of the prescription.

(2) If the Board does not issue a decision due to extraordinary circumstances, as determined by the Board, the prescription is automatically renewed for 30 days from the end of the current term. When there are extraordinary circumstances, the Board will issue an order alerting the parties that it will not issue a decision within the required time period. Under such circumstances, the Board will issue its decision as expeditiously as possible.

(3) A prescribed agreement will continue in effect until 30 days after the Board serves a decision that grants a petition to terminate or after the end of the prescription period, whichever is later.

§ 1145.8 Data.

(a) A shipper or receiver with practical physical access to only one Class I carrier serving the lane of traffic for which individualized performance records are sought, and based on a good faith belief that the Class I carrier has provided service that does not meet at least one performance standard from § 1145.2, may submit a written request to the incumbent rail carrier for all individualized performance records relevant to the performance standard(s) the shipper or receiver believes the rail carrier has failed.

(1) In the request to the rail carrier, the shipper or receiver must identify the

specific performance standard(s) that it believes the rail carrier has failed, and the corresponding date range and lane(s).

(2) Within seven days of the written request, the incumbent rail carrier shall provide the shipper or receiver with the requested individualized performance records.

(3) For purposes of this section, ''individualized performance records'' means the original estimated times of arrival, transit times, and/or industry spot and pull records related to the shipper or receiver's traffic, along with the corresponding time stamps.

(b) All Class I carriers shall report to the Board on a weekly basis, in a manner and form determined by the Board, data that shows: the percentage of shipments on the carrier's system that moved in manifest service and that were delivered within 24 hours of OETA, out of all shipments on the carrier's system that moved in manifest service during that week; and, for each of the carrier's operating divisions and for the carrier's overall system, the percentage of planned service windows during which the carrier successfully performed the requested local service, out of the total number of planned service windows on the relevant division or system for that week, all within the meaning of this part.

(c) Class I carriers shall provide, in the format of their choosing, machine-readable access to the information listed in this section.

(1) *Machine-readable* means data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.

(2) *Open format* is a format that is not limited to a specific software program and not subject to restrictions on re-use.

(d) Class I carriers shall retain all data necessary to respond to a request under paragraph (a) of this section for a minimum of four years.

[FR Doc. 2024–09483 Filed 5–6–24; 8:45 am]

BILLING CODE 4915–01–P

FEDERAL REGISTER

Vol. 89 Tuesday,
No. 89 May 7, 2024

Part VII

Department of the Interior

Bureau of Land Management

43 CFR Part 2360

Management and Protection of the National Petroleum Reserve in Alaska; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2360

[BLM_HQ_FRN_MO4500177994]

RIN 1004–AE95

Management and Protection of the National Petroleum Reserve in Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: This rule governs the management of surface resources and Special Areas in the National Petroleum Reserve in Alaska (Reserve or NPR–A). The Bureau of Land Management (BLM) manages the NPR–A consistent with its duties under the Naval Petroleum Reserves Production Act, as amended (NPRPA), Federal Land Policy and Management Act, as amended, (FLPMA), and other authorities. The rule revises the framework for designating and assuring maximum protection of Special Areas' significant resource values and protects and enhances access for subsistence activities throughout the NPR–A. It also incorporates aspects of the NPR–A Integrated Activity Plan (IAP) approved in April 2022.

DATES: This rule is effective on June 6, 2024.

FOR FURTHER INFORMATION CONTACT: James Tichenor, Advisor—Office of the Director, at 202–573–0536 or *jtichenor@blm.gov* with a subject line of ''RIN 1004–AE95.'' For questions relating to regulatory process issues, contact Faith Bremner at *fbremner@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. For a summary of the rule, please see the rule summary document in docket BLM–2023–0006 on *www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

I. List of Acronyms and Abbreviations
II. Executive Summary
III. Background
IV. Section-by-Section Discussion
V. Procedural Matters

I. List of Acronyms and Abbreviations

To ease the reading of this preamble and for reference purposes, the following acronyms and abbreviations are used in the preamble:

ANILCA (Alaska National Interest Lands Conservation Act of 1980)
BLM (Bureau of Land Management)
ASRC (Arctic Slope Regional Corporation)
FLPMA (Federal Land Policy and Management Act of 1976)
IAP (Integrated Activity Plan)
ICAS (Iñupiat Community of the Arctic Slope)
NPR–A or Reserve (National Petroleum Reserve in Alaska)
NPRPA or the Act (Naval Petroleum Reserves Production Act of 1976)
UIC (Ukpeaġvik Iñupiat Corporation)

II. Executive Summary

The Naval Petroleum Reserves Production Act of 1976 (NPRPA) gives the BLM three overarching mandates for managing the Reserve: (1) conduct an oil and gas exploration, leasing, and production program; (2) protect environmental, fish and wildlife, historical, and scenic surface resources from the impacts of that program through mitigation of reasonably foreseeable and significantly adverse effects; and (3) assure maximum protection for significant surface values from the impacts of the oil and gas program, including subsistence use, within Special Areas. Through this rulemaking process, the BLM is developing a more cohesive framework for these three mandates by establishing requirements and procedures for protecting the surface values of the Reserve while conducting the oil and gas program.

The final rule implements the critical components of the statutory framework described above, establishing procedures for the BLM to mitigate reasonably foreseeable and significantly adverse effects of proposed oil and gas activities on the surface resources of the Reserve and to provide maximum protection for surface values within Special Areas for proposed oil and gas activities. The BLM will continue to follow the part 3130 regulations for managing oil and gas leasing and production in the Reserve.

The rule updates the purpose of the subpart 2361 regulations to more accurately and completely reflect the scope of the regulations. The purpose of the updated regulations is to provide standards and procedures to implement 42 U.S.C. 6506a(b), which requires the Secretary to ensure that ''[a]ctivities undertaken pursuant to this Act include or provide for such conditions, restrictions, and prohibitions as [she] deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR–A],'' and to provide standards and procedures to implement 42 U.S.C. 6504(a), under which any exploration in Special Areas ''shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the [NPR–A].''

The rule establishes new standards and procedures for managing and protecting surface resources in the Reserve from the reasonably foreseeable and significantly adverse effects of oil and gas activities. It requires the BLM, in each decision concerning oil and gas activity in the Reserve, to adopt measures to mitigate the reasonably foreseeable and significantly adverse effects on surface resources, taking particular care with surface resources that support subsistence. The rule requires the BLM to manage oil and gas activities in accordance with the IAP, enshrining longstanding BLM practice into regulations. In the BLM's experience, the IAP provides an invaluable means of evaluating management options, engaging the public, and guiding decision-making, consistent with the BLM's duties under NPRPA and the National Environmental Policy Act (NEPA).

The rule codifies the five existing Special Areas and their significant resource values and management as currently established in Secretarial decisions and the 2022 IAP, and it establishes a process for designating, amending, and de-designating Special Areas in the future. The rule sets forth standards and procedures for managing oil and gas activities within Special Areas, confirming that the management priority within Special Areas is to assure maximum protection of significant resource values consistent with the requirements of the NPRPA for exploration of and production from the Reserve. The procedures detail requirements for analyzing proposed oil and gas leasing, exploration, development, or new infrastructure in Special Areas, including providing opportunities for public participation and consulting with federally recognized Tribes and Alaska Native Claims Settlement Act (ANCSA) corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area. The BLM must evaluate potential adverse effects on significant resource values and consider measures to avoid, minimize, or otherwise mitigate adverse effects to achieve maximum protection of significant resource values.

The rule requires the BLM to manage Special Areas to protect and support

fish and wildlife and their habitats and the associated subsistence use of those areas by rural residents, and it requires the BLM to provide reasonable access to and within Special Areas for subsistence purposes. The rule encourages the BLM to explore co-stewardship opportunities for Special Areas, including co-management, collaborative and cooperative management, and tribally led stewardship, fulfilling the special trust relationship that the Department of the Interior has with Tribes.

III. Background

A. The Need for the Rule

The BLM is promulgating this final rule because the regulatory framework governing the management and protection of environmental, fish and wildlife, other surface resources, and Special Areas in the Reserve needs updating. Conditions throughout the Arctic have changed dramatically since 1977, when the BLM issued the current regulations for management of surface resources and Special Areas in the Reserve. Rapidly changing conditions, including the intensifying impacts of climate change on the Reserve's natural environment and Native communities, make it necessary and appropriate for the BLM to develop new regulations that account for and respond to these changing conditions and that require the BLM to regularly address changing conditions.

In addition, the current regulations do not reflect the full management regime for the Reserve. This rule will provide a framework for management to protect Special Areas and surface resources in the Reserve, which requires a delicate balance between exploration for and development of oil and gas resources and protecting subsistence, recreational, fish and wildlife, historical, scenic, and other values. The applicable legal standards and procedures for management of the Reserve are currently scattered throughout several statutes and BLM regulations, plans, and guidance documents. For example, the existing regulations do not integrate with the BLM's development and use of IAPs, which have been used for more than two decades to guide management of lands within the Reserve. Although the BLM is not required to prepare a resource management plan for the Reserve under FLPMA, see 42 U.S.C. 6506a(c), it has chosen to produce and update the IAP through a public process and supported by analysis in an Environmental Impact Statement (EIS). The IAP allocates land uses in the Reserve and includes oil and gas lease stipulations and infrastructure restrictions that apply to BLM authorizations in Special Areas and other areas throughout the Reserve. The overlay of an updated regulatory regime to govern the Reserve, including the requirement to develop future IAPs to direct management of the lands and resources in the Reserve, will enhance consistency and certainty, particularly with respect to protection of surface resources and Special Areas.

Through the NPRPA, as amended, Congress has given the BLM three overarching mandates for managing the Reserve: (1) conduct an oil and gas exploration, leasing and production program; (2) protect environmental, fish and wildlife, historical, and scenic surface resources from the impacts of that program through mitigation of reasonably foreseeable adverse effects; and (3) assure maximum protection for significant surface values from the impacts of the oil and gas program, including subsistence use, within Special Areas. Through this rulemaking process, the BLM is developing a more cohesive framework for these three mandates by establishing requirements and procedures for protecting the surface values of the Reserve while conducting the oil and gas program, as discussed in more detail below.

1. Conduct an Oil and Gas Leasing, Exploration, and Production Program

The NPRPA directs the Secretary of the Interior to ''conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act.'' In response to this mandate, in 1981 the BLM developed regulations establishing the procedures for administering a competitive leasing program for oil and gas within the Reserve. Those regulations are set forth in 43 CFR part 3130, and they are not being amended in this rulemaking process. Following promulgation of the part 3130 regulations, the BLM held two lease sales in the Reserve in 1982 and one each in 1983 and 1984.[1] After receiving no bids during the 1984 lease sale and determining that the oil and gas industry had ''little interest in another lease sale,'' the BLM discontinued sales in the Reserve for the next 15 years.[2] The BLM restarted lease sales in 1999 and, over the next 2 decades, held a total of 15 sales for the Reserve. These sales initially generated considerable bonus bid revenue for the Federal Government and the State of Alaska; however, bid revenue dropped off significantly as lands in the Reserve with the highest potential for development were leased. Between 1999 and 2019, the BLM offered nearly 60 million acres of leases in the Reserve but received bids on just 12 percent of that acreage.[3]

The BLM continues to authorize oil and gas leasing and production in the Reserve. The most recent oil and gas lease sale in the Reserve occurred in 2019. Under the 2022 IAP, approximately 11.8 million acres of the Reserve's subsurface estate are available for oil and gas leasing. In March 2023, the BLM approved the Willow Master Development Plan Project for construction and operation of new infrastructure in the Bear Tooth Unit within the Reserve. The approved Willow project incorporates substantial resource protection measures, such as reducing the number of proposed drill sites, while authorizing the production and transportation to market of Federal oil and gas resources within the Reserve, consistent with the BLM's statutory directives.

2. Protect Environmental, Fish and Wildlife, Historical, and Scenic Values

Under the NPRPA, the Secretary of the Interior assumes all responsibilities for the protection of environmental, fish and wildlife, and historical or scenic values. The Act authorizes the Secretary to ''promulgate such rules and regulations as [she] deems necessary and appropriate for the protection of such values within the reserve.'' 42 U.S.C. 6503(b). The BLM additionally has a responsibility to ''provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects [of oil and gas activities] on the surface resources'' throughout the Reserve. 42 U.S.C. 6506a(b). The current regulations, however, provide little detail on the standards and procedures the BLM should use to implement these important requirements. New and revised standards and procedures are needed to ensure that the BLM is fulfilling its statutory duties under the NPRPA, FLPMA, and other authorities to the best of its ability.

The many important surface resources of the Reserve are described in detail in

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[1] U.S. Geological Survey, The NPR–A Data Archive 2 (Mar. 2001), *available at https://pubs.usgs.gov/fs/fs024-01/fs024-01.pdf.*

[2] BLM, Northeast NPR–A Final IAP/EIS (Aug. 1998), *available at https://web.archive.org/web/20001018022001/http:/aurora.ak.blm.gov/npra/final/html/contents_vol1.html.*

[3] BLM, NPR–A Sale Statistics 1999 to Present, *available at https://www.blm.gov/sites/blm.gov/files/documents/files/Oil_Gas_Alaska_NPR-A_LeaseSale_Statistics_1999toPresent.pdf.*

the preamble to the proposed rule. These include extensive calving grounds for the Teshekpuk Caribou Herd and the Western Arctic Caribou Herd; threatened and sensitive bird species and the Qupałuk Flyway Network Site; marine mammals including polar bears, six whale species, spotted seals, and walruses; and abundant fish species including Pacific salmon. Overall, the implications of climate change for wildlife in the Arctic are substantial, particularly for marine mammals that are threatened by continued Arctic warming and the resulting deterioration of sea ice. The final rule better supports the BLM's ability to manage impacts to surface resources resulting from climate change and to respond to changing conditions more rapidly.

3. Assure Maximum Protection for Significant Surface Values, Including Subsistence Use, Within Specially Designated Areas

The NPRPA requires the BLM to ''assure the maximum protection of [significant subsistence, recreational, fish and wildlife, or historical or scenic] values'' within Special Areas ''to the extent consistent with the requirements of [the NPRPA] for the exploration of the reserve.'' 42 U.S.C. 6504(a). This requirement applies to the impacts of all oil and gas activities. 42 U.S.C. 6504(a); 6506a(n)(2). The final rule improves upon the standards and procedures that implement this requirement. For example, the current regulations identify specific measures the BLM may take to assure maximum protection but provide no further guidance on the evaluation and selection of such measures.

The final rule also maintains and enhances access for long-standing subsistence activities in the Reserve. The importance of subsistence harvesting to the Iñupiat people and residents of communities in and around the Reserve is discussed in depth in the preamble to the proposed rule. Impacts on subsistence are occurring on the North Slope with greater frequency as development expands across the region. Nuiqsut, the community closest to current oil and gas development on the North Slope, has experienced the most impacts. Effects on subsistence and concerns for ongoing subsistence activities have also been documented for Point Lay, Wainwright, Utqiagvik, Atqasuk, and Anaktuvuk Pass. Many of these effects are related to oil and gas exploration and development—including seismic activity and oil and gas-related research, pipelines, and traffic—on caribou and other terrestrial species. Provisions of the rule for management of subsistence uses within Special Areas and co-stewardship opportunities in management of Special Areas and subsistence fulfill the special trust relationship that the Department of the Interior has with Tribes.

In sum, this rule implements the critical components of the statutory framework described above, establishing procedures for the BLM to mitigate reasonably foreseeable and significantly adverse effects of proposed oil and gas activities on the surface resources of the Reserve and to provide maximum protection for surface values within Special Areas for proposed oil and gas activities, consistent with the requirements of the Act related to conducting oil and gas exploration and production—all as explicitly required by the NPRPA. The BLM will continue to follow the part 3130 regulations for managing oil and gas leasing and production in the Reserve. The BLM will also continue to maintain an IAP for the Reserve per the final rule. The IAP addresses management of the Reserve more broadly than oil and gas activities, whereas this rule and the codification of the 2022 IAP in provisions of this rule apply only to oil and gas activities.

Public Comments on the Need for the Rule

During the public comment period, the BLM received approximately 89,000 comments on *regulations.gov* from Tribes, Alaska Native Corporations, State and local governments, organizations, businesses, and individuals. Among them were comments from the Arctic Slope Regional Corporation, Doyon Limited, Iñupiat Community of the Arctic Slope, Kuukpik, Native Village of Kotzebue, and Village of Wainwright.

This preamble responds to comments in the relevant part of the discussion. For example, the following addresses comments on the need for the rule.

Comment: Commenters stated that the Reserve was set aside for the purposes of energy resource development and security in the United States and that they do not think that the BLM should promote any regulations that would slow, deter, or counter these purposes.

BLM Response: The rule implements express statutory direction in the NPRPA, which requires authorizations for oil and gas activities to ''include or provide for such conditions, restrictions, and prohibitions . . . necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources'' throughout the Reserve. The NPRPA also requires the BLM to ensure maximum protection of Special Areas' significant resource values from oil and gas activities. Please see the Brief Administrative History of the Reserve discussion below for more details.

Comment: The BLM received comments requesting that it remove the climate change justification from the Need for the Rule discussion. The BLM also received comments that balancing oil and gas activities with the protection of surface resources is not enough to address the climate change concerns raised in section II(E), Need for the Rule.

BLM Response: Intensifying impacts from climate change are particularly affecting North Slope Iñupiaq communities and creating substantial uncertainty for managing surface resources in the Reserve. Changes in native plant communities, wildlife habitat, and migration corridors, particularly for caribou, are affecting the availability of and access to subsistence resources. Climate change is also affecting things like permafrost stability and creating engineering challenges for infrastructure. Promulgating this rule now provides industry with assurances regarding management of the Reserve and allows it to better plan for future exploration and development. Updating the regulatory framework will improve the BLM's ability to respond to changing conditions in the Arctic while providing transparency in conservation and development decisions.

Comment: The BLM received comments espousing the position that there is not a need for additional rules to manage the Reserve because the IAP already provides stringent requirements for environmental protection and designates specific areas for oil and gas development.

BLM Response: The 2022 IAP Record of Decision (ROD) provides broad management direction for uses and activities allowed within the Reserve, including requirements for environmentally and socially responsible resource development. The BLM is seeking to codify the 2022 IAP development process and management framework for oil and gas activity into regulations, which currently are over 40 years old and outdated. Additionally, this final rule consolidates the provisions governing the BLM's management of oil and gas activity while mitigating adverse effects on surface resources and managing Special Areas for maximum protection of significant resource values in the Reserve.

Comment: Commenters requested that the BLM cite the need to protect wildlife species, including those with declining

populations like the Arctic peregrine falcon and caribou, in the Need for the Rule.

BLM Response: The concerns raised in this comment are encompassed in the proposed and final rule with references to ''protection and control of the environmental, fish and wildlife, and historical and scenic values of the National Petroleum Reserve in Alaska.''

B. Brief Administrative History of the Reserve

Designated by President Warren G. Harding in 1923 as Naval Petroleum Reserve No. 4, E.O. 3797–A, the Reserve is one of several naval petroleum reserves established on public land in the early part of the 20th Century to serve as an emergency oil reserve for the U.S. Navy. The Reserve extends from the north slope of the Brooks Range to the Arctic Coast and encompasses approximately 23 million acres of public land.

The U.S. Navy explored for oil and gas in the Reserve from 1944 to 1953, resulting in the discovery of two small oil fields (Simpson and Umiat), one prospective oil field (Fish Creek), a gas field (South Barrow), and four prospective gas fields (Meade, Square Lake, Titaluk, and Wolf Creek). The Navy also pioneered numerous methods for oil exploration in the Arctic and collected a tremendous amount of scientific information concerning northern Alaska. By the 1970s, when Congress began debating the role of the naval petroleum reserves in the context of the nation's changing energy needs, the Reserve remained ''largely unexplored and almost completely undeveloped.'' H.R. Rep. No. 94–156, at 3 (1975). In 1976, Congress passed the NPRPA, which transferred administrative jurisdiction over the Reserve from the Secretary of the Navy to the Secretary of the Interior and redesignated the ''Naval Petroleum Reserve Numbered 4, Alaska'' as the ''National Petroleum Reserve in Alaska'' in 1977. Public Law 94–258 (1976) (codified at 42 U.S.C. 6502). It also directed the President to prepare a study to ''determine the best overall procedures'' for exploring, developing, and transporting the reserve's oil and gas resources. *Id.* section 105(b)(1) (codified at 42 U.S.C. 6505(b)).

In the NPRPA, Congress sought to strike a balance between oil and gas exploration and ''the protection of environmental, fish and wildlife, and historical or scenic values'' in the Reserve. It did so by directing the Secretary to ''promulgate such rules and regulations as he [or she] deems necessary and appropriate for the protection of such values within the reserve.'' 42 U.S.C. 6503(b). The Conference Report explained that the Act would immediately vest responsibility for protection of the Reserve's ''natural, fish and wildlife, scenic and historical values . . . in the Secretary of the Interior . . . so that any activities which are or might be detrimental to such values will be carefully controlled.'' H.R. Conf. Rep. No. 94–942 (1976). The report stated the Conference Committee's expectation ''that the Secretary will take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve.'' *Id.*

Congress further directed that ''[a]ny exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.'' 42 U.S.C. 6504(a). The Conference Report elaborated that the Act would ''immediately authorize the Secretary to require that the exploration activities within these designated areas be conducted in a manner designed to minimize adverse impacts on the values which these areas contain.'' H.R. Conf. Rep. No. 94–942 (1976).

To implement the NPRPA, the BLM developed regulations in 1977 to govern management and protection of the Reserve. Those regulations, which have remained unchanged since their original promulgation, are set forth at 43 CFR part 2360, subpart 2361. The regulations provide a purpose and objectives for the protection of the environmental, fish and wildlife, and historical or scenic values of the Reserve and require the BLM to take such action as is necessary to mitigate or avoid unnecessary surface damage and to minimize ecological disturbance throughout the Reserve to the extent consistent with the requirements of the NPRPA for the exploration of the Reserve. Among other provisions, the regulations identify examples of maximum protection measures that may be implemented to protect significant resource values and provide guidance for designating additional Special Areas within the Reserve.

Three years after the BLM developed regulations to govern management of the Reserve, the Department of the Interior Appropriations Act, Fiscal Year 1981, directed the Secretary to ''conduct an expeditious program of competitive leasing of oil and gas'' in the Reserve, while ''provid[ing] for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on . . . surface resources . . . .'' Public Law 96–514, 94 Stat. 2957 (1980). The BLM subsequently developed a new set of regulations to govern the oil and gas leasing program in the Reserve, which were promulgated in 1981 and are set forth at 43 CFR part 3130. The part 3130 regulations did not amend the subpart 2361 regulations, and, as a result, the BLM currently follows two sets of regulations located in different parts of the code governing management of the Reserve.

The Fiscal Year 1981 Appropriations Act also exempted the Reserve from the requirement to prepare land use plans under section 202 of FLPMA. However, the BLM has found that planning is beneficial to ensure compliance with the statutory and regulatory framework governing the Reserve and since 1998 has maintained an IAP for the Reserve. Because planning in the Reserve is exempted from FLPMA section 202, the IAP is not developed as a resource management plan and does not implement multiple use and sustained yield. Instead, the IAP focuses possible future BLM management practices on those uses that are allowable under the NPRPA for the Reserve, and consistent with NEPA regulations at 40 CFR parts 1500 through 1508, the IAP is developed through an EIS process.

The BLM first developed an IAP for the Northeast portion of the Reserve, which was finalized in 1998, and established initial surface protections relevant to the Teshekpuk Lake and Colville River Special Areas. Upon signing the 1998 ROD, the Secretary approved the addition of ''much of the Kikiakrorak and Kogosukruk Rivers and an area approximately two miles on either side of these rivers'' to the Colville River Special Area, thus increasing its size to 2.44 million acres, and the addition of the Pik Dunes to the Teshekpuk Lake Special Area. 64 FR 16747 (April 6, 1999). The 2003 Northwest NPR–A IAP proposed the new Kasegaluk Lagoon Special Area, which the Secretary approved in a ROD in 2004. See 70 FR 9096 (Feb. 24, 2005). The Kasegaluk Lagoon Special Area is located in the northwestern corner of the Reserve and includes important habitat for marine mammals, among other values.

The BLM developed the first IAP for the full Reserve in 2013. Through the 2013 IAP, the Secretary made several

decisions concerning Special Areas. First, the Secretary designated a fifth Special Area: Peard Bay. The 107,000-acre area was designated to ''protect haul-out areas and nearshore waters for marine mammals and a high use staging and migration area for shorebirds and waterbirds.'' (BLM, NPR–A IAP ROD 4 (Feb. 2013), available at *https://eplanning.blm.gov/public_projects/nepa/5251/42462/45213/NPR-A_FINAL_ROD_2-21-13.pdf.*) Second, the Secretary expanded the Teshekpuk Lake Special Area by 2 million acres ''to encompass all the roughly 30-to-50-mile band of land valuable for bird and caribou habitat between Native-owned lands near Barrow and Native-owned lands near Nuiqsut . . . .'' (*Id.* at 19.) Third, the Secretary expanded the Utukok River Uplands Special Area to 7.1 million acres ''to more fully encompass prime calving and insect-relief habitat within the NPR–A . . . .'' (*Id.* at 4.) Finally, the Secretary broadened the purpose of the Colville River Special Area to include the ''protect[ion of] all raptors, rather than the original intent of protection for arctic peregrine falcons.'' (*Id.*)

The current IAP, adopted in April 2022, was informed by a Final EIS issued by the agency in 2020. The EIS evaluated a range of alternatives for managing oil and gas activities and resources in the Reserve. (BLM, NPR–A Final IAP/EIS (June 2020), *available at https://eplanning.blm.gov/eplanning-ui/project/117408/570.*) These alternatives were informed and shaped by extensive outreach efforts with the public and stakeholders, including:

- *Scoping:* During the scoping period from November 21, 2018, to February 15, 2019, the BLM held eight public meetings in Alaska and received approximately 56,000 comment submissions, including form letters.
- *Public Review of the Draft IAP/EIS:* During the comment period for the Draft IAP/EIS from November 25, 2019, through February 5, 2020, the BLM held eight public meetings in Alaska and received more than 82,000 comments, including form letters and signed petitions.
- *Comments received after the Final IAP/EIS was released and prior to the ROD:* In reaching the decision in the 2022 ROD, the BLM reviewed and fully considered comments received after distribution of the Final IAP/EIS on June 26, 2020. The comments did not identify any significant new circumstances or information related to environmental concerns bearing upon the proposed action or its impacts. Instead, they generally reflected concerns already raised by comments submitted during scoping and the public's review of the Draft IAP/EIS.

In addition to the above, the current IAP benefited from suggestions and careful review of the analysis in the IAP/EIS by several cooperating agencies: the Bureau of Ocean Energy Management, Iñupiat Community of the Arctic Slope, National Park Service, North Slope Borough, State of Alaska, and U.S. Fish and Wildlife Service. During the IAP/EIS process, the BLM consulted with:

- Tribes as required by a Presidential Executive Memorandum dated April 29, 1994;
- Communities, Tribal organizations, and Native corporations on the North Slope;
- The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration—Fisheries pursuant to the Endangered Species Act; and
- Alaska's State Historic Preservation Office pursuant to the National Historic Preservation Act.

Pursuant to Alaska National Interest Lands Conservation Act (ANILCA) section 810(a)(1) and (2), the BLM also conducted hearings in North Slope communities to gather comments regarding potential impacts to subsistence use resulting from the alternatives considered in the IAP/EIS. Section 3.6 of the 2022 IAP details the BLM's process for evaluating impacts to subsistence use and findings based on that evaluation.

The 2022 IAP makes approximately 11.8 million acres (52 percent) of the Reserve's subsurface estate available for oil and gas leasing. The remaining approximately 11 million acres (48 percent) of the Reserve, including the majority of lands within Special Areas and much of the coastal area of the Reserve along the Beaufort Sea, are closed to oil and gas leasing to protect and conserve important surface resources and uses in these areas. The majority of the area closed to oil and gas leasing was determined to be medium or low potential for discovery or development of oil and gas resources in the Reasonably Foreseeable Development Scenario in the 2020 NPR–A Final IAP/EIS. (BLM, NPR–A Final IAP/EIS at B–1 (June 2020), *available athttps://eplanning.blm.gov/public_projects/117408/200284263/20020421/250026625/Volume%202_Appendices%20B-Y.pdf.*) The IAP makes lands available for application for oil and gas infrastructure, including pipelines and other infrastructure necessary for owners of any offshore leases in the State or Federal waters of the Chukchi and Beaufort Seas to bring oil and gas across the Reserve to the Trans-Alaska Pipeline System, while also prohibiting new infrastructure on lands containing habitat of special importance to nesting, breeding, and molting waterfowl as well as those with critical calving and insect relief areas for the Teshekpuk Lake and Western Arctic Caribou Herds. (BLM, NPR–A IAP ROD 1–2 (Apr. 2022))

C. Statutory Authority

The NPRPA is the primary source of management authority for the Reserve. Under the NPRPA, the Secretary must ''assume all responsibilities'' for ''any activities related to the protection of environmental, fish and wildlife, and historical or scenic values'' and ''promulgate such rules and regulations as he [or she] deems necessary and appropriate for the protection of such values within the reserve.'' 42 U.S.C. 6503(b).

Congress has also directed the Secretary to ''conduct an expeditious program of competitive leasing of oil and gas'' in the NPR–A. *Id.* However, the NPRPA also requires the Secretary to ensure all oil and gas activities within the Reserve ''include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources'' throughout the NPR–A. *Id.* at 6506a(b).

The NPRPA also authorizes the Secretary to designate Special Areas to protect ''significant subsistence, recreational, fish and wildlife, or historical or scenic value[s]'' in the NPR–A and provides that any ''exploration'' in Special Areas ''shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.'' *Id.* at 6504(a).

Other authorities that guide management of the NPR–A include FLPMA and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Although Congress in 1980 exempted the NPR–A from FLPMA's land use planning and wilderness study requirements, 42 U.S.C. 6506a(c), it did not exempt the NPR–A from FLPMA's other provisions. Hence, the BLM must ''take any action necessary to prevent unnecessary or undue degradation'' of all BLM-administered public lands, including within the NPR–A. 43 U.S.C. 1732(b).

Similarly, certain portions of ANILCA apply within the Reserve. Of particular importance for this rule, section 810 of ANILCA, which governs subsistence

uses within the Reserve, requires the BLM to ''evaluate the effect'' of proposed activities ''on subsistence uses and needs . . . .'' 16 U.S.C. 3120(a). If such activities will ''significantly restrict subsistence uses,'' then the BLM must hold hearings in affected communities, limit activities to ''the minimal amount of public lands necessary,'' and take ''reasonable steps . . . to minimize adverse impacts upon subsistence uses and resources . . . .'' *Id.* Fulfilling section 810's requirements is of crucial importance for the NPR–A, as more than 40 communities utilize its resources for subsistence purposes.

Public Comments on Statutory Authority

Comments: Some commenters asserted that the proposed rule conflicts with the plain language and congressional intent of the NPRPA, as amended by Public Law 96–514 (codified at 42 U.S.C. 6506a). Other commenters raised concerns that the proposed rule ignores that the NPRPA exempted the Reserve from certain provisions of FLPMA. Others commented that the proposed rule violates the plain language and congressional intent of FLPMA and the application in the rule is therefore inappropriate. Commenters further stated that Congress designated the Reserve to be developed in balance with conservation and that the proposed rule aims to align management of the Reserve with FLPMA in a manner that ignores the unique considerations identified in the NPRPA and would inappropriately restrict oil and gas development and decrease domestic oil supply.

BLM Response: The BLM disagrees with commenters' assertions that the rule conflicts with the NPRPA or FLPMA. This rule appropriately implements the statutory framework in the NPRPA, as amended, to provide for oil and gas exploration and development in the Reserve while ensuring the protection of environmental, fish and wildlife, and historical or scenic values across the Reserve; and specifically within Special Areas to ensure that any oil and gas activity is undertaken in a manner that provides for the maximum protection of surface values to the extent consistent with the requirements of the NPRPA.

Similarly, this rule appropriately implements the applicable provisions of FLPMA to the management of the Reserve. The Department of the Interior and Related Agencies' Fiscal Year (FY) 1981 Appropriations Act (Pub. L. 96–514) exempted management of the Reserve from only two sections of FLPMA: section 202 (43 U.S.C. 1712), which requires the BLM to prepare resource management plans to guide management of public lands; and section 603 (43 U.S.C. 1782), which required the BLM to complete wilderness reviews and describes the procedures for managing any lands recommended to Congress for wilderness designation pending congressional action. The BLM is otherwise obligated to manage public lands within the Reserve pursuant to FLPMA, where consistent with the NPRPA, as amended. Under FLPMA, the BLM has broad authority to regulate the use, occupancy, and development of public lands within the Reserve and must take action ''to prevent unnecessary or undue degradation of the lands'' (43 U.S.C. 1732(b)).

Comments: Other comments suggested that the BLM add a specific reference to ANILCA in § 2361.3.

BLM Response: The BLM agrees with this suggestion and has added a discussion of ANILCA to that section of the final rule.

D. Public Engagement

The BLM published the proposed rule in the **Federal Register** on September 8, 2023 (88 FR 62025), for a 60-day comment period ending on November 7, 2023. In response to public requests for an extension, the BLM extended the comment period for 10 days (88 FR 72985) and then again for 20 days (88 FR 80237). The resulting 90-day comment period closed on December 7, 2023.

During the comment period, the BLM hosted a variety of public outreach activities. The BLM held two virtual public meetings on October 6 and November 6, 2023. Presentation slides and video recordings of the virtual meetings were made available on the BLM website for the rulemaking (*https://www.blm.gov/about/laws-and-regulations/NPR-A-Rule*). The BLM held three in-person meetings in Anchorage (October 10, 2023), Nuiqsut (November 1, 2023), and Utqiagvik (November 2, 2023) to provide an overview of the proposed rule and answer questions from the public. The BLM also held one hybrid meeting in Wainwright on December 4, 2023. A court reporter was present at the Nuiqsut and Utqiagvik meetings to transcribe all comments and questions. The hybrid meeting in Wainwright was recorded via the Zoom platform, and those comments were collected by the BLM on behalf of the commenters and submitted as comments to the rulemaking docket on *regulations.gov (https://www.regulations.gov/docket/BLM-2023-0006*). Additionally, the BLM posted transcripts from the meetings as supporting and related materials to the rulemaking docket on *regulations.gov*.

The BLM also posted a fact sheet, a frequently-asked-questions document, a side-by-side comparison of the proposed rule with the existing regulation, and other background information on the BLM website to further public understanding of the proposed rule (*https://www.blm.gov/about/laws-and-regulations/NPR-A-Rule*).

In addition, during the comment period, the BLM conducted external outreach and participated in meetings to discuss the content of the proposed rule, including congressional briefings; meetings with the State of Alaska; and meetings with industry and other stakeholder interest groups.

Public Comments on Public Engagement

Comments on scope of outreach:

Commenters noted their perception that the BLM did not seek the input of those likely to be affected by the rulemaking prior to issuing the Notice of Intent in the **Federal Register**, as they stated is required by Executive Order (E.O.) 13563. Specifically, commenters stated their position that the BLM did not conduct outreach or engagement with the eight active lessees in the Reserve, State and national trade associations (American Petroleum Institute and Alaska Oil and Gas Association), and numerous Tribal and local government entities including the North Slope Borough, to ''seek their views on the scope or merits of the contemplated proposed rulemaking.''

Commenters also provided input on outreach methods. Commenters suggested that the BLM utilize KBRW as local residents often listen to that station for important announcements including meetings. Commenters also suggested that the BLM reach out to local search and rescue offices in villages because those volunteers directly interact with subsistence users. Comments emphasized that many Tribes and allotment owners do not have cell phones, utilize social media, or own computers; many do not have internet access, and if they do, it is limited and unreliable.

BLM Response: The BLM's intention to initiate this rulemaking was announced in March 2023. On August 25, 2023, the BLM mailed a formal offer for consultation to 45 Tribes and 30 Alaska Native Corporations to engage in consultation on the proposed rule. The BLM did not receive a response to these invitations from any of the Tribes or Alaska Native Corporations. Since the announcement of the proposed rule on

September 8, 2023, the BLM has continued to offer consultation via phone, email, and in-person invitations to Tribes and Alaska Native Corporations that it determined would be most likely to have substantial direct effects from the rule, including the Native Village of Atqasuk; Atqasuk Corporation; Village of Wainwright; Olgoonik Corporation; Native Village of Nuiqsut; Kuupik Corporation; Native Village of Barrow; Ukpeaġvik Iñupiat Corporation (UIC); Arctic Slope Regional Corporation (ASRC); and Iñupiat Community of the Arctic Slope (ICAS). On September 6th, 2023, agency staff called State and local governments to ensure they were aware of the upcoming publication of the proposed rule and to offer opportunities to discuss the rule language.

For some proposed rules, the BLM chose to engage with stakeholders about the broader topic earlier in the rulemaking process. In this instance, however, we believed it would be more productive to engage in more in-depth discussion regarding the content of the proposed changes to the rule with the benefit of the actual proposal for review and discussion.

The BLM worked with communities within the Reserve to host in-person public comment meetings, including posting meeting flyers, amplifying meetings on social media, and announcing the meetings on local CB radios. We always appreciate suggestions on outreach methods and how we might better reach audiences. We note the commenters' specific outreach suggestions for future efforts in the North Slope region.

Comments on timing:

Commenters expressed their concerns that the timeline for review of the rule directly conflicted with hunting and fall subsistence whaling activities. Commenters also noted their perception that the BLM is ignoring local circumstances such as the North Slope Borough's mayoral elections, which they stated prevented meaningful input on the proposed rule from North Slope communities. Comments expressed the opinion that the public comment timeline was inadequate, noting that 60 days was insufficient, and that the additional 30 days of extensions still did not allow North Slope organizations to diligently prepare comments on the rule and to weigh-in to the fullest extent possible. Commenters requested additional time to allow the public to have meaningful opportunity to review the necessary information and provide substantive comments.

Commenters expressed concern that the comment period for the rule overlapped with the comment period for the Coastal Plain Oil and Gas Leasing Program Supplemental EIS comment period.

Commenters emphasized the importance of working with the NPR–A Working Group, as the group consists of important local leaders and provides a forum for discussion of the rule including recommendations. Commenters suggested that certain group members (specifically Utqiagvik) did not receive notification of the meetings and that they should be involved in the discussion.

Commenters noted their opinion that the schedule for in-person and virtual public meetings for the rule did not provide sufficient notice to allow the public to meaningfully participate, nor the opportunity to adjust schedules so as to attend in person. Commenters also noted their opinion that the meetings were hastily scheduled, with only a few days' notice, and that meetings were canceled with little or no notice and often not rescheduled. Commenters requested additional public meetings and requested that those additional meetings be adequately noticed to facilitate public participation and local engagement.

Commenters noted that there is no reason the proposed rule should have substantially less public participation than other, less significant actions that have dictated management of the Reserve as both have been subject to the Administrative Procedure Act (APA). Commenters noted that the APA ensures that BLM rulemaking is a transparent and regular process.

BLM Response: BLM agrees that the timing for the public comment period was difficult and not ideal. Whaling is an incredibly important subsistence activity for North Slope communities, and fall is one of two key times to harvest. While the comment period for the proposed rule was during the fall whaling season, the BLM took steps to ensure that North Slope communities were given the opportunity to provide comments on the proposed rule and engage in the process in a meaningful way. First, the BLM conducted extensive outreach to Reserve communities, holding in-person public meetings in Nuiqsut, Utqiagvik, and Wainwright. Further, we recognize that submitting public comments online or through the mail might pose a challenge to these communities. To facilitate greater participation, we offered opportunities for community members at these sessions to submit their comments for the record through comment cards or through a court reporter. In addition, the agency met with the NPR–A Working Group three times during the public comment period. The NPR–A Working Group is comprised of representatives from North Slope local governments, Alaska Native Corporations, and tribal entities. It is intended to provide a forum for North Slope communities to provide input to management of the Reserve (*https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/alaska/NPR-A/npr-a_working_group*). For each meeting in Reserve communities, the BLM coordinated meeting dates, times, and locations with local entities, although some changes still resulted due to unforeseen events or weather. Regarding the comment received specially addressing the November 2 meeting in Utqiagvik, meeting details were finalized in mid-October 2023 and advertised to the community via social media and flyers, in addition to notification to the NPR–A Working Group and posting on the project website.

The BLM received requests to extend the public comment period for the proposed rule; specifically, we were asked to extend the comment period for an additional 90 days, which would have made for a 150-day (5-month) comment period. A 5-month comment period far exceeds the typical duration for rulemaking comment periods. While we were unable to grant the requested extension, the BLM did extend the comment period for 30 days, resulting in a 90-day comment period for the proposed rule. While the comment period for the proposed rule overlapped with the comment period on the Draft Supplemental EIS for the Coastal Plain, the Coastal Plain comment period was 60-days and ended one month before the close of the comment period on the proposed rule.[4] Throughout the comment period and since, the BLM has continued to engage with Reserve region Tribes and Alaska Native Corporations on the rule.

Comments on meeting format:

Commenters provided input on the format of both the in-person and virtual meetings. Commenters noted that public comment and testimony was not part of the meetings, which, in their opinion, confirmed the BLM's ''limited intention to actually gather knowledge or data, or

[4] The Coastal Plain of the Arctic National Wildlife Refuge is approximately 50 miles east of the NPR–A. The 2017 Tax Act (Pub. L. 115–97) directed the BLM to conduct two sales in the Coastal Plain offering at least 400,000 acres of high-potential hydrocarbon lands for bid by 2024. More information on the supplemental environmental impact statement for the Coastal Plain Oil and Gas Leasing Program can be found on that project's website at *https://eplanning.blm.gov/eplanning-ui/project/2015144/570.*

to collaborate.'' Commenters also noted their perception that the BLM limited questions from the public and only answered select written questions submitted in English and then did not read them verbatim but instead paraphrased them. Some commenters stated concern over the format of the virtual meetings and noted that they did not think the meetings were long enough in duration and that they prefer a townhall format over the webinar format that was utilized. Commenters further noted that they would have liked to interact with each other and/or the BLM. Commenters expressed their opinion that the BLM's comment process does not provide special considerations that account for Indigenous groups' understanding of Western institutional public processes, which makes the process less transparent to Indigenous peoples.

Some commenters noted that, in their opinion, the BLM should ''reset the process to allow more public engagement and to receive the benefit of comment from informed stakeholders who can contribute to a better and more durable final rule.''

BLM Response: All members of the public were invited to submit comments to the BLM electronically at *Regulations.gov* or by mail, personal delivery, or messenger delivery. The BLM uploaded comments received by mail, personal delivery, or messenger delivery to *Regulations.gov.* As the official repository of comments, *Regulations.gov* is available to the public, allows the agency to better track and make more effective use of comments, and allows the public to review submissions from other commenters. For public meetings, the agency hosted virtual and in-person informational sessions along with in-person public comment meetings for communities located within the Reserve.

The informational sessions were designed to help the interested public understand the proposed rule and provide a forum to answer questions. The BLM communicated with attendees that comments would not be collected at the informational sessions due to the logistical feasibility of accurately and comprehensively recording comments in those venues. Participants were given both the *Regulations.gov* website and the mailing address for comment submission, and BLM representatives were available to answer questions about how to submit comments. The agency did not receive any questions during information sessions that were not written in English.

The BLM worked with communities within the Reserve to host in-person public comment meetings. We have heard on numerous occasions through other project outreach efforts that submitting public comments online or through the mail often poses a challenge to these communities. To facilitate greater participation, we offered opportunities for community members at these meetings to submit their comments to the record through comment cards or orally through a transcriber.

Comments on public engagement for the 2022 IAP:

Commenters expressed their opinion that the BLM incorrectly relied on the public comment process that informed the 2020 IAP ROD and noted that the BLM should have conducted NEPA review for the proposed rule. Commenters noted their opinion that the BLM streamlined the public involvement process and the actual impacts of the rule by claiming that it is administrative in nature, thus dismissing the need for additional stakeholder input. Commenters also noted their opinion that the rule vastly alters major Federal planning processes and land management standards that were developed using robust public input and that if the BLM wants to move forward with a rule that alters existing Federal land management, then the agency must acknowledge the public involvement process requirements at a minimum.

The BLM received comments stating that ''The State [of Alaska] strongly opposes and finds it disingenuous for BLM to consider and describe stakeholder engagement during the NPR–A IAP relevant stakeholder engagement and as justification for the need of the proposed rule.''

BLM Response: The BLM did not rely on the IAP public comment process as the public comment for this rule. Rather, the BLM provided for public comment on the proposed rule as required by the APA. With respect to NEPA compliance for this rulemaking, it is relevant that the current IAP was supported by an extensive NEPA analysis—including preparation of an EIS. The final rule does not alter any current on-the-ground management, and it meets the criteria set forth at 43 CFR 46.210(i) for a Departmental categorical exclusion in that this rule is ''of an administrative, financial, legal, technical, or procedural nature.'' Additionally, the final rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would preclude the application of the categorical exclusion. As such, the BLM has complied with NEPA by relying on this categorical exclusion.

E. Tribal Consultation

On August 25, 2023, the BLM invited via mail 45 Tribes and 30 Alaska Native Corporations to engage in consultation regarding the proposed NPR–A rule. Since the announcement of the proposed rule, we have continued to offer consultation to Native Village of Atqasuk, Atqasuk Corporation, Village of Wainwright, Olgoonik Corporation, Native Village of Nuiqsut, Kuupik Corporation, Native Village of Barrow, UIC, ICAS, and ASRC. We met with the Mayor of Atqasuk on October 31, Native Village of Nuiqsut on November 1, ICAS on November 3 and February 6, Village of Wainwright on November 21, Olgoonik Corporation on December 19, ASRC on December 21, and Kuukpik on February 1. In addition, staff met and discussed the proposed rule with the NPR–A Working Group (consisting of representatives from North Slope local governments, Native corporations, and Tribal entities, *https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/alaska/NPR-A/npr-a_working_group*) on September 26, October 17, and December 1. We also held in-person public meetings in Nuiqsut, Utqiagvik and Wainwright where verbal comment was recorded, along with three informational sessions—one in Anchorage and two virtual. The BLM will continue to engage in consultation with Tribes and Alaska Native Corporations after the final rule is published.

Public Comments on Tribal Consultation

Commenters expressed their opinion that the Alaska Native Corporations and the federally Recognized Tribes of Alaska were not properly consulted during the rulemaking process. Commenters expressed their opinion that the BLM did not comply with E.O. 13175, Secretary's Order 3043, President Biden's ''Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships'' and ''Memorandum on Uniform Standards for Tribal Consultation,'' and the DOI Policy Manual 512 DM 4 and 5. Comments stated that the BLM letter to Alaska Tribes and Alaska Native Corporations was sent 7 business days before the proposed rule's publication which ''fails to meet the numerous consultation requirements detailed at length'' in the Executive order and Memoranda listed above.

Commenters expressed that because the rule was published during fall whaling season, ''What little

consultation or public meeting process did occur was hastily convened with little to no opportunity for local communities to receive timely notice.''

Commenters requested that the BLM engage in meaningful communication and consultation with local villages and Tribes to ensure the new regulations meet the needs and concerns of the communities who rely on the Reserve. Comments requested that the BLM consultation be more inclusive than just the federally recognized Tribes and ANSCA corporations. One commenter stated: ''Also, the rule seems to treat ANCSA corporations the same as Tribes which needs further clarification.''

Another commenter stated: ''BLM's efforts to avoid working with local stakeholders of the NPR–A is almost impressive in its breadth. Not only has the State been excluded, but also leaders from impacted NPR–A Alaska Native communities, the North Slope Borough, the BLM-created NPR–A Working Group, the congressionally established ASRC, the tribal representatives from the ICAS, the Voice of the Arctic Inupiat (VOICE), and the general public of Alaska and residents of the NPR–A. These process deficiencies are especially stark after so many prior NPR–A-focused planning and permitting efforts featured comprehensive consultation and process. Conversely, this may be the North Slope's most disconnected and disingenuous public process in the modern era.''

BLM Response: Please see our response to similar comments in the discussion of Public Engagement above. We understand that some commenters found the public comment period dissatisfying. We received very helpful input and our outreach complied fully with applicable law and policy.

In addition, 512 DM 6 (*https://doi.gov/sites/doi.gov/files/elips/documents/512-dm-6.pdf*) outlines requirements for consultation between appropriate ANCSA Corporation officials and Department officials. While not considered government-to-government consultation, it is the policy of the Department to recognize and fulfill its legal obligations to consult with ANCSA Corporations on the same basis as Alaska Native Tribes. To the extent that concerns expressed by a federally recognized Tribe and an ANCSA Corporation substantively differ, officials shall give due consideration to the rights of sovereignty and self-government of the Tribe, and to the unique legal status and rights of the ANCSA Corporation.

In its many years of engaging with North Slope communities, the BLM has gained a deep understanding of the connection those communities have with the NPR–A. For example, for the Iñupiat of the North Slope, ''cultural resources are not merely places or things but also provide a link between North Slope history, Iñupiat culture and values, subsistence activities, and the biological and physical environment. These resources have spiritual and cultural importance to residents of the North Slope, and their protection is of utmost importance to the Iñupiat.'' [5] Contemporary Iñupiaq values, including respect for nature, hunting traditions, and family and kinship, are ''inextricably linked with all facets of Iñupiaq life,'' but ''none more so than subsistence hunting and harvesting traditions. Maintaining and passing down cultural values, including knowledge of subsistence hunting and harvesting methods, traditions, and places, is of utmost importance to North Slope residents.'' [6] ''The Iñupiaq people's relationship to the land is characterized by . . . subsistence traditions . . . ; thus, to the Iñupiat, protecting traditional lands and waters and the wild resources that inhabit them is essential to maintaining cultural traditions, knowledge, and identity. Today, the Iñupiat are continuously adapting and responding to various forces of change that challenge their ability to protect these lands and waters and that contribute to social stress within communities.'' [7] Among those forces of change is oil and gas development. ''Given the historical and unique nature of the economic, social, and cultural value Alaska Natives place on subsistence resources in the planning area and the importance of these resources to the nutritional health and food security of Alaska Natives,'' the adverse impacts of oil and gas development are predominately borne by Alaska Natives residing in communities that utilize subsistence resources from the NPR–A.[8]

F. General Public Comments

General Comments About the Rule

Comments: Commenters expressed support that the proposed rule would provide enhanced protection for natural resources for future generations, including wildlife and biodiversity, fragile Arctic environments, and Alaska's unique ecosystem. Commenters believed that the proposed rule would help the BLM address changing conditions, including climate change, improve upon standards and procedures to protect surface values and significant resource values, promote transparency and inclusivity, and would overall result in a more comprehensive plan to manage the Reserve.

BLM Response: We appreciate the recognition of these goals of the proposed rule, and we agree the proposed rule would advance these outcomes. The BLM made changes in the final rule to strengthen resource protection measures and clarify standards and procedures for implementing the rule with transparency and community engagement.

Comments: The BLM received comments expressing concerns that the proposed rule would restrict oil and gas development and could harm local economies that are reliant on oil and gas revenue. Commenters expressed concern that the proposed rule may be contrary to congressional direction set forth in the NPRPA and may not fulfill the purposes of the Reserve. We appreciate commenters raising these concerns through the rulemaking process, and the final rule incorporates changes to clarify the BLM's statutory mandate under the NPRPA for managing the Reserve.

BLM Response: As detailed in discussion and comment responses throughout this preamble to the final rule, the BLM believes managing oil and gas leasing and production under this regulatory framework will best enable the BLM to meet its requirements to ensure protection of environmental, fish and wildlife, historical, and scenic values in the Reserve and will benefit local communities. This rule balances all aspects of the BLM's statutory mandate for managing the NPR–A.

Comments: The BLM also received comments generally addressing recreation in the Reserve and requesting more discussion on how recreation activities and experiences would be affected by the rule.

BLM Response: We did not address recreation directly under the framework of the rule because the rule only addresses management of oil and gas activities in the Reserve. As the BLM implements the rule, there may be indirect effects on recreation activities in the Reserve, such as fewer impacts on recreation experiences associated with oil and gas production due to decisions that minimize and mitigate those impacts on surface resources in the Reserve.

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[5] BLM, NPR–A Final IAP/EIS (June 2020), section 3.4.2., *available at https://eplanning.blm.gov/public_projects/117408/200284263/20020342/250026546/Volume%201_ExecSummary_Ch1-3_References_Glossary.pdf.*

[6] *Id.* section 3.4.4.

[7] *Id.*

[8] *Id.* section 3.4.5.

Comments About Climate Change

Comments: The BLM received comments discussing the impacts of climate change already being realized in the Reserve, such as impacts to wildlife habitat and permafrost and the potential loss of associated subsistence food sources. Commenters urged the development of a comprehensive analysis of the climate impacts of Western Arctic oil and gas production. Commenters recommended that an updated climate analysis should incorporate adaptive management practices, which would allow the BLM to manage the Reserve for improved climate resiliency.

Commenters requested that the BLM ensure decisions are consistent with Council on Environmental Quality (CEQ) guidance, Environmental Protection Agency (EPA) guidance, and Secretarial Order 3399 regarding addressing climate impacts. In particular, commenters recommended that the BLM include a requirement in the rule to analyze the social cost of carbon, consider the reasonably foreseeable effects of climate change on infrastructure, and model greenhouse gas emissions. Commenters proposed various frameworks and approaches for incorporating climate analysis and emissions management into the rule.

BLM Response: This rule is focused on impacts to surface values of the Reserve and implementing the BLM's statutory obligation to protect those values when authorizing oil and gas leasing and production. Thus, the BLM is not analyzing or specifically considering the climate impacts of oil and gas development as part of the rulemaking process. We recognize that the changing conditions of surface values in the Reserve are being driven in a significant way by climate change and that changes due to climate change are occurring at an accelerated rate in the Arctic compared to other parts of the planet. Because of the dynamic nature of those impacts on surface resources, however, the BLM must consider and address climate impacts during the implementation of the rule. For example, the BLM will analyze the condition of surface resources, including changing conditions caused by climate impacts, when determining when to update the IAP. We further note that the BLM must analyze and consider greenhouse gas emissions, and climate impacts in general, when conducting NEPA analysis for oil and gas leasing and production activities.

Comments: Some commenters argued that the NPRPA creates an obligation for the BLM to limit greenhouse gas emissions from activities in the Reserve and expressed concern that the proposed rule fails to ''mitigate reasonably foreseeable and significantly adverse effects on the surface resources'' by not addressing emissions from recently approved oil and gas leases.

BLM Response: The BLM agrees that the provisions of the NPRPA that require the BLM to mitigate reasonably foreseeable and significantly adverse effects on surface resources and to assure maximum protection for significant resource values in Special Areas require the BLM to analyze and consider greenhouse gas emissions when it is considering new oil and gas activity in the Reserve. As described above, such analysis and consideration will occur as part of the NEPA process both for any changes to the IAP and for project-level approvals.

Comments About Wildlife

Comments: Commenters provided detailed information about fish and wildlife habitats in the Reserve and the impacts of oil and gas production on specific species and their habitats. In particular, comments documented information about caribou in the Utukok Uplands and their behavioral responses to oil and gas development, as well as polar bear populations within the Reserve and the impacts of oil and gas activities on the species. Commenters recommended the rule include additional protections to build resilient habitats for plants and wildlife, such as establishing connectivity zones between Special Areas. Comments expressed concern that existing mitigation measures do not ensure maximum protection for subsistence of the Teshekpuk Caribou Herd.

BLM Response: The BLM appreciates the wealth of information provided by commenters about wildlife species and habitats in the Reserve and impacts occurring from oil and gas activities. While analyzing specific habitat areas or mitigation measures is outside the scope of this rulemaking process, the BLM believes the final rule strengthens provisions that will support the BLM's management of important wildlife habitat and other surface resources in the Reserve. For example, the final rule requires that all Special Area designation and amendment processes will rely on the best available scientific information, including Indigenous Knowledge, as well as the best available information concerning subsistence uses and resources within the Reserve. The final rule also details procedures for the BLM to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas.

Comments About Oil and Gas Production

Comments: The BLM received comments stating that the proposed rule disregards congressional intent that the BLM manage the Reserve for oil and gas production, including the NPRPA's requirement that the BLM conduct an expeditious program of competitive leasing of oil and gas in the Reserve. Commenters cited the U.S. Court of Appeals for the Ninth Circuit, which commenters assert has held that the NPRPA did not give the Secretary the discretion not to lease, but rather that the Secretary is given the discretion to provide rules and regulations under which leasing would be conducted.

BLM Response: We believe the final rule appropriately reflects the BLM's mandates in the NPRPA to conduct an oil and gas leasing and production program in the Reserve while protecting environmental, fish and wildlife, and historical and scenic values within the Reserve. In the same section that establishes an oil and gas leasing program in the Reserve, the NPRPA explicitly directs the BLM to ''provide for such conditions, restrictions, and prohibitions as . . . necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources'' of the Reserve when conducting the oil and gas program (42 U.S.C. 6506a(b)). Further the BLM updated § 2361.40 in the final rule to specifically reference the BLM's mandate under the NPRPA to assure maximum protection of significant resource values in Special Areas ''consistent with the requirements of the NPRPA for exploration and production of the Reserve.'' This is consistent with *Northern. Alaska Environmental. Center* v. *Kempthorne,* 457 F.3d 969 (9th Cir. 2006), which states only that the government could not forbid *all* oil and gas leasing throughout the Reserve, not that it lacks discretion not to lease in some areas. Indeed, in that case, the court upheld an IAP that deferred leasing in a significant portion of the NPR–A.

Comments: The BLM received comments discussing the maximum protection requirements in the proposed rule and the context of the statutory language. Commenters stated that the maximum protection requirement in the NPRPA was not intended to create a presumption against oil and gas activities, but rather to ensure that exploration operations would be conducted to minimize adverse impacts on the environment. Commenters

argued that the maximum protection provisions in the proposed rule are contrary to the plain language of the NPRPA, congressional intent and the 1981 Appropriations Act.

BLM Response: The NPRPA requires the BLM to conduct oil and gas activities in Special Areas ''in a manner which will assure the maximum protection of [any significant subsistence, recreational, fish and wildlife, or historical or scenic] values to the extent consistent with the requirements of this Act.'' The Conference Report on the NPRPA elaborated that the Act would ''immediately authorize the Secretary to require that the exploration activities within these designated areas be conducted in a manner designed to minimize adverse impacts on the values which these areas contain.'' H.R. Conf. Rep. No. 94–942 (1976). The provisions of the rule implementing this requirement enable the agency to fulfill its statutory duty to protect Special Areas. We note that maximum protection measures are not an objective standard but rather are established in the context of resource needs and other uses, including valid existing rights and ongoing oil and gas production in the Reserve. As established in the existing regulation and carried forward to the final rule, maximum protection measures can include limiting types of vehicles and aircraft, requiring use of alternative routes, and rescheduling activities. They can also include restrictions on oil and gas infrastructure or closures to certain oil and gas activities, consistent with prescriptions for the Special Areas and existing leases. Maximum protection measures are and will continue to be developed through public processes with opportunities for public input and consultation with Tribes, ANCSA corporations, and local governments.

Comments: Commenters requested a more detailed explanation of how the rule would apply to and affect existing leases, operations, and activities. Commenters expressed concerns that the rule would adversely affect future proposals for development activities and impermissibly conflict with existing leases, by which the BLM has granted a right to build infrastructure and produce oil. Commenters acknowledged existing leases can be subject to reasonable regulations but argued that the proposed rule is not a reasonable restriction because it would create uncertainty about permit approval. Commenters suggested that leases may expire while the BLM delays action to document uncertainty or denies a permit on the grounds that the proposed infrastructure is not practicable or essential. Other comments discussed that the BLM has authority to take actions it determines are necessary to protect the environment in the Reserve, including through regulatory actions, and that this is acknowledged in the standard language in BLM leases.

BLM Response: The rule includes specific protections for valid existing rights. For example, the final rule allows for new permanent infrastructure on lands within Special Areas that are allocated as unavailable to new infrastructure if necessary to comport with the terms of a valid existing lease. The final rule similarly makes clear that the presumption against new oil and gas activities in Special Areas would be overcome by the need to comport with the terms of a valid existing lease.

At the same time, we note that, while the terms of an existing lease and approved development project or permit will not be affected by the rule, a valid lease does not entitle the leaseholder the unfettered right to drill wherever it chooses or categorically preclude the BLM from considering alternative development scenarios within leased areas, nor does it give the leaseholder the right to produce all economically recoverable oil and gas on the lease. Further, the BLM can condition permits for drilling on implementation of environmentally protective measures and could even deny a specific application altogether if it were to propose development in a particularly sensitive area, and where mitigation measures would not be effective. Future development of an existing lease, by its terms, could be subject to additional terms and conditions. For example, the standard lease for activities in the Reserve states, ''An oil and gas lease does not in itself authorize any on-the-ground activity'' and notes that more restrictive stipulations may be added. Similarly, a standard lease stipulation entitled ''Conservation of Surface Values for NPR–A Planning Area Land'' provides: ''Operational procedures designed to protect resource values will be developed during Surface Use Plan preparation, and additional protective measures may be required beyond the general and special stipulations identified in the above-referenced documents.''

Comments: The BLM received comments expressing concern that oil and gas activities in the Reserve cause negative effects on the environment and wildlife, such as land degradation, air pollution, and threats to ecosystems, all of which affect biodiversity and human health. Commenters recommended the BLM develop a comprehensive cumulative effects analysis and whole Arctic conservation strategy, referencing a 2003 National Research Council report on cumulative effects of oil and gas activities on Alaska's North Slope. Commenters requested that the BLM implement consistent monitoring practices to ensure it has comprehensive data to use in decision-making, which would enable more effective management of oil and gas activities in the Reserve.

BLM Response: The BLM believes the final rule supports decision-making that will provide meaningful protections for environmental and wildlife values in the Reserve from the impacts of oil and gas exploration and production, consistent with the agency's statutory obligation to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the Reserve. In doing so, the rule will support the BLM's ability to manage for ecosystem services, and particularly their contributions to subsistence use, as the agency makes management decisions under the framework of the rule. (See, *e.g.,* Guidance For Assessing Changes In Environmental And Ecosystem Services In Benefit-Cost Analysis, Office of Management and Budget (Feb. 2024), available at *https://www.whitehouse.gov/wp-content/uploads/2024/02/ESGuidance.pdf.*) The final rule establishes that in managing both the significant resource values of Special Areas and the surface resources of the Reserve broadly, the BLM will adopt conditions, restrictions, or prohibitions that may involve conditioning, delaying action on, or denying some or all aspects of future and proposed oil and gas activities. For example, the BLM might condition or deny development if an operator proposes infrastructure along the Colville River if it is feasible to locate the infrastructure outside of the area closed to protect wildlife and subsistence activities, even if the operator would prefer the location closer to the river. It is not within the scope of this rulemaking process to develop a cumulative effects analysis or establish monitoring protocols, which are better suited to an IAP amendment process.

G. Summary of Changes in the Final Rule

The following paragraphs summarize changes the BLM made from the proposed rule to the final rule. More detailed explanations for the changes are found in the responses to comments and the description of the final rule in section IV of this preamble to the final rule.

Section 2361.3 Authority

The BLM added references to FLPMA and ANILCA in the Authorities section in the final rule, including the caveat that the land use planning and wilderness study requirements of FLPMA do not apply to lands within the Reserve, pursuant to 42 U.S.C. 6506a(c).

Section 2361.5 Definitions

The BLM revised the definition of ''infrastructure'' in the final rule to clarify that the term means, ''a permanent or semi-permanent structure or improvement that is built to support commercial oil and gas activities on BLM-administered lands within the Reserve, such as pipelines, gravel drilling pads, man camps, and other structures or improvements.'' The revised definition further clarifies that ''infrastructure'' does not include structures or improvements that will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve.

The BLM clarified in the final rule that the term ''significant resource values'' refers to surface values that the BLM identifies as significant, in order to ensure consistency with the language in the NPRPA. Similarly, the BLM made minor clarifications in the definition of the term ''Special Areas'' to ensure consistency with the language in the NPRPA. The final rule defines ''Special Areas'' as: ''areas within the Reserve identified by the Secretary or by statute as having significant resource values and that are managed to assure maximum protection of such surface values, to the extent consistent with the requirements of the Act for the exploration and production of the Reserve.''

The final rule incorporates the definition for the term ''co-stewardship'' that is used in BLM Permanent Instruction Memorandum No. 2022–011 (Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403).

Section 2361.10 Protection of Surface Resources

The BLM added ''oil and gas'' before the word ''activities'' throughout the section to clarify that the requirements of this rule only apply to oil and gas activities. The final rule replaces ''Bureau'' with ''authorized officer'' to provide clarity about the BLM official responsible for implementing requirements in the rule.

The BLM removed proposed paragraph (b)(3) from the final rule because it is duplicative of environmental analysis requirements under NEPA. The paragraph had provided that, in assessing effects of a decision concerning proposed activity in the Reserve, the Bureau would identify and evaluate any reasonably foreseeable effects of its decision, including effects later in time or farther removed in distance, and effects that result from the incremental effects of the proposed activities when added to the effects of other past, present, and reasonably foreseeable actions.

Section 2361.20 Existing Special Areas

The BLM did not amend the final rule in response to specific comments regarding the significant resource values, boundaries, or management of existing Special Areas. The rule merely codifies the existing Special Areas and their significant resource values and management as currently established in Secretarial decisions and the 2022 IAP. The final rule establishes a process in § 2361.30 for designating, amending, and de-designating Special Areas that will be followed to make changes to Special Areas.

Section 2361.30 Special Areas Designation and Amendment Process

The BLM reorganized § 2361.30 in the final rule, with a new paragraph (a) that outlines requirements applicable to all processes that will designate, de-designate, or otherwise change boundaries or management of Special Areas. These provisions require that the BLM: (1) rely on the best available scientific information, including Indigenous Knowledge; (2) provide the public and interested stakeholders with meaningful opportunities to participate in the evaluation process; (3) consult with any federally recognized Tribes and ANCSA corporations that use the affected Special Area for subsistence purposes or have historic, cultural or economic ties to the Special Area; and (4) base decisions solely on the presence or absence of significant resource values. This new paragraph will provide more consistency to all decision-making processes for Special Areas.

The final rule changes the Special Area evaluation period from 5 to 10 years, while specifying that the BLM may conduct the evaluation sooner if the authorized officer determines that changing conditions warrant earlier review. For example, the BLM may decide to conduct an evaluation in less than 10 years upon receiving nominations or recommendations for Special Area changes. The BLM believes this change addresses concerns about agency and community capacity while ensuring regular reviews occur to maintain an inventory of resource conditions and make management changes as appropriate. The final rule specifies that as part of the evaluation, the BLM will determine whether to require additional measures or strengthen existing measures to assure maximum protection of significant resource values within existing Special Areas.

The BLM also revised the final rule to provide more clarity and certainty around the interim measures provision. The final rule clarifies that interim measures may be implemented at any time after BLM receives a recommendation to designate or modify a Special Area. The final rule also clarifies that any interim measures must be consistent with the governing management prescriptions in the IAP, and the BLM is required to provide public notice that interim measures are in place and reassess such measures to determine if they are still needed if they remain in place for more than 5 years.

Section 2361.40 Management of Oil and Gas Activities in Special Areas

Section 2361.40 is revised in the final rule to state the management priority within Special Areas is to assure maximum protection of significant resource values, ''consistent with the requirements of the NPRPA for exploration [and production] of the Reserve.'' The BLM believes this clarification addresses public comments requesting additional consistency with the language of the NPRPA and reflects the BLM's statutory mandate for managing the Reserve.

The final rule clarifies that the BLM will identify and adopt maximum protection measures for each significant resource value that is present in a Special Area when Special Areas are designated. The BLM will also update maximum protection measures as appropriate thereafter, including in the IAP, lease terms, and permits to conduct oil and gas activities. The final rule also includes maximum protection measures that are identified in the existing regulation but had been eliminated in the proposed rule, as well as additional examples of categories of measures.

On lands within Special Areas that are allocated as closed to leasing or unavailable to new infrastructure, the final rule allows for the BLM to approve new permanent infrastructure related to existing oil and gas leases only if such infrastructure is necessary to comport with the terms of a valid existing lease. This provision removes language in the proposed rule that further specified that the infrastructure must be essential for exploration or development activities

and no practicable alternatives exist which will have less adverse impact on significant resource values of the Special Area.

The final rule provides clarity around how the presumption against new leasing and new infrastructure on lands within Special Areas that are allocated as open for those activities will be addressed through the environmental review process. The rule provides that as part of the environmental analysis, the BLM will document a justification for overcoming the presumption, such as if the proposed infrastructure is necessary to comport with the terms of a valid existing lease, or if it will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve, and the proposal has been conditioned to avoid, minimize, or otherwise mitigate adverse effects. The public will have an opportunity to review and comment on any justification for overcoming the presumption.

The BLM reorganized § 2361.40 to clarify the requirements for preparing an environmental analysis of proposed leasing, exploration, development, or new infrastructure in Special Areas, and reaching a final decision. These procedures are set forth in a revised § 2361.40(g). The BLM must provide meaningful opportunities for public participation, including responding to comments, and consult with federally recognized Tribes and ANCSA corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area. The BLM must evaluate potential adverse effects on significant resource values and consider measures to avoid, minimize, or otherwise mitigate adverse effects to achieve maximum protection of significant resource values. The BLM must also document and consider uncertainty about potential adverse effects on significant resource values, and account for any uncertainty when taking actions taken to avoid, minimize, or mitigate adverse effects.

If the BLM determines through the environmental analysis that the proposal cannot avoid adverse effects on significant resource values in a Special Area, then the BLM must prepare a Statement of Adverse Effect. The requirement to prepare a Statement of Adverse Effect was included in the proposed rule, but the final rule provides more clarity around how it fits within the environmental review process. The Statement of Adverse Effect will be incorporated into the environmental analysis and provided to the public for review and comment.

Lastly, the BLM updated the maps for the final rule so that they show the boundaries of the existing Special Areas on the maps from the 2022 IAP showing the current allocations for oil and gas leasing and infrastructure. The maps depict the exact data from the IAP ROD, and do not change any designations or allocations from the 2022 IAP.

Section 2361.50 Management of Subsistence Uses Within Special Areas

The final rule removes the phrase ''to the extent consistent with assuring maximum protection of all significant resource values that are found in such areas'' from this section, so paragraph (b) now simply reads: ''The Bureau will provide reasonable access to and within Special Areas for subsistence purposes.'' This phrase was causing confusion and was unnecessary because § 2361.30 requires the BLM to adopt measures to assure maximum protection of significant resource values when designating Special Areas.

The BLM also revised the language in this section to refer to ''reasonable access'' instead of ''appropriate access'' for consistency with the language in section 811 of ANILCA.

Section 2361.60 Co-Stewardship Opportunities in Management of Special Areas and Subsistence

In the final rule, the title of this section is revised from ''Co-stewardship opportunities in Special Areas.'' The first sentence is also revised to add ''and subsistence resources throughout the Reserve.'' Those revisions reflect that the BLM will seek co-stewardship opportunities not just in managing Special Areas, but also in managing subsistence resources more broadly.

The first sentence is also revised to add ''federally recognized'' to clarify that the BLM engages in co-stewardship only with federally recognized Tribes. Separately, the Bureau may partner with Alaska Native Claims Settlement Act corporations, local governments, or organizations as provided by law, which will not be co-stewardship arrangements but a different type of partnership. The text of the rule has been revised to make this distinction clearer.

IV. Section-by-Section Discussion and Response To Comments on Individual Provisions

Section 2361.1—Purpose

Existing and Proposed Regulations

Existing § 2361.0–1 is redesignated to § 2361.1 in the final rule. The existing provision states that the purpose of the regulations is ''to provide procedures for the protection and control of environmental, fish and wildlife, and historical or scenic values'' in the Reserve. The BLM proposed to revise § 2361.1 to establish a two-part purpose for the rule to more accurately and completely reflect the scope of the regulations. The first purpose was to provide standards and procedures to implement 42 U.S.C. 6506a(b), which requires the Secretary to ensure that ''[a]ctivities undertaken pursuant to this Act include or provide for such conditions, restrictions, and prohibitions as [she] deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [Reserve].''

The second purpose outlined in the proposed rule was to provide standards and procedures to implement 42 U.S.C. 6504(a), under which any exploration in Special Areas ''shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.'' The standards and procedures to implement these two provisions will also fulfill the BLM's mandate to take action necessary to prevent unnecessary or undue degradation under FLPMA, 43 U.S.C. 1732(b).

Public Comments on § 2361.1

Commenters expressed support for the proposed revisions to § 2361.1 to provide needed clarity, purpose, and priority for the protection and management of Special Areas. We agree that the changes will help.

Commenters recommended that the BLM include oil and gas leasing and production as a purpose of the regulations. We decline this suggestion. Regulations for oil and gas leasing and production within the Reserve are covered in 43 CFR part 3130.

Commenters requested that the BLM revert to the purpose in the original version of § 2361.1. We decline this request. The existing regulations do not reflect the full scope of the BLM's statutory obligations or the scope of this rule. Proposed § 2361.1 accurately and completely reflected that scope.

Commenters requested that the Purpose section include language that is in the current version of 42 U.S.C. 2361.0–2, which recites that the objective of the regulations is to provide environmental protection ''to the extent consistent with the requirements of the Act.'' We believe that is unnecessary. The proposed rule included language in the Purpose section which stated that the regulation was ''pursuant to and consistent with the provisions of the Naval Petroleum Reserves Production

Act of 1976 (90 Stat. 303; 42 U.S.C. 6501 *et seq.*).''

The BLM received comments requesting that the rule explicitly state that the purpose of the regulations is to provide standards and procedures to cease any new oil and gas activities in the Reserve and execute a phase down of all existing oil and gas extraction. The comments suggest that including this language would allow the BLM to meet its statutory requirement to ensure mitigation of reasonably foreseeable and significantly adverse effects and prevent unnecessary or undue degradation. This comment's recommendation would not be consistent with the NPRPA, which directs the Secretary to implement an oil and gas leasing program in the Reserve.

Description of the Final Rule

The BLM did not change this section of the proposed rule in the final rule. The final rule states the purpose of the regulations is to provide procedures for protection and control of the environmental, fish and wildlife, and historical and scenic values of the National Petroleum Reserve in Alaska, including mitigating the significantly adverse effects of oil and gas activities on the surface resources of the Reserve and assuring maximum protection of significant resource values in Special Areas pursuant to and consistent with the provisions of the Naval Petroleum Reserves Production Act of 1976 (90 Stat. 303; 42 U.S.C. 6501 *et seq.*), Alaska National Interest Lands Conservation Act (94 Stat. 2371, 16 U.S.C. 3101 *et seq.*), and other applicable authorities.

Section 2361.0–2—Objectives

Existing and Proposed Regulations

The existing § 2361.0–2 states the objectives of the regulations. The BLM proposed to remove this section because the proposed revision of § 2361.1 would make it redundant.

Public Comments on Existing § 2361.0–2

The BLM received comments requesting that it not amend the Objectives section because the original Objectives section clarified that environmental protections are designed to control exploration and production activities. Commenters expressed the opinion that the existing provision appropriately states the objective of the NPRPA and implements regulations based on Congress's intent to provide for the protection of the environmental and other surface values consistent with the exploration and development of oil and gas resources within the Reserve. Commenters suggested the proposed changes to the Objectives section disregard the BLM's primary purpose under the NPRPA of expeditious leasing, exploration, and development of the Reserve. Commenters recommended the Objectives include the clause: ''. . . maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve'' in accordance with the BLM's obligations under the NPRPA and associated law.

BLM Response: We did not make changes in response to these comments. The existing § 2361.0–2 was removed because the proposed rule's revision of § 2361.1 made it redundant. The proposed rule included language in the Purpose section stating that the regulation is ''pursuant to and consistent with the provisions of the Naval Petroleum Reserves Production Act of 1976 (90 Stat. 303; 42 U.S.C. 6501 *et seq.*).''

Description of the Final Rule

The BLM did not change this section of the proposed rule in the final rule. The final rule removes § 2361.0–2 from the regulations.

Section 2361.3—Authority

Existing and Proposed Regulations

Existing § 2361.0–3 is redesignated to § 2361.3 in the final rule. The existing rule identifies the NPRPA as the only statutory authority for the regulations. In the proposed rule, the BLM included the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96–514), which amended the NPRPA and instructed the Secretary to mitigate reasonably foreseeable and significantly adverse effects on the surface resources in the Reserve (codified at 43 U.S.C. 6506a).

Public Comments on § 2361.3

Commenters recommended the rule include ANILCA as an authority for the rule, in part because section 810 of ANILCA governs subsistence use on public lands in Alaska. Commenters also pointed out that FLPMA generally applies to public land management in Alaska, rather than section 202. We agree that referring to ANILCA is helpful. Other than the land use planning provisions of section 202 and the wilderness inventory requirements in section 603, FLPMA applies to lands within the Reserve.

Description of the Final Rule

The BLM changed the final rule in response to comments, adding references to FLPMA and ANILCA in the Authorities section in the final rule, including the caveat that the land use planning and wilderness study requirements of FLPMA do not apply to lands within the Reserve, pursuant to 42 U.S.C. 6506a(c).

Section 2361.4—Responsibility

Existing and Proposed Regulations

Existing § 2361.0–4 is redesignated to § 2361.4 in the final rule.

The BLM proposed to modify the statement in the existing regulations that, under the NPRPA, the BLM is responsible for managing surface resources in the Reserve to add that BLM is also responsible for managing the subsurface mineral resources in the Reserve. The proposed rule also added that the BLM is responsible for assuring maximum protection of Special Areas' significant resource values. The proposed rule deleted paragraph (b) because the U.S. Geological Survey is no longer responsible for managing exploration in the Reserve. Secretarial Order 3071, 47 FR 4751 (Feb. 2, 1982); Secretarial Order 3087, 48 FR 8982–83 (Mar. 2, 1983).

Public Comments on § 2361.4

Comment: The BLM received a comment stating that the BLM is responsible for managing subsurface resources, and therefore the commenter requested that the rule include a plan for periodic mineral surveys of the Reserve so the BLM can more effectively govern subsurface resources beyond just oil, gas, and coal.

BLM Response: We decline this suggestion because it goes beyond the scope of this rule. In addition, even if mineral surveys were within the scope of BLM's typical activities, they would be inappropriate here. The NPRPA withdrew the Reserve from all forms of entry and disposition under the public land laws, including the mining and mineral leasing laws, with the only exception being certain gravel sales. The 1981 Appropriations Act amended the NPRPA to allow for the oil and gas leasing program (42 U.S.C. 6502).

Comment: Commenters recommended removing the term ''environmental degradation'' from the section but did not provide an explanation for the change.

BLM Response: The BLM declines to make this change. The current regulation at § 2361.0–4 uses the term ''environmental degradation,'' and the use of this term in § 2361.0–4 is consistent with the BLM's duties and obligations under applicable laws, including the NPRPA, FLPMA, and ANILCA.

Comment: Commenters recommended that because the proposed changes to the section discuss the BLM's responsibility for assuring maximum protection of Special Areas' significant resource values, then the section should also discuss the need to balance resource protection with the responsibility to develop the Reserve's oil and natural gas resources.

BLM Response: While the BLM must ''conduct an expeditious program of competitive leasing of oil and gas'' in the Reserve, oil and gas leasing within the Reserve is addressed in 43 CFR part 3130. Hence, it is not necessary to include that in the Responsibility section for this rule.

Description of the Final Rule

The BLM did not change this section of the proposed rule in the final rule. Section 2361.4 in the final rule states that the BLM is responsible for the surface and subsurface management of the Reserve, including protecting surface resources from environmental degradation and assuring maximum protection of significant resource values in Special Areas.

Section 2361.5—Definitions

Existing and Proposed Regulations

Existing § 2361.0–5 is redesignated to § 2361.5 in the final rule.

The BLM proposed to update the definition for ''exploration'' to ensure consistency with NPRPA's definition of ''petroleum'' (42 U.S.C. 6501); update the definition of ''Special Areas'' for consistency with other proposed changes to the regulations; and incorporate a definition for ''Indigenous Knowledge,'' consistent with the guidance set forth in the Memorandum issued by CEQ and the Office of Science and Technology Policy (OSTP) on November 30, 2022. The BLM also proposed to add new definitions for ''Integrated Activity Plan,'' ''infrastructure,'' and ''significant resource value.''

Public Comments on § 2361.5

Comment: Commenters provided a general statement of support for § 2361.6 and the new definition for ''Indigenous Knowledge,'' consistent with the guidance set forth in the Memorandum issued by CEQ and OSTP on November 30, 2022.

BLM Response: We agree that the new definition will provide useful direction for the BLM in taking into account Indigenous Knowledge and add consistency in implementing CEQ and OSTP guidance.

Comment: Comments included a recommendation that the proposed processes for collecting and utilizing Indigenous Knowledge properly includes Alaska Native Corporations. Commenters stated that Alaska Native Corporations have a unique congressional mandate to manage Alaska Native lands for the benefit of their Alaska Native owners and Alaska Native Corporations regularly utilize Indigenous Knowledge to manage Indigenous-owned lands in Alaska. Furthermore, Alaska Native Corporations employ Indigenous Knowledge holders who understand the unique aspects of managing these traditional lands.

BLM Response: We decline this suggestion because the proposed rule's definition of Indigenous Knowledge already encompasses all Alaska Native peoples, including Alaska Native Corporations and other Alaska Native entities, by specifying that it ''is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, and Alaska Natives.'' Consistent with Departmental policy found in 512 DM 6, the BLM recognizes and respects the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between Alaska Native Corporations and the Federal Government.

Comment: Commenters recommended that the BLM consider the following definition of Indigenous Knowledge: ''Indigenous Knowledge means a body of observations, oral and written knowledge, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment. It is applied to phenomena across biological, physical, social, spiritual, and cultural systems. Indigenous Knowledge can be developed over millennia, continues to develop, and includes understanding based on evidence acquired through direct contact and long-term contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation and acquired through multigenerational observations, lessons, and skills over time. Indigenous Knowledge is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, and Alaska Natives''.

BLM Response: We decline this edit as it does not meaningfully change or improve the definition and would not be consistent with the definition being used by other Federal agencies.

Comment: Commenters requested the BLM clarify the definition of ''Indigenous Knowledge'' or how Indigenous Knowledge would be used in the Reserve. Commenters stated that the proposed definition could be interpreted to mean that any person or entity simply deemed ''Indigenous'' would have a claim to have Indigenous Knowledge and that this proposed definition diminishes the knowledge of those who actually live in the area as opposed to those who do not.

BLM Response: We decline this suggestion. The proposed rule's definition of Indigenous Knowledge encompasses all Alaska Native peoples, including members of Alaska Native Corporations and other Alaska Native entities, by specifying that it ''is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, and Alaska Natives.'' In the final rule, Indigenous Knowledge, as well as best available information on subsistence resources and uses, will be considered in designating, de-designating and modifying boundaries or management of Special Areas. As a result, the Indigenous Knowledge will need to be specific to the areas and uses at issue, which will necessarily be focused on those informed about resources and uses on the ground, *i.e.,* members of local communities and Tribes.

Comment: Commenters requested the BLM clarify in the proposed rule how traditional knowledge will be used in conjunction with recognized scientific practices and standards of the North Slope Borough and the State of Alaska, particularly as those standards relate to the development in the Arctic and the Reserve.

BLM Response: We decline this suggestion. As the proposed rule states in § 2361.30, Indigenous Knowledge is included as a part of best available scientific information.

Comment: Commenters expressed general support for the reasoning stated for the proposed definition of ''infrastructure.''

BLM Response: The BLM appreciates public support for the proposed approach.

Comment: Commenters recommended amending the definition of ''infrastructure'' by omitting clauses: ''and that is not ephemeral, such as snow or ice roads'' and ''but it does not include exploratory wells that are drilled in a single season.'' The commenter thought these revisions would strengthen the definition.

BLM Response: We decline this suggestion. This definition is based on the framework set out in the IAP to identify which types of new infrastructure are subject to prohibitions within certain areas of the Reserve.

Section 1.2 of the 2022 IAP excludes single season snow and ice infrastructure as well as exploratory wells that are drilled in a single season. Based on comments received, the BLM clarified the definition to provide additional detail about what qualifies as infrastructure and what types of structures or improvements are not considered infrastructure for the purposes of this rule.

Comment: Some commenters stated their opinion that the definition of ''infrastructure'' may violate valid existing lease rights where a new oil and gas location for commercial development would be infrastructure and is restricted in multiple provisions, but exploratory wells drilled in a single season would not be infrastructure nor under the same restrictions.

BLM Response: The BLM disagrees with commenters' assertion. The rule is incorporating the allocations for infrastructure from the IAP and using a similar definition that focuses on permanent or semi-permanent structures. Further, the final rule makes clear that new infrastructure will not be restricted if the location of the proposed structures or improvements is necessary to comport with the terms of a valid existing lease.

Comment: Commenters stated that the proposed definition of ''infrastructure'' creates an arbitrary division between types of infrastructure. Commenters noted that infrastructure built to support science and public safety could have the same characteristics and features as infrastructure built to support commercial oil and gas activities and could support oil and gas activities, or vice versa. In addition, commenters stated that infrastructure associated with oil and gas development often includes new roads and local facilities that benefit the community. On the North Slope, access to subsistence areas and connectivity provided by roads is considered a benefit by many residents. For example, roads associated with industrial development near the Native villages of Utqiagvik and Nuiqsut have improved the ability of residents to pursue subsistence opportunities.

BLM Response: The definition of infrastructure in the final rule applies to permanent or semi-permanent structures or improvements that support oil and gas activities, and does not apply to other, non-oil and gas structures or improvements, because that term is used specifically to implement the Special Area provision of the NPRPA, 42 U.S.C. 6504(a) (as amended), which by its terms applies only to oil and gas exploration and production activities. Although the general mitigation provision of this rule (§ 2361.10) applies only to oil and gas activities, it is not the only tool available to the BLM for requiring mitigation in the Reserve. The BLM has explicit and ample authority under the NPRPA to apply mitigation requirements within the reserve, as well as under NEPA to evaluate potential mitigation measures as part of the analysis for proposed actions. Mitigation for other types of activities, such as siting and construction of infrastructure for scientific research or public safety, may be addressed through other means, such as implementing requirements of the IAP for non-oil and gas infrastructure or as determined through the analysis in project-specific decisions. With regard to infrastructure that benefits communities within the Reserve, § 2361.10 of the final rule provides that, when identifying conditions, restrictions, and prohibitions necessary or appropriate to mitigate the reasonably foreseeable and significantly adverse effects of proposed oil and gas activities in the portions of the Reserve outside Special Areas, the Bureau will fully consider community access and other infrastructure needs. Additionally, in response to comments, the BLM revised the restrictions on new infrastructure in § 2361.40 of the final rule to clarify that within Special Areas, infrastructure that will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve may be allowed provided that appropriate measures are adopted to assure maximum protection of significant resource values.

Comment: Commenters stated that the definition of ''infrastructure'' would allow for the authorization of temporary infrastructure for exploration, but would delay or prevent the BLM from authorizing infrastructure to support commercial development on existing leases. Comments further stated that this definition may result in a regulatory ''taking'' claim.

BLM Response: The final rule expressly allows for the authorization of new infrastructure, as defined in § 2361.5, that is necessary to honor the terms of a valid existing lease. The final rule will therefore not deprive a leaseholder of its rights under an existing lease.

Comment: Commenters expressed the opinion that defining ''infrastructure'' as ''essentially limited to structures or improvements in support of commercial oil and gas activities'' raises concerns about what types of infrastructure could be allowed within Special Areas and other sensitive regions. For example, ''Lease Stipulation K–1 does not apply to intercommunity roads or other permanent roads constructed with public funds for general transportation purposes. While the presence and use of such roads would have an effect on caribou and other significant resource values, it is not clear to what extent such infrastructure would fall within the proposed definition and thus come under the purview of maximum protection provisions.'' Commenters also stated that additional clarity is needed on ''where access and infrastructure could be allowed and how maximum protection will be assured in such areas.''

BLM Response: The BLM revised the definition of ''infrastructure'' in the final rule to clarify what structures or improvements are regulated by this rule. The final rule defines the term as, ''a permanent or semi-permanent structure or improvement that is built to support commercial oil and gas activities on BLM-administered lands within the Reserve, such as pipelines, gravel drilling pads, man camps, and other structures or improvements.'' The revised definition further clarifies that ''infrastructure'' does not include structures or improvements that will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve. In addition, the rule is incorporating the IAP's prescriptions on infrastructure, and is not prescribing specific new measures for management of Special Areas.

Comment: Commenters recommended that defining the term ''Integrated Activity Plan'' is not necessary, as the requirement under section 202 of the FLPMA to prepare land use plans does not apply to the Reserve and, therefore, the IAP should not be defined as a land management plan. Commenters suggested the IAP is unique to the Reserve and it should remain that way.

BLM Response: The BLM agrees that it does not develop IAPs to comply with section 202 of FLPMA, though it prepares IAPs to provide a framework for managing the Reserve. The BLM believes that the final rule should define the term ''IAP'' to accurately describe the relationship to the requirements in the rule and IAPs and to assist the BLM when preparing future IAPs.

Comment: Commenters suggested that the BLM revise its proposed new definition of ''significant resource value'' to be consistent with 42 U.S.C. 6504(a) and state ''any significant subsistence, recreational, fish and wildlife, historical, or scenic value identified by the BLM as supporting the designation of a Special Area.''

Commenters noted that omitting the word ''significant'' in the definition in the proposed rule is outside of BLM statutory authority and ''incorrectly lowers the requirements for designation of Special Areas'' to have significant resource values.

BLM Response: The BLM believes that including the word ''significant'' in the definition of ''significant resource value'' is redundant and circular. The definition makes clear that the value supports designation of a Special Area, which makes it significant. This definition is consistent with the NPRPA. To provide additional clarity and consistency with the NPRPA, the final rule specifies that the term ''significant resource values'' refers to surface values.

Comment: Commenters requested a more precise definition of ''significant resource value'' given that ''the creation and expansion of Special Areas that would subsequently preclude or severely limit oil and gas exploration and development is based on the presence of a significant resource value.'' The comment stated that ''this is an inadequate and circular definition.''

BLM Response: The BLM declines this request. The significant resource values that BLM is required to assure maximum protection for are specifically listed in section 104(b) the NPRPA (42 U.S.C. 6504), and this rule is implementing the NPRPA.

Comment: Commenters suggested the BLM revise the definition of ''significant resource value'' because the proposed definition is ''vague and would allow BLM to designate lands as having surface resources to support a special area designation if there are any subsistence, recreational, fish and wildlife, historical, or scenic values contained in the near vicinity.''

BLM Response: The BLM declines this request. The definition comes from the plain language of the NPRPA.

Comment: Commenters believe that the proposed definition of ''significant resource value'' is contrary to statutory authority and should be revised since it is ''contrary to the requirements that Congress established for the designation of Special Areas.'' The comment states that when the definitions for ''Special Areas'' and ''significant resource value'' are considered collectively, the proposed rule could be interpreted to remove the statutory requirement that ''restricts the designation of Special Areas to those areas containing certain significant values.''

BLM Response: The BLM disagrees with the comment's interpretation of the two definitions. The definition of ''significant resource value'' recites the specific surface values listed in the NPRPA that may warrant designation and management of a Special Area by the Secretary of the Interior. The definition of ''Special Area'' makes clear those areas must have significant resource values. These definitions, and the rest of the regulation, do not provide for or imply that the BLM would designate Special Areas in the absence of significant resource values.

Comment: A commenter suggested adopting the definition of ''Areas of Critical Environmental Concern'' as a substitute for the definition of ''Special Areas.''

BLM Response: We decline that suggestion. The NPRPA provides a specific definition of what would be considered a Special Area, which differs from the definition of an Area of Critical Environmental Concern as defined in FLPMA.

Comment: Commenters requested the BLM include oil and gas resources as a ''significant resource value'' given that the economic opportunity and revenue generated by oil and gas production provides significant value to the residents of the North Slope in the form of health and emergency services and other basic needs.

BLM Response: We decline that suggestion. Section 104(b) of the NPRPA (42 U.S.C. 6504) specifically lists the surface resource values that should be considered—''containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value''— and oil and gas is not one of them.

Comment: Commenters opined that the revised definition of ''significant resource value'' exceeds statutory authority in providing that such designated areas would be protected to a maximum standard. Commenters suggested the definition implies that Special Areas are held to a higher standard and that reasonable impacts associated with oil and gas development are not allowed. Commenters also opined that the proposed rule expands the definition of ''Special Areas'' beyond the scope of law. The definition would ''impede development of a competitive leasing and development program'' in the Reserve, as intended by Congress.

BLM Response: We disagree. The definition in the proposed rule is consistent with the NPRPA, which explicitly states, ''to assure the maximum protection of such surface values to the extent consistent with the requirements of this Act.''

Comment: Commenters recommended the definition of ''significant resource value'' explicitly exclude future oil and gas leasing, exploration, and development. Commenters believe that allowing leasing, exploration, and development within Special Areas is ''contrary to the goal of establishing Special Areas.''

BLM Response: The BLM does not agree with this comment. Allowing some leasing, exploration, and development in Special Areas is not automatically inconsistent with the goal of Special Areas, which Congress specifically provided should be given maximum protection for their significant resource values consistent with the requirements of the Act for the exploration and production of oil and gas in the Reserve. This rule does not close areas to any activities beyond the closures already adopted by the IAP and leaves additional protective measures for area-specific analysis, subject to the processes described in this rule.

Comment: The BLM requested comments on whether to include the definition of ''permanent oil and gas facilities'' as defined in the 2022 IAP ROD. Commenters recommended removing the exclusions in the IAP definition because exploration wellheads and seasonal facilities such as ice roads and ice pads can be designed for use in successive winters and therefore should not be excluded. Commenters recommended that the BLM expand this definition to clearly encompass all permanent oil and gas facilities at any stage, including exploration and delineation, development, production, transportation, and decommissioning. Commenters encouraged the addition of water reservoirs and trenching done at any stage to be added to the definitions because these activities have long lasting effects on multiple resources. Commenters suggested that the definition include any development that permanently alters the surface resources or ecological values. Commenters recommended removing ''materials sites such as sand and gravel'' from the definition as they are not necessarily oil and gas related and they can be reclaimed.

BLM Response: Based on the feedback received, the BLM is not including a definition for ''permanent facilities'' in the final rule. We believe that the revised definition of ''infrastructure'' in the final rule adequately encompasses this subject by clarifying that for the purposes of this rule ''infrastructure'' includes permanent and semi-permanent structures and improvements, and by providing explanation and examples of those structures and improvements.

Comment: The BLM requested comments on whether to incorporate a

proposed definition of ''essential'' that resembles provisions of Lease Stipulation K–12 from the 2022 IAP ROD. In response to this request, some commenters stated that defining ''essential'' would provide clarity, and that the language of ''no other feasible and prudent option is available'' is good as a constraining description. Commenters suggested making the definition prioritize resource protection over production. Other commenters opined that the definition of ''essential'' as written in the proposed rule is sufficient and is in line with the purpose of providing maximum protection to Special Areas.

Commenters pointed out that they believe the definition of ''essential'' in the 2022 IAP ROD differs slightly from the definition of essential in § 2361.40(d)(3).

BLM Response: The BLM is not including a definition for ''essential'' in the final rule. After assessing public comment and the structure of the rule, the BLM instead eliminated the provision in the proposed rule that limited new permanent infrastructure related to existing oil and gas leases to that which is ''essential for exploration or development activities and no practicable alternatives exist. . .'' on lands within Special Areas that are allocated as unavailable to new infrastructure. Therefore, the term ''essential'' does not appear in the final rule. The provisions in the IAP, including the definition of the word ''essential'' in the stipulations, will apply.

Comment: Commenters recommended defining the terms ''reasonably foreseeable'' and ''significantly adverse effects.'' Commenters also recommended defining the term ''effects'' to clarify that effects include effects on environmental, fish and wildlife, and historical or scenic values.

BLM Response: We decline this request. These terms have standard accepted meanings and have been further clarified through their use in NEPA. The term ''effects'' is used throughout this rule in reference to environmental analysis that will occur and be documented under NEPA, and so defining the term separately here would create confusion.

Comment: Commenters recommended that since ''rural resident'' is not defined in 50 CFR 100.4 but is defined in ANILCA Title VIII, the proposed rule should not reference 50 CFR 100.4.

BLM Response: The regulations in 50 CFR part 100 implement the Federal Subsistence Management Program on public lands within the State of Alaska pursuant to the authority in Title VIII of ANILCA. While the term ''rural resident'' is used throughout ANILCA, it is not specifically defined; however, 50 CFR 100.4 defines the term ''rural'' and the term ''resident'' and then uses those terms in the definition of ''subsistence uses.'' The BLM will retain this citation.

Comment: Commenters recommending defining the term ''ecological integrity'' in the rule because protecting surface resources requires maintaining the ecological integrity of surface resources. The scientific meaning of ''ecological integrity'' is the capability of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition and functional organization comparable to that of the natural habitat of the region.

BLM Response: The BLM did not include the term ''ecological integrity'' in the final rule, and therefore it is not defined in this section of the final rule.

Comment: The BLM received a comment that the phrase ''minimize the disruption of natural flow patterns and changes to water quality'' should be replaced with ''maintain natural flow regimes and the ecological integrity of lotic and lentic ecosystems.'' ''Natural flow regime'' could be defined as the magnitude, frequency, duration, timing, and rate of change of flow events that characterize the hydrology of a natural river environment.

BLM Response: This phrase is used in the 2022 IAP to describe the objectives of restrictions that the IAP applies to new oil and gas leases and infrastructure. The proposed rule and final rule incorporate the phrase to explain restrictions in the 2022 IAP that are codified by the rule. Because the rule is using language that is used in the 2022 IAP, the BLM declines to change the wording here, which would create confusion.

Comment: Commenters recommended defining the following terms in the regulation:

- *Financial readiness* means the lessee's financial capability to honor its contractual obligations.
- *U.S. energy needs* means the projected energy consumption of the United States of America in a given year, which comes from different sources such as nuclear power, natural gas, petroleum, renewable energy, and coal.
- *Financial projection* means the lessee's financial planning to estimate expected revenues, expenses, and cash flows which are normally used to build a company budget.
- *Financial stress* means a financial method designed to simulate the lessee's finances under adversarial situations.
- *Financial balances* means all the financial statements prepared by the lessee for cooperative reasons or to report to other U.S. agencies.

BLM Response: These terms do not appear in the rule text and thus need not be defined in this rule.

Comment: Some commenters recommending eliminating the new definitions for Indigenous Knowledge, Integrated Activity Plan, infrastructure, and significant resource values.

BLM Response: We decline those suggestions. These definitions are needed to ensure clarity and consistency in the implementation of the proposed rule.

Description of the Final Rule

In response to comments, the BLM revised the definition of ''infrastructure'' in the final rule to clarify that the term means, ''a permanent or semi-permanent structure or improvement that is built to support commercial oil and gas activities on BLM-administered lands within the Reserve, such as pipelines, gravel drilling pads, man camps, and other structures or improvements.'' The revised definition further clarifies that ''infrastructure'' does not include structures or improvements that will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve.

The BLM also clarified in the final rule that the term ''significant resource values'' refers to surface values, in order to ensure consistency with the language in the NPRPA. Similarly, the BLM made minor clarifications in the definition of the term ''Special Areas'' to ensure consistency with the language in the NPRPA. The final rule defines ''Special Areas'' as: ''areas within the Reserve identified by the Secretary or by statute as having significant resource values and that are managed to assure maximum protection of such surface values, to the extent consistent with the requirements of the Act for the exploration and production of the Reserve.''

The final rule incorporates the definition for the term ''co-stewardship'' that is used in BLM Permanent Instruction Memorandum No. 2022–011 (Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403). This definition was added in response to comments on § 2361.60.

All other definitions included in the proposed rule are carried forward to the final rule without change.

Section 2361.6—Effect of Law

Existing and Proposed Regulations

Existing § 2361.0–7 is redesignated to § 2361.6 in the final rule. The BLM proposed to update this section to conform to existing legal authorities, including adding provisions to implement the Department of the Interior Appropriations Act, Fiscal Year 1981, Public Law 96–514 (Dec. 12, 1980), 94 Stat. 2957, 2964, in revised paragraph (a), and the Barrow Gas Field Transfer Act of 1984, Public Law 98–366 (July 17, 1984), 98 Stat. 468, 470, in new paragraph (b)(4).

Public Comments on § 2361.6

Commenters supported the provision included at proposed § 2361.6(b)(4) authorizing the Secretary to grant such rights-of-way to the North Slope Borough as may be necessary to permit the North Slope Borough to provide energy supplies to villages on the North Slope. We agree with these comments.

Commenters recommended that this section state that the rule does not apply to oil and gas leases issued prior to the effective date of the rule. The BLM addresses the rule's application to existing oil and gas leases in responses to comments in section III(E) earlier in this preamble to the final rule (General Public Comments, Comments about oil and gas production).

Description of the Final Rule

The BLM did not change this section of the proposed rule in the final rule.

Section 2361.7—Severability

Existing and Proposed Regulations

The BLM proposed this new section to establish that if any provision of part 2360 is invalidated, then all remaining provisions would remain in effect.

Public Comments on § 2361.7

Commenters recommended the BLM remove this section from the final rule because they see it as unnecessary or uncharacteristic for a rulemaking. The BLM decided to retain this section as proposed in the final rule because the various components of the rule are distinct and may operate independently. As such, they should be considered separately by a reviewing court, and if any portion of the rule were to be invalidated, the remaining provisions could continue to provide the BLM with necessary tools to manage oil and gas activity and protect important resources in the Reserve.

Many of the provisions simply update the regulations to bring them more into line with the BLM's statutory duties. Those updates would function independently of the rest of the rule. The procedural requirements in § 2361.10(b) for protecting surface resources in the Reserve also would stand alone, as would the codification of existing Special Areas in § 2361.20, the procedural requirements in § 2361.30, the specific requirements for new infrastructure in § 2361.40, and other provisions.

Further, the paragraphs within specific sections may also function independently of each other. For example, the final rule's provisions pertaining to the management of oil and gas activities in Special Areas in § 2361.40 describe how the authorized officer will assure maximum protection for significant resource values while allowing for exploration and production within the Reserve. Within that section, each paragraph serves a separate function, such as requiring the authorized officer to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas; directing the authorized officer to identify, adopt, and update maximum protection measures; prescribing requirements for considering the authorization of new leases or infrastructure proposed in areas allocated as closed to leasing or unavailable to new infrastructure; prescribing different requirements for considering the authorization of new leases or infrastructure proposed in areas allocated as available for future oil and gas leasing or new infrastructure; and providing the framework for considering new oil and gas activities through a NEPA process. Hence, if a court prevents any provision of one part of this rule from taking effect, that should not affect the other parts of the rule. The remaining provisions would remain in force.

Description of the Final Rule

The BLM did not change this section of the proposed rule in the final rule.

Section 2361.10—Protection of Surface Resources

Existing and Proposed Regulations

Existing § 2361.1 is redesignated to § 2361.10 in the final rule, and the title is changed from ''protection of the environment'' to ''protection of surface resources'' to more closely track with the BLM's statutory authority under 42 U.S.C. 6506a(b), which directs the BLM to ''provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [Reserve].''

The BLM proposed to establish new standards and procedures for managing and protecting surface resources in the Reserve from the reasonably foreseeable and significantly adverse effects of oil and gas activities. In 1980, Congress authorized the Secretary to mitigate those effects through ''necessary or appropriate'' ''conditions, restrictions, and prohibitions.'' 42 U.S.C. 6506a(b). Existing paragraph (a) requires the authorized officer to take action ''to mitigate or avoid unnecessary surface damage and to minimize ecological disturbance throughout the reserve to the extent consistent with the requirements of the Act for the exploration of the reserve.'' The BLM proposed to amend paragraph (a) to mirror the statutory language. As amended, paragraph (a) also provided further clarification by recognizing that, in some circumstances, the BLM may delay or deny proposed activities that would cause reasonably foreseeable and significantly adverse effects on surface resources.

The proposed rule deleted existing paragraph (b). It concerns coordination between the BLM and the U.S. Geological Survey, which is no longer relevant because the Geological Survey is no longer responsible for managing exploration in the Reserve. Paragraph (b) in the proposed rule spelled out new procedures for protecting surface resources in the Reserve. As explained above, Congress assigned the BLM the duty to protect the surface resources in the Reserve, but BLM regulations do not fully explain the scope of that duty. The proposed rule was drafted to provide direction to the agency and the public in complying with Congress's mandate.

In paragraph (b)(1), the proposed rule directed the BLM to manage oil and gas activities in accordance with the IAP. In doing so, the proposed rule enshrined longstanding BLM practice into regulations. As explained above, in the 1980 Amendments to the NPRPA Congress chose to exempt the Reserve from FLPMA's planning requirements (42 U.S.C. 6506a(c)). Nonetheless, since 1998, the BLM has prepared several IAPs to primarily govern oil and gas activities in the Reserve. The IAP is a form of land use plan that ''addresses a narrower range of multiple use management than a resource management plan.'' 2013 NPR–A IAP ROD at 17. In the BLM's experience, the IAP provides an invaluable means of evaluating management options, engaging the public, and guiding decision-making, consistent with the BLM's responsibilities under applicable

Federal laws, including NPRPA and NEPA. Accordingly, the proposed rule required the BLM to maintain an IAP, which would provide predictability to industry and North Slope communities and help guide BLM use authorizations in the Reserve but would give way to the regulations in the event of a conflict.

Paragraph (b)(2) of the proposed rule required the BLM, in each decision concerning oil and gas activity in the Reserve, to adopt measures to mitigate the reasonably foreseeable and significantly adverse effects on surface resources, taking particular care with surface resources that support subsistence. The BLM would do so by documenting for each decision its consideration of effects and how those effects informed the choice of mitigation measures. Paragraphs (b)(3) and (4) specified that the BLM's effects analysis would include any reasonably foreseeable effects, including indirect effects (those that are ''later in time or farther removed in distance''), cumulative effects (those ''that result from the incremental effects of proposed activities when added to the effects of other past, present, and reasonably foreseeable actions''), and ''any uncertainty concerning the nature, scope, and duration of potential effects.'' For example, if the BLM determined that a proposed lease sale's effects on subsistence resources—when added to the effects of other past, present, and reasonably foreseeable actions—could be significantly adverse, then under this proposed section, the BLM would need to adopt measures to mitigate those effects.

The proposed rule deleted existing paragraphs (c) and (d). Existing paragraph (c) requires the BLM to take maximum protection measures on all actions within Special Areas and identify the boundaries of Special Areas on maps. It also describes some requirements that may constitute ''maximum protection measures.'' Existing paragraph (d) concerns designation of new Special Areas. The proposed rule moved this content to §§ 2361.20, 2361.30, and 2361.40, as most appropriate. Moving this material to those new sections would provide clarification by focusing § 2361.10 on protection of surface resources throughout the Reserve.

Proposed new paragraph (c) clarified that for surface resources in Special Areas, the BLM also would have to comply with the provisions governing Special Areas in §§ 2361.20 through 2361.60. Moving the provisions concerning Special Areas to different sections makes that cross-reference necessary.

Proposed new paragraph (d) required the BLM to include in each oil- and gas-related decision or authorization, ''such terms and conditions that provide the Bureau with sufficient authority to fully implement the requirements of this subpart.'' That provision would ensure that the BLM incorporates into decision documents whatever language is necessary to enable it to implement any final rule.

Existing paragraph (e)(1) provides that ''the authorized officer may limit, restrict, or prohibit use of and access to lands within the Reserve, including special areas.'' The existing rule conditions that authority by requiring it to be exercised ''consistent with the requirements of the Act and after consultation with appropriate Federal, State, and local agencies and Native organizations.'' The proposed rule specified that the authorized officer has that authority ''regardless of any existing authorization.'' That added language would clarify that existing authorizations would not prevent the BLM from limiting, restricting, or prohibiting access to the Reserve consistent with the requirements of the Act. The proposed rule retained the condition that exercises of that authority must be consistent with the NPRPA, and it added ''and applicable law'' to clarify that the authorized officer cannot contradict other legal requirements. Instead of requiring the authorized officer to consult with ''Native organizations,'' the proposed rule provided more specificity by requiring consultation with federally recognized Tribes and Alaska Native Claims Settlement Act corporations. Consistent with the BLM's duty under NPRPA and ANILCA, the proposed rule also amended paragraph (e)(1) to allow the authorized officer to limit, restrict, or prohibit use of and access to the Reserve to protect subsistence uses and resources.

The proposed rule amended existing paragraph (f) to recognize the breadth of Federal laws that apply to the management and protection of historical, cultural, and paleontological resources in the Reserve.

Public Comments on § 2361.10

Comment: Commenters supported ''protection of surface resources'' and establishing new standards and procedures for managing and protecting surface resources in the Reserve from the foreseeable and significantly adverse effects of oil and gas activities.

BLM Response: The BLM appreciates commenters acknowledging the intention of the regulations.

Comment: Commenters recommended changing the title of this section to ''Protection of environmental values, including surface resources,'' to reflect the NPRPA which speaks to ''protection of environmental . . . values'' broadly. 42 U.S.C. 6503(b).

BLM Response: The reference to surface resources is consistent with the NPRPA, which provides: ''Activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska.'' 43 U.S.C. 6506a(b). The BLM did not change the title of this section in the final rule.

Comment: Commenters recommended revising proposed § 2361.10 to emphasize the overarching purpose of the Reserve for oil and gas production by clarifying that the NPRPA requires resource protection ''to the extent consistent with the requirements of this Act for the exploration of the reserve.'' Other commenters recommended revising proposed § 2361.10 to emphasize the overarching purpose of the Reserve for environmental protection by clarifying that the NPRPA requires protection of environmental values, including, but not limited to, surface resources.

BLM Response: The BLM believes § 2361.10 appropriately reflects the mandates in the NPRPA to conduct an oil and gas leasing and production program in the Reserve while protecting environmental, fish and wildlife, and historical and scenic values within the Reserve. The NPRPA specifically directs the BLM to mitigate adverse effects on the surface resources of the Reserve when conducting the oil and gas program. The BLM added the phrase ''oil and gas'' to modify ''activities'' throughout this section of the final rule to clarify that these regulations are specific to the BLM's implementation of its oil and gas program in the Reserve.

We also note that the final rule in § 2361.40 references the BLM's mandate under the NPRPA to assure maximum protection of significant resource values in Special Areas ''consistent with the requirements of the NPRPA for exploration and production of the Reserve.''

Comment: Commenters recommended that the BLM develop and explain the criteria it will use to determine the scope of effects that are both ''reasonably foreseeable'' and ''significantly adverse'' to provide

transparency and promote regulatory certainty.

BLM Response: We decline that suggestion. These terms have a generally accepted meaning, including as a part of any NEPA analysis, and are also covered in the NEPA regulations in 40 CFR part 1500. Providing additional definitions in the rule would not add more clarity.

Comment: Commenters recommended the rule should articulate that continued oil and gas activities at any scale in the Reserve will cause reasonably foreseeable and significantly adverse effects on surface resources in the Reserve and prohibit new leasing and production throughout the Reserve, as well as require delaying or denying proposed activities that would hinder the protection of surface resources.

BLM Response: The BLM does not accept these recommendations. The requirements of the rule are consistent with the plain language of the NPRPA that requires all oil and gas activities in the Reserve be subject to ''such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects.'' Further, § 2361.10(a) specifically provides for the BLM to condition, delay, or deny some or all proposed activities as may be necessary to fulfill these requirements.

Comment: The BLM received comments stating that, while the preamble states that the Reserve's standards related to the protection of surface values would also fulfill the BLM's mandate to take action necessary to prevent unnecessary or undue degradation, there is no mention of this obligation in the proposed rule. Commenters requested that the BLM add provisions that expressly reference and incorporate unnecessary or undue degradation standards or include cross references to those standards in §§ 2361.10 and 2361.40.

BLM Response: The BLM declines the request to expressly reference FLPMA's unnecessary or undue degradation provision in the rule. FLPMA requires the BLM to prevent unnecessary or undue degradation on all BLM-managed public land. This mandate applies to a broader range of uses within the Reserve than are being addressed in this rule and the BLM will prevent unnecessary and undue environmental degradation within the Reserve whether or not it is specifically identified in §§ 2361.10 and 2361.40. Nevertheless, the BLM did add FLPMA to the Authorities section of the rule.

Comment: The BLM received comments stating that the NPRPA requires mitigation, but commenters expressed concern that the rule focuses on prevention.

BLM Response: The BLM follows a mitigation hierarchy that generally includes avoidance as the first step in mitigating adverse effects on public land resources and values, consistent with the CEQ regulations implementing NEPA, particularly 40 CFR 1508.1(s). In pursuit of the BLM's mandate under the NPRPA to ''provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [Reserve]'', the rule draws on all steps of the mitigation hierarchy, including preventing impacts entirely through avoidance where appropriate. For example, § 2361.10(a) requires the Bureau to protect surface resources by adopting appropriate measures to mitigate reasonably foreseeable and significantly adverse effects of proposed oil and gas activities; § 2361.10(b)(2) requires the authorized officer to adopt measures to mitigate reasonably foreseeable and significantly adverse effects on surface resources, particularly with regard to those resources that support subsistence use and needs; and § 2361.40(g) requires the authorized officer to evaluate and require mitigation measures to address adverse effects on significant resource values when considering authorizing oil and gas leasing or new infrastructure in a Special Area.

Comment: The BLM received comments concerning the phrase, ''delaying action on, or denying some or all aspects of proposed activities'' in proposed § 2361.10(a). Some commenters suggested that the BLM lacks the statutory authority to delay or deny activities in the Reserve. Other commenters supported the provision in the proposed rule and recommended the BLM describe circumstances that would warrant denying proposed activities. Commenters recommended this provision should discuss mitigating reasonably foreseeable and significantly adverse effects to the climate. Commenters requested the final rule specifically provide that if differences in caribou behavior, distribution, or harvests are detected, BLM will prohibit additional development.

BLM Response: The NPRPA provides the BLM with the authority to ''provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigation reasonably foreseeable and significantly adverse effects on the surface resources of the [Reserve].'' Additionally, the BLM's oil and gas lease forms for leases issued in the Reserve include terms that enable the BLM to require measures deemed necessary to minimize adverse impacts to the land, air, and water; to cultural, biological, visual, and other resources; and to other land uses or users. Examples of how the BLM might exercise this authority would be to reduce the number of drill pads or density of roads in a development proposal to protect caribou calving, restrict timing on drilling activities to protect subsistence activities, or phase project components to limit the amount of habitat being impacted at a given time.

Analyzing climate impacts of oil and gas development is not part of this rule, which is focused on impacts to surface values of special areas and surface resources broadly. Climate change impacts the surface values that the BLM is required to protect, including subsistence resources, fish and wildlife habitat, and recreation opportunities, and those impacts will be analyzed and addressed through NEPA processes when evaluating potential projects. Similarly, the BLM is not addressing specific resource values such as caribou in the rule; however, caribou habitat will be considered as a significant resource value where appropriate as the BLM implements the rule.

Comment: Commenters stated concerns that proposed § 2361.10(a) will result in violations of valid existing lease rights, and that the BLM should provide clear assurance that the government will not withhold approval for reasonable proposals for infrastructure, such as roads and pipelines, necessary to bring valid existing leases into production.

BLM Response: We do not agree with these assertions. The BLM will implement § 2361.10(a) consistent with valid existing lease rights. As discussed in more detail in section III(E) above, while the rule will not affect the terms of an existing lease or approved development project or permit, future development of an existing lease may be subject to additional terms and conditions if necessary to ensure that the BLM's decision is consistent with its statutory responsibility to mitigate reasonably foreseeable adverse effects of oil and gas activity on the surface resources as required by the NPRPA. For example, the Willow Master Development Plan includes numerous lease stipulations, required operating procedures, and mitigation measures intended to avoid, minimize, or otherwise mitigate the effects of oil and gas production on surface resources.

Comment: The BLM received comments stating that the proposed rule

is not adaptive as it only requires future leases to comply with lease stipulations and ''by exempting all the currently authorized activities, the BLM constrains its ability to adapt its resource management strategy in response to climate change.'' The BLM also received comments stating that ''concerns about breach-of-contract claims against the Federal Government are ill-founded as BLM has reserved the right—in the lease itself—to set the rate of production.'' The commenters state that the BLM can use the authority granted in the lease language to create regulations that deny or prohibit additional oil and gas exploration and development as well as suspend operations and production of current drilling. Comments express that the NPRPA gives BLM authority to restrict or suspend activities in the Reserve and state that the BLM ''can do so 'in the interest of conservation of natural resources' or to 'mitigate reasonably foreseeable and significantly adverse effects on surface resources.' ''

BLM Response: The rule will apply to existing leases to the extent it is compatible with the terms of those leases. The BLM is not exempting all currently authorized activities but is constrained by valid existing rights.

Comment: Commenters recommended that the BLM state that its ability to impose mitigation is only related to activities specifically undertaken pursuant to the NPRPA, and that for mitigation to apply, the NPRPA activity must cause effects 'on the surface resources' of the Reserve.

Commenters requested that the BLM make commitments related to mitigation measures for the ecosystems and species affected by oil and gas development, as well as design and adopt a comprehensive mitigation plan for impacts to threatened or endangered species in the Reserve. The BLM received comments requesting the BLM supplement its 2022 IAP with additional mitigation measures that address the impacts of all permitted activities in the Reserve as well as the cumulative impacts of actions outside of agency control.

BLM Response: As discussed above, the BLM has authority to require mitigation of impacts to public lands resources from authorizations and other Federal actions in the Reserve, consistent with the NPRPA and FLPMA. For example, the NPRPA requires that oil and gas authorizations include provisions to mitigate reasonably foreseeable and significantly adverse effects on surface resources. The rule is clear that the mitigation requirements in § 2361.10(b)(2) apply to adverse effects on surface resources of the Reserve, and the final rule specifies in paragraph (b) that the requirements in the section apply to proposed oil and gas activities. The BLM further notes that although this rule would only apply to oil and gas activities, protection of surface resources from other actions may be addressed through other means, such as the IAP and site-specific authorizations. The BLM is not developing mitigation plans or supplementing the 2022 IAP as part of this rulemaking process.

Comment: Commenters recommended adding evaluation procedures before proposed § 2361.10(b)(1) that would require the BLM to evaluate the condition of surface resources within the Reserve at least every 5 years, including a climate impacts assessment.

Commenters recommended adding a new section requiring a commitment to survey and monitor significant surface resources on an on-going basis and to rigorously study changes in and impacts to those resources.

Commenters recommended that the regulations require the BLM to establish baseline data for resources in the Reserve, including specifically caribou distribution and movement, subsistence food contamination, and air quality data.

BLM Response: The BLM does not currently have the resources to conduct a full evaluation of all surface resources in the Reserve every 5 years. Under § 2361.30, the BLM will evaluate the Reserve for significant resource values every 10 years, which will provide important resource inventory and monitoring information at regular intervals and enable the BLM to study changes to those resources over time, including the impacts from a changing climate. Additionally, under § 2361.10(b)(1), the BLM will maintain an IAP addressing management of all BLM-administered lands and minerals throughout the Reserve. The IAP amendment process will provide opportunities for the BLM to evaluate all surface resources within the Reserve on a regular basis and update baseline data for those resources.

Comment: Commenters stated that the BLM must ensure an appropriate framework for IAP development that is consistent with Federal law and follows NEPA's process for public participation. The BLM received a comment requesting that the language in the proposed rule requiring the BLM to maintain an IAP for the Reserve be removed from the rule as it could prematurely restrict the BLM's ability to make informed decisions with respect to future IAPs.

BLM Response: The BLM has been preparing IAPs since 1998 through a NEPA process and is incorporating this requirement into the rule to ensure ongoing, robust public participation in preparation of these management plans. Merely requiring the BLM to maintain an IAP for the Reserve does not restrict decision-making space for future IAP amendments.

Comment: Commenters discussed integrating the 2022 IAP into the rule; some commenters were concerned that the IAP would not address long-term impacts from resource extraction and asked the BLM to perform a comprehensive review of the plan. Other comments requested the BLM support and align with the IAP as it is a system that already works and is ''highly protective of surface resources in the NPR–A, but it does not preclude oil and gas development.''

BLM Response: The 2022 IAP was based on a previous, multi-year environmental analysis and public engagement process. The BLM is not reviewing the plan at this time. The rule aligns with the 2022 IAP and codifies portions of it related to Special Area designation and management.

Comment: Commenters recommended the rule require measures to mitigate reasonably foreseeable and significantly adverse effects on carbon storage, an ecosystem service that is currently provided by boreal peatlands and permafrost. Commenters recommended the rule require measures to mitigate reasonably foreseeable and significantly adverse effects on caribou and their habitat.

BLM Response: The NPRPA requires that oil and gas authorizations including provisions to mitigate reasonably foreseeable and significantly adverse effects on surface resources. The rule is clear that the mitigation requirements in § 2361.10(b)(2) apply to adverse effects on surface resources of the Reserve, and the final rule specifies in paragraph (b) that the requirements in the section apply to proposed oil and gas activities. In addition, the BLM has authority to mitigate impacts to public lands resources from authorizations and other Federal actions in the Reserve, consistent with the NPRPA and FLPMA. The BLM is not developing mitigation measures for specific resources as part of this rulemaking process.

Comment: Commenters suggested that the requirement in proposed § 2361.10(b)(3) to consider any reasonably foreseeable effects, including indirect effects and cumulative effects, unnecessarily duplicates the BLM' s existing obligations under NEPA. Other commenters recommended that the

BLM clarify in proposed § 2361.10(b)(3) that reasonably foreseeable effects include effects from activities that have not yet been proposed but that are induced by the proposed activity. The BLM received comments stating that the NPRPA does not authorize the BLM to consider incremental effects of proposed activities when authorizing activities in the NPRPA nor does it allow the BLM to condition, restrict, or prohibit activities because of potential effects from activities outside of the Reserve.

BLM Response: The BLM removed § 2361.10(b)(3) from the final rule because it was duplicative of the agency's obligations under NEPA and potentially confusing to restate in the rule. We note that NEPA obligates the BLM to analyze direct, indirect, and cumulative impacts, including to consideration of the impacts of reasonably foreseeable future actions, when making decisions about authorizing activities.

Comment: The BLM received comments regarding proposed § 2361.10(b)(4), specifically the use, meaning, and implication of the phrase ''any uncertainty concerning the nature, scope, and duration of potential effects'' in the proposed rule. Some commenters suggested that the BLM lacks the statutory authority to consider ''any uncertainty'' in potential effects and then implement restrictions on proposed activities that ''account for and reflect such uncertainty'' for any impacts. Other commenters supported the requirement in the proposed rule for the BLM to account for uncertainty regarding potential impacts of proposed development and recommended the final rule include more specificity about what qualifies as uncertainty and how it can be considered in decisions.

BLM Response: We decline these suggestions. Considering uncertainty is a standard practice for any Federal agency that completes NEPA analysis. Agencies are required to use high quality information and science and data when conducting their analysis. To the extent there are uncertainties, current regulations in 40 CFR 1502.21(a) address incomplete or unavailable information in analysis and state that ''When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.'' The text in the regulation builds on the language in the NEPA regulations to require more specific discussion of how the BLM is taking uncertainties into account in making decisions, which is within the BLM's authority and beneficial in light of the rapidly changing conditions in the Arctic.

Comment: Commenters recommended § 2361.10(b)(4) explicitly state that the BLM must base its decisions on the best available science and will not rely solely on the lack of scientific certainty when declining to impose any conditions, restrictions, or prohibitions.

BLM Response: The BLM declines this request. Including this language would be duplicative of the requirements of the NEPA process and other aspects of the regulation.

Comment: Commenters recommended adding a new § 2361.10(b)(5) that states: In assessing effects of a decision concerning proposed activity in the Reserve, the Bureau will identify and evaluate any significantly adverse effects of its decision, including any effects on environmental, fish and wildlife, and historical or scenic values that are individually or collectively significant and any impacts associated with greenhouse gas emissions.

BLM Response: The BLM declines this request. The first part of the proposed requirement is duplicative with the BLM's NEPA process and the requirement in the NPRPA to mitigate significantly adverse effects. Further, analyzing the climate impacts of oil and gas development is not part of this rule, which is focused on addressing impacts to significant resource values of Special Areas and surface resources in the Reserve. The BLM analyzes climate impacts as part of NEPA analysis when evaluating potential projects, including leasing and development decisions.

Comment: Commenters expressed concern with limiting consultation in paragraph (e)(1) to federally recognized Tribes and ANCSA corporations and requested that BLM consultation be more inclusive than just those two groups. Commenters requested the BLM add a requirement to engage in meaningful communication and consultation with local villages and Tribes to ensure the new regulations meet the needs and concerns of the communities who rely on the Reserve.

BLM Response: The BLM did not consider a broader approach to consultation in the proposed rule, and so the final rule does not adopt such an approach. The BLM works closely with local communities when making management decisions for the Reserve and will continue to engage and communicate with local communities in implementing the rule, independent of formal consultation efforts.

While not considered government-to-government consultation, per 512 DM 6, it is the policy of the Department to recognize and fulfill its legal obligations to consult with ANCSA Corporations on the same basis as Alaska Native Tribes. Native organizations are always invited to participate in the public-involvement periods of NEPA projects and lend their voices to management actions within the Reserve or on any BLM-managed public lands.

Comment: Commenters recommended the BLM define the role of the North Slope Science Initiative (NSSI) with respect to surveys and monitoring, the evaluation of effects, recommendations for modified protections and restrictions, and mitigation measures.

BLM Response: The NSSI is an advisory body that is intended to coordinate inventories, monitoring, and research for a better understanding of terrestrial, aquatic, and marine ecosystems of the North Slope of Alaska, and was established by the Secretary pursuant to section 348 of the Energy Policy Act of 2005, Public Law 109–58, 119 Stat. 594, 708 (2005) (codified at 42 U.S.C. 15906). While the NSSI provides valuable information, the BLM does not believe it is appropriate for these regulations that apply only to BLM-managed public lands in the Reserve to define NSSI's role. The NSSI is a body that coordinates scientific efforts between agencies and provides guidance and recommendations to the Secretary, the BLM, and other agencies within the Department.

Comment: Commenters recommended the BLM include a presumption against all oil and gas activities in § 2361.10 similar to the presumption proposed in § 2361.40(c) to ensure protection against significantly adverse effects.

BLM Response: A presumption against all oil and gas activities in the Reserve would not be consistent with the NPRPA, which requires the BLM to conduct an oil and gas leasing program in the Reserve. The NPRPA imposes special requirements on the BLM to protect significant resource values within Special Areas, which is why the presumption is only included in § 2361.40. We note the final rule provides opportunities for the BLM to avoid and mitigate adverse impacts on surface resources generally. For example, § 2361.10(a) requires the BLM to protect surface resources by adopting whatever conditions, restrictions, and prohibitions it deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects of proposed oil and gas activities, including conditioning, delaying action on, or denying some or all aspects of proposed oil and gas activities.

Comment: Commenters recommended the final rule stipulate that the BLM will not waive lease stipulations or mitigation provided by Required Operating Procedures (ROPs) unless the threats to the resources that supported the ROPs no longer exist.

BLM Response: We decline that suggestion. ROPs are a standard practice across the BLM and describe the protective measures that the BLM will impose on applicants during the permitting process. Similar to lease stipulations, the objective of a ROP must be met in order for exceptions, modifications, or waivers to be granted under the 2022 IAP. At the permitting stage, the BLM authorized officer will not include those ROPs that, because of their location or other inapplicability, are not relevant to a specific permit application. We also note that at the permit stage, the BLM may establish additional requirements as warranted to protect the land, resources, and uses in accordance with the BLM's responsibilities under relevant laws and regulations.

Comment: Commenters recommended the rule require the BLM to consider and adopt as necessary measures to specify the rates of development and production in the public interest. Commenters recommended the rule include a provision that the BLM may specify the rate of production and limit or suspend activity on leases. Commenters also requested that the rule update the pricing of bonds or schemes that standardize financial health requirements for lessees (such as those found in the Surface Mining Control and Reclamation Act) and reflect the true cost of development and the increased risk of abandonment for oil and gas projects in the Reserve.

BLM Response: The BLM declines this request. Regulations for oil and gas leasing and production within the Reserve are covered in 43 CFR part 3130, which the BLM is not revising in this rule. The standard lease terms and conditions also provide for the BLM to provide conditions on production.

Comment: Commenters recommended the BLM recognize and enforce water quality standards identified by Native landowners near Utqiagvik and Nuiqsut to protect watersheds that extend beyond Special Areas.

BLM Response: We decline that suggestion. While the BLM requires compliance with applicable laws, this addition would be outside the scope of this rulemaking.

Comment: Commenters asked for clarification in § 2361.10 about subsistence use under ANILCA section 811, and recreational shooting under the Dingell Act.

BLM Response: We decline that suggestion. The proposed rule addresses oil and gas activities and does not limit subsistence use access or preclude recreational shooting.

Comment: Commenters requested increased protections for vegetation, as regeneration of vegetation is dependent on environmental conditions.

BLM Response: We decline this suggestion. Vegetation is included because it is encompassed by ''the environmental, fish and wildlife, and historical and scenic values of the National Petroleum Reserve in Alaska.''

Comment: Commenters expressed concern about the ability to challenge the BLM's oil and gas related decisions.

BLM Response: The regulation does not change procedural requirements for public participation in the BLM's decision-making processes.

Comment: Commenters asked the BLM to include burying pipelines in lease requirements.

BLM Response: This issue is addressed at the project level, as a mitigation measure or design feature associated with a specific development proposal. The BLM declines to include this requirement in this regulation.

Comment: Commenters expressed support for the BLM's integration of the IAP into the proposed rule, including in sections pertaining to protection of surface resources and designation and management of Special Areas, regarding the obligation that the BLM must consult specifically with ''federally recognized Tribes'' not ''Native organizations.''

BLM Response: We appreciate the support.

Comment: Commenters requested that the BLM analyze future development on a case-by-case basis prioritizing consultation and coordination with those people who are directly impacted.

BLM Response: The BLM analyzes specific development proposals on a case-by-case basis through the NEPA process, and that process is unchanged by this regulation. The BLM will continue to consult with appropriate Federal, State, and local agencies, and with federally recognized Tribes, and Alaska Native Claims Settlement Act corporations as required by laws, regulations, and policies governing government-to-government consultation. The BLM also made minor edits to the language of this section for clarity. The BLM will also continue to engage stakeholders, local communities, and the general public in decision-making processes for development projects.

Description of the Final Rule

In response to comments, the BLM removed paragraph (b)(3) from the final rule because it is duplicative of environmental analysis requirements under NEPA. The BLM also added ''oil and gas'' before the word ''activities'' throughout the section to clarify that the requirements of this rule only apply to oil and gas activities. The final rule clarifies that new use authorizations must conform to any designation or modifications of Special Areas that have occurred outside of the IAP.

The final rule replaces ''Bureau'' with ''authorized officer'' to provide clarity about the BLM official responsible for implementing requirements in the rule. The final rule defines authorized officer as ''any employee of the Bureau of Land Management who has been delegated the authority to perform the duties of this subpart.'' This term refers to an employee that carries out duties that are carefully circumscribed by this rule, other relevant regulations, and Bureau policy, such as the BLM delegation of authority manual. This employee's duties are also subject to the control or direction of other executives including the BLM Director, the Assistant Secretary for Land and Minerals Management, the Deputy Secretary, and the Secretary, all of whom are officers of the United States, appointed by the President and confirmed by the Senate. The remainder of the section is unchanged from the proposed rule.

Section 2361.20—Existing Special Areas

Existing and Proposed Regulations

The existing regulations only identify the Colville River, Teshekpuk Lake, and Utukok River Uplands Special Areas by name (§ 2361.1(c)); they do not account for the Kasegaluk Lagoon and Peard Bay Special Areas. Further, the current regulations do not identify or describe the significant resource values associated with each Special Area. Under the NPRPA, the BLM must assure maximum protection of each of these values consistent with exploration of the Reserve. In pursuit of that obligation, the proposed rule established new § 2361.20 to incorporate all five of the existing Special Areas into part 2360 and identify the significant subsistence, recreational, fish and wildlife, historical, and scenic values that are associated with each of them.

The proposed rule required any lands designated as a Special Area to continue to be managed as such for the already-identified values and any additional values identified through the process set forth in new § 2361.30. The existing

regulations (§ 2361.1(c)) require the boundaries of the Special Areas to be depicted on maps available for public inspection in the BLM's Fairbanks District Office. Proposed § 2361.20 specified that a map of each Special Area would be available at the Arctic District Office, which is now the BLM office that oversees the Reserve. The BLM would also publish and maintain copies of these maps on its website.

Public Comments on § 2361.20

Comment: The BLM received comments expressing support of the existing Special Areas section, stating appreciation for proposing to recognize all five of the existing Special Areas and their significant resource values in regulations. Commenters believe that this establishes management priorities against which development proposals can be evaluated and mitigated.

BLM Response: We agree recognizing all existing Special Areas in the regulation will provide increased transparency and clarity for managing these areas and their significant resource values.

Comment: Commenters recommended changes to management of existing Special Areas, such as by closing them to oil and gas leasing and development and strengthening prohibitions against oil and gas infrastructure or development impacts.

BLM Response: The BLM is not changing the specific management prescriptions for existing Special Areas as part of this rulemaking process, as those decisions were most recently identified in the 2022 IAP. The rule codifies the existing Special Areas and their significant resource values as currently established in Secretarial decisions. The final rule establishes a process in § 2361.30 for designating, amending, and de-designating Special Areas. Changes to management of existing Special Areas will follow that process.

Comment: Commenters recommended changes to the boundaries of existing Special Areas and specified additional values associated with existing Special Areas and recommended the BLM add those values to the final rule.

Comments specific to the Teshekpuk Lake Special Area include:

- Polar bears have begun inhabiting the Teshekpuk Lake area due to the receding sea ice and should be identified as a significant resource value;
- Pik Dunes has unique geologic character, insect-relief habitat for caribou, rare endemic plant populations, use by various water and shorebirds, and scenic and recreational value, and should be closed to fluid mineral leasing, new infrastructure, and other activities including sand and gravel mining;
- The Special Area should be expanded to include the area between the Teshekpuk Lake Special Area western boundary and the village of Atqasuk, which has high density of Yellow-billed loons, Red-throated Loons, King Eider, raptor nests, and caribou calving sites;
- The Qupaluk Flyway Network Site be reviewed to ensure that it is not available for leasing or infrastructure; and
- The Special Area is unnecessarily large, and the BLM should re-analyze the Teshekpuk Lake Special Area boundaries before finalizing the rule.

Comments specific to the Colville River Special Area include:

- The final rule should be updated to reflect the following special resource values are present in the Special Area: caribou summer range, winter range, and migratory connectivity; suitable Wild and Scenic Rivers; Yellow-billed loons; raptors; and moose;
- The Colville River Delta is particularly important for birds and should be closed to all to oil and gas leasing;
- The Arctic peregrine falcon has been delisted, so the Special Area should be decreased or eliminated;
- The Special Area should be considered critical habitat for the Arctic peregrine falcon; and
- Parts of the Special Area, specifically Ocean Point, are important for subsistence, yet heavy traffic and long-term impacts from development threaten caribou migration and subsistence hunting.

Comments specific to the Kasegaluk Lagoon Special Area include:

- The Special Area is important for brants, shorebird migration, Red-throated and Yellow-billed loons, and the significant resource values for the Special Area should include high-use staging and migration area for waterfowl, shorebirds, loons, and other waterbirds.

Comments specific to the Utukok River Uplands Special Area include:

- The final rule should be updated to reflect that suitable Wild and Scenic Rivers are special resource values in the Special Area;
- The final rule should designate an area north and west of the Kokolik River near the west boundary of the Reserve as part of the Utukok River Uplands Special Area to help avoid river crossings of the Kokolik River to access potential development areas and better protect the Kokolik River; and
- The final rule should move the northern border of the area unavailable for leasing and new infrastructure to cover all of the Utukok River Upland Special Area as this area was not included in the area made unavailable for leasing and infrastructure in the 2013 IAP. Commenters state that the reasons for excluding it no longer exist and failing to make this area unavailable for leasing infrastructure may lead to Western Arctic Caribou Herd calving habitat loss under possible future developments.

BLM Response: The BLM did not amend the rule in response to specific comments regarding the significant resource values or boundaries of existing Special Areas. The rule merely codifies the existing Special Areas and their significant resource values as currently identified by Secretarial decisions designating or amending the Special Areas. The final rule establishes a process in § 2361.30 for designating, amending, and de-designating Special Areas. Changes to existing Special Areas, including identifying additional values and changing management, will follow that process, recognizing that the BLM may not remove lands from the Teshekpuk Lake and Utukok River Uplands Special Areas unless directed to do so by statute. The protections for a surface value in a Special Area are not limited to those protections in the IAP or other Secretarial decisions relating to the establishment of Special Areas. For example, polar bears are protected by the Marine Mammal Protection Act, 16 U.S.C. 1531 *et seq.,* and the Endangered Species Act, 16 U.S.C. 1531–1544. Indeed, as shown in the 2013 IAP map 3.3.8–6, a significant portion of polar bear denning critical habitat in the Reserve and a number of identified dens are located within the Teshekpuk Lake Special Area, which provides an additional layer of protection for that species.

Description of the Final Rule

The BLM did not change this section of the proposed rule in the final rule. The following existing Special Areas are codified in the final rule:

- Colville River Special Area, which has important habitat for raptor and other bird species, including the Arctic peregrine falcon; important habitat for moose; important habitat for fish; important subsistence activities; important recreational activities; world-class paleontological deposits; and significant cultural resources;
- Kasegaluk Lagoon Special Area, which has important habitat for marine mammals; unique ecosystem for the Arctic Coast; opportunities for primitive

recreational experiences; important habitat for migratory birds; and important subsistence activities;

- Peard Bay Special Area, which has haul-out areas and nearshore waters for marine mammals; and high-use staging and migration areas for shorebirds and waterbirds;
- Teshekpuk Lake Special Area, which has important habitat for a large number of migratory and other waterbirds; important caribou habitat; important shorebird habitat; subsistence hunting and fishing activities; Pik Dunes; and overwintering habitat for fish; and
- Utukok River Uplands Special Area, which has important habitat for the Western Arctic Caribou Herd; subsistence hunting activities; grizzly bear habitat; and important wilderness values.

Additional details on the significant resource values of each Special Area are found in the preamble to the proposed rule.

Section 2361.30—Special Areas Designation and Amendment Process

Existing and Proposed Regulations

The existing regulations provide general direction for recommending and considering additional Special Areas in § 2361.1(d). In the past, the BLM has typically designated Special Areas, and received Special Area recommendations from the public and stakeholders, through the IAP revision and amendment process. Enumerating procedures for designating and amending Special Areas in the regulations will provide clarity for stakeholders and ensure that the BLM fulfills its statutory obligation to assure maximum protection of Special Areas' significant resource values.

The proposed rule added a new section to provide standards and procedures for designating and amending Special Areas. Paragraph (a) required the BLM, at least once every 5 years, to evaluate lands in the Reserve for significant resource values and designate new Special Areas or update existing Special Areas by expanding their boundaries, recognizing the presence of additional significant resource values, or requiring additional measures to assure maximum protection of significant resource values. Paragraph (a)(2) allowed, but did not require, the BLM to conduct this evaluation through the IAP amendment process. Paragraph (a)(3) required the BLM to rely on the best available scientific information, including Indigenous Knowledge, and the best available information concerning subsistence uses and resources.

Paragraph (a)(4) required the BLM to provide meaningful opportunities for public participation in the evaluation process, including review and comment periods and, as appropriate, public meetings. Existing § 2361.1(d) concerns the submission, content, and public review of recommendations for additional Special Areas. Proposed paragraph (a)(4) retained the basic contours of that provision but provided additional specificity. The proposed language allowed the public to participate in the evaluation process, including by recommending new Special Areas, new significant resource values for existing Special Areas, and measures to assure maximum protection of Special Areas' significant resource values. The proposed rule required the BLM to evaluate and respond to such recommendations. Similar to existing § 2361.1, proposed paragraph (a)(4) specified that Special Area recommendations should describe the size and location of the lands, significant resource values, and measures necessary to assure maximum protection of those values.

Proposed paragraph (a)(5) allowed the authorized officer to implement interim measures to assure maximum protection of significant resource values in lands under consideration for designation as a Special Area. This provision was designed to assist the BLM in fulfilling its statutory duty to protect Special Areas.

Paragraph (a)(6) required that the BLM base decisions to designate Special Areas solely on whether significant resource values are present and prohibited the BLM from considering the existence of measures to protect or otherwise administer those values. For example, if lands not within a Special Area contained important caribou calving habitat and those lands were already subject to certain protections under the IAP, the BLM would not be permitted to consider those protections during the decision-making process for the proposed designation or update. The proposed rule explained that this change is needed to align the regulations with the NPRPA, which authorizes the Secretary to designate Special Areas based on the presence of ''any significant subsistence, recreational, fish and wildlife, or historical or scenic value . . . .'' 42 U.S.C. 6504(a).

Proposed paragraph (a)(7) required the BLM, when designating a Special Area or recognizing the presence of additional significant resource values in an existing Special Area, to adopt measures to assure maximum protection of significant resource values. That provision mirrors the BLM's statutory responsibility under the NPRPA. 42 U.S.C. 6504(a). Paragraph (a)(7) was designed to provide needed clarification by specifying that those measures would supersede any inconsistent provisions in the IAP.

Proposed paragraph (a)(8) incorporated the requirement of existing § 2361.1(c) that the BLM publish in the **Federal Register** a legal description of any new Special Area. The proposed rule also required the BLM to publish in the **Federal Register** a summary of the significant resource values supporting the Special Area designation. Rather than requiring publication in local newspapers as the current regulations require, the proposed rule required the BLM to maintain maps of the Special Areas on its website. Those proposals were designed to provide more effective public notice.

Proposed § 2361.30(b) established a framework for removing lands from Special Area designations. Because Congress identified the Utukok River Uplands and Teshekpuk Lake Special Areas in the NPRPA and required them to be managed to protect surface resources, the BLM cannot remove lands from those Special Area designations absent statutory authorization. See Public Law 94–258, sec. 104(b), 90 Stat. 304 (1976). For other Special Areas, the proposed rule permitted the BLM to remove lands from a Special Area designation only when the significant resource values that supported the designation are no longer present (*e.g.,* if important wildlife habitat that supported the designation was no longer present). That provision is consistent with the BLM's statutory duty to ''assure the maximum protection of such surface values consistent with the requirements of [the NPRPA] for the exploration of the reserve.'' *Id.*

Before removing lands from a Special Area designation, proposed paragraph (b) required the BLM to provide the public with the opportunity to review and comment on its proposed decision and consult with federally recognized Tribes and Alaska Native Claims Settlement Act corporations. Finally, the proposed rule required the BLM to document its consideration of those comments. Those requirements would assure public participation in the de-designation process.

Public Comments on § 2361.30

Comment: Commenters requested the BLM explain how new and additional procedural requirements would integrate with the environmental

analysis that the BLM already conducts under NEPA for proposed Federal actions. Commenters recommended the BLM ensure the new procedures are not duplicative of NEPA obligations. Commenters expressed their concern that if they are separate and distinct from each other, it could increase the number of procedural steps, time, and risk for proposed activities in the Reserve.

Commenters recommended that the BLM continue to use the IAP for management of the Reserve including adding, revising, or removing Special Areas. Commenters suggested that requiring a separate 5-year cycle for Special Area review and evaluation may establish a different management framework applicable only to Special Areas which would be separate from the review and management of the entire Reserve through IAP/EIS processes.

Commenters expressed concern that mechanisms provided in the proposed rule that could be used to manage lands as Special Areas could preclude a rigorous public process pursuant to NEPA.

Commenters expressed concern that there is an over-reliance on public participation in the contraction and expansion processes outlined in the proposed rule, and suggested this may allow the Reserve to be managed by outside interest groups instead of prioritizing Native communities and local stakeholders.

BLM Response: The new procedures outlined in § 2361.30 are intended to ensure that the BLM regularly reviews the surface values and environmental conditions in the Reserve specifically for the purpose of managing Special Areas with significant subsistence, recreational, fish and wildlife, historical, and scenic values to assure their maximum protection, as directed by the NPRPA. These procedures will support other NEPA processes by ensuring the BLM has up-to-date baseline conditions for surface values within the Reserve and will specifically support oil- and gas-related NEPA analyses by ensuring necessary measures are in place to protect important resources. It is anticipated that the BLM will often incorporate these procedures into IAP revisions and amendments; however, rapidly changing conditions in the Arctic require that the BLM has the ability to conduct this review and decision-making process outside of an IAP process when necessary.

The final rule has been updated from the proposed rule to ensure that robust public participation is a mandated component of all processes to designate, amend, and de-designate Special Areas. The BLM is required to include and consider input from all members of the public in making decisions governing the public lands. The BLM will continue to work closely with Native communities and local stakeholders when making decisions regarding management of the Reserve.

Comment: Commenters expressed concern that the BLM may not have included a regulatory consultation obligation for expanding Special Areas or increasing protective measures in Special Areas.

BLM Response: We agree with this comment that clarification on consultation would be helpful. We have reorganized § 2361.30 in the final rule, with a new paragraph (a) that outlines requirements applicable to all processes that would designate, de-designate, or otherwise change boundaries or management of Special Areas. In all processes, including those resulting in de-designation or removal of lands from a Special Area, the BLM is required to provide the public and interested stakeholders with meaningful opportunities to participate in the evaluation process, and consult with any federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area.

Comment: Commenters expressed the opinion that the requirements in § 2361.30(a)(1) are duplicative of FLPMA section 201 and should be eliminated from the final rule.

BLM Response: FLPMA section 201 requires that the BLM maintain on a continuing basis an inventory of all public lands and their resource and other values, and to keep the inventory current so as to reflect changes in conditions and to identify new and emerging resource and other values. Consistent with FLPMA and the NPRPA, proposed § 2361.30(a)(1) specifies that the BLM must maintain a current inventory of the significant subsistence, recreation, fish and wildlife, historical, and scenic values within the Reserve. This requirement is not duplicative of FLPMA but rather expounds on it by detailing the very specific public lands values that the NPRPA requires the BLM to evaluate and manage for protection in the Reserve.

Comment: Commenters recommended that the process for designating and removing Special Areas should be identical, balanced, reasonable, and should include consultation and environmental analysis to support decision-making. Commenters recommended that Indigenous Knowledge be included in all Special Area designation decisions to fully capture the expertise about resources, such as permafrost, and to appropriately assess impacts to those resources.

BLM Response: The BLM revised the final rule to create a new paragraph (a) that outlines requirements applicable to all processes that would designate, de-designate, or otherwise change boundaries or management of Special Areas. These requirements include relying on the best available scientific information, including Indigenous Knowledge, as well as the best available information concerning subsistence uses and resources within the Reserve. This new paragraph will provide more consistency to all decision-making processes for Special Areas.

Comment: The BLM received multiple comments discussing the timing of the Special Areas review, including:

- Commenters believe that the timing of the Special Area review should be more frequent than the 5 years proposed to account for rapidly changing conditions;
- Commenters expressed support for the 5-year review interval;
- Commenters believe that the 5-year review is restrictive and unfounded in law;
- Commenters suggested including an additional mid-way report to help ensure agency accountability;
- Commenters requested the BLM remove the 5-year review requirement and allow for changes to be made when best available information demonstrates that such changes are necessary;
- Commenters recommended a 10-year interval for Special Area evaluation and suggested that the BLM conduct evaluations in the context of preparing a holistic IAP. Comments suggest that this would bring stability to managing the Reserve and help reduce the needed frequency for stakeholder engagement during large-scale planning efforts;
- Commenters expressed concern that the BLM lacks the staff and resources to engage in 5-year reviews;
- Commenters expressed concern that 5-year interval reviews would place a heavy burden on local communities and preclude or limit local input on the public process; and
- Commenters recommended that at every 5-year period, the BLM should consider removing and decreasing Special Areas, not only creating or expanding Special Areas.

BLM Response: The final rule changes the review period to 10 years, while specifying the BLM may conduct the review sooner if the authorized officer

determines that changing conditions warrant. This requirement is limited to identifying additional or expanding existing Special Areas, additional special values, and additional protective measures in order to address the risks associated with changing circumstances on the ground, which may require additional protections. The BLM believes this change addresses concerns about agency and community capacity while ensuring regular reviews occur to maintain an inventory of resource conditions and make management changes as appropriate.

The NPRPA requires the BLM to manage areas designated by the Secretary to have significant resource values in a manner that assures the maximum protection of those values consistent with exploration and production of the Reserve. Once those values have been identified and designated, they must continue to be managed for protection consistent with the Act. The BLM will only remove Special Area designations when the significant resource values are no longer present. Therefore, the rule does not require the BLM to regularly evaluate eliminating or reducing Special Area designations. The BLM will evaluate the presence or absence of significant resource values in existing Special Areas when updating the IAP, and through that process the public can provide information to BLM regarding the absence of significant resource values to inform de-designation decisions.

Comment: Commenters requested that the proposed rule clarify that the BLM is required not only to identify and adopt new maximum protection measures during the 5-year review, but also evaluate existing measures and strengthen them as needed.

BLM Response: The final rule specifies that as part of the review, the BLM will determine whether to require additional measures or strengthen existing measures to assure maximum protection of significant resource values within existing Special Areas.

Comment: Commenters recommend that during the review process, the BLM should conduct an assessment to determine if Significant Resource Values continue to exist and whether maximum protection is necessary.

BLM Response: The BLM declines this request. The public can submit information regarding the status of significant resource values during the review process, and that information would be taken into account in a future planning process and as applicable in decision-making as part of the NEPA process, *i.e.,* if it is significant new information. The reason for the required regular review is to address risks associated with needing additional protections in light of changing circumstances on the ground.

Comment: Commenters recommended the final rule state that the BLM will designate Special Areas in a manner that maintains the ecological integrity necessary to sustain such values.

BLM Response: The BLM believes this is unnecessary because the final rule requires the BLM to rely on the best available scientific information when making management decisions for Special Areas and maintaining ecological integrity is consistent with adoption and implementation of maximum protective measures.

Comment: Commenters recommended the BLM enable adoption of permanent maximum protection measures in the rule.

BLM Response: Including permanent maximum protection measures is not within the regulatory framework of the rule, which establishes administrative processes by which the BLM will adopt and may change maximum protection measures for significant resource values in Special Areas. The overarching requirement to adopt measures for maximum protection of significant resource values in Special Values continues to apply.

Comment: Commenters requested more explanation of the standards that would be used to determine a resource is significant.

BLM Response: The BLM declines this suggestion. The definitions in the rule and the Special Areas identified in the NPRPA and IAP provide sufficient clarity for the use of this term in the rule. Ultimately, determinations about the significance of subsistence, recreational, fish and wildlife, historical, and scenic values will be at the discretion of the BLM. As stated in the definition of Significant Resource Value in the final rule, it is a surface value ''that the Bureau identifies as significant and supports the designation of a Special Area.'' This evaluation will necessarily be determined in the context of site-specific resources, with input from Tribes, scientific experts, other government agencies, and the public. Therefore, a more specific definition could be overly prescriptive and would not necessarily add more clarity.

Comment: Commenters asked why Indigenous Knowledge is only included in § 2361.30 and not throughout the rest of the proposed rule.

BLM Response: Best available scientific information, including Indigenous Knowledge, is discussed in the context of evaluating resources for designation, de-designation, and management of Special Areas. The BLM expects Indigenous Knowledge would also be part of consultations, which are required throughout all aspects of the rule.

Comment: The BLM received comments expressing the opinion that the NPRPA's maximum protection clause expressly applies only to Special Areas designated by the Secretary of the Interior and should not apply to areas under consideration, therefore proposed § 2361.30(a)(5) regarding interim measures exceeds the BLM's statutory authority. Other commenters expressed the opinion that § 2361.30(a)(5) conflicts with FLPMA section 201. Commenters also generally recommended that § 2361.30(a)(5) be eliminated because areas shouldn't be managed as Special Areas until they are designated as such.

Commenters requested more clarity around the process for implementing interim measures in lands under consideration for designation as a Special Area.

BLM Response: The NPRPA provides the BLM with the direction and authority to provide for such conditions, restrictions, and prohibitions as deemed necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the Reserve. These conditions, restrictions, and prohibitions may include interim measures to protect surface resources within Special Areas under consideration for designation.

The option for the authorized officer to apply interim measures is not inconsistent with the requirement of 42 U.S.C. 6504 to ensure maximum protection of significant resource values to the extent consistent with the requirements of the NPRPA. Rather, this discretion supports the BLM's ability to fulfill this obligation as part of a formal designation of a new Special Area while ensuring any interim management is consistent with both the requirements of the NPRPA and the specific provisions of the current IAP.

The BLM revised the final rule to provide more clarity and certainty around the interim measures provision. The final rule clarifies that interim measures may be implemented at any time after the BLM receives an internal or external recommendation to designate or modify a Special Area. The final rule also clarifies that any interim measures must be consistent with the governing management prescriptions in the IAP, and the BLM is required to provide public notice that interim measures are in place and reassess such measures to determine if they are still

needed if they remain in place for more than 5 years.

Comment: Commenters expressed the opinion that the requirement in § 2361.30(a)(6) to designate Special Areas solely on the basis of the presence of significant resource values is an improper interpretation of 42 U.S.C. 6504. Commenters also recommended the BLM should consider effectiveness of mitigation measures and other management when determining whether to designate Special Areas and suggested that if the values can be managed with existing measures, then a Special Area may not be required.

Other commenters supported the recognition that Special Area designations and expansions be based solely on the presence of significant resource values without regard to the administration of measures to protect the values.

BLM Response: The NPRPA provides for the Secretary to designate Special Areas that contain significant subsistence, recreational, fish and wildlife, or historical or scenic values, and requires the Secretary to assure the maximum protection of those values when authorizing oil and gas activities, to the extent consistent with the requirements of the Act. The NPRPA does not place contingencies on either of those directives, such as considering other management decisions in place that may affect the risk to the resources or the likely effectiveness of mitigation measures to address the impacts of oil and gas activities. Furthermore, management decisions may change over time, and so relying on current overlapping management is not adequate to ensure appropriate protection for significant resource values. Therefore, the BLM believes the most appropriate way to fulfill the congressional directives set forth in the NPRPA is to designate Special Areas where the identified significant resource values exist regardless of other management that may be in place, and to implement maximum protection measures that specifically target those resource values.

Comment: Commenters recommended that the rule should require that Special Areas and areas under consideration for Special Area designation be closed to oil and gas leasing.

BLM Response: Management decisions for Special Areas, including oil and gas allocations, are made through the IAP process and/or the separate Special Area designation process described in the rule. These regulations implement the NPRPA, which requires the BLM to provide maximum protection for significant surface values in Special Areas in the context of conducting an oil and gas leasing and production program in the Reserve. The rule incorporates this directive through a presumption that leasing and production in Special Areas will not be consistent with this standard, while also ensuring consistency with the requirements of the NPRPA and valid existing rights.

Comment: Commenters expressed the opinion that the BLM is not prohibited from removing lands from Teshekpuk Lake and Utukok River Uplands because the NPRPA does not specify a geographic boundary for these areas nor does it make these current designations permanent.

BLM Response: Section 104(b) of the NPRPA (42 U.S.C. 6504) identifies the Utukok River and Teshekpuk Lake areas as special areas containing significant subsistence, recreational, fish and wildlife, or historical or scenic values that are subject to the ''maximum protection'' standard. Congress specifically identified these two Special Areas by naming them in the NPRPA. The BLM does not believe it has the authority to de-designate some or all of the Special Area designations for Teshekpuk Lake and Utukok River Uplands that were explicitly included in the NPRPA, because Congress has expressly directed that the BLM apply the maximum protection standard in those areas.

Comment: Commenters recommended that the BLM not allow for land to be removed from Special Areas where wildlife habitat values are no longer present because the land is no longer inhabitable by the species or because species populations are declining. Commenters suggested that the BLM should not allow for further development and degradation of the land in those circumstances.

BLM Response: This issue is best addressed in the Special Area amendment process, because it is dependent on site-specific circumstances. The regulations are designed to implement the NPRPA, which directs the BLM to designate and manage Special Areas to provide maximum protection for significant resource values. While the rule provides that an authorized officer may only remove areas from Special Area designation if the significant resource values are no longer present, any such decision would be conducted through site-specific processes, with opportunity for public input and consultation regarding the appropriate decisions on types of habitats and desired future conditions.

Comment: Commenters requested more clarity regarding the process by which a resource value will be determined to be sufficiently absent to warrant de-designation of a Special Area.

Commenters recommended that the rule should require the BLM to use the best scientific data available when determining whether the significant resource values that support the designation are no longer present.

BLM Response: The BLM revised the final rule to create a new paragraph (a) that outlines requirements applicable to all processes that will designate, de-designate, or otherwise change boundaries or management of Special Areas. In all processes, including those resulting in de-designation or removal of lands from a Special Area, the BLM is required to rely on the best available scientific information, including Indigenous Knowledge, as well as the best available information concerning subsistence uses and resources within the Reserve. The BLM must also provide the public and interested stakeholders with notice of, and meaningful opportunities to participate in, the evaluation process, and consult with any federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area. These requirements will ensure opportunities for public and Tribal input and participation in any evaluation of whether all of the significant resource values that support a Special Area designation are no longer present.

Comment: Commenters suggested establishing an overlay of Indigenous Ancestral Homeland Preservation Special Areas within the NPR–A to protect significant subsistence values.

BLM Response: The BLM would appreciate this information being provided as part of decisions on managing surface values in the Reserve. Specifying this overlay is beyond the current scope of the regulation.

Comment: Commenters expressed concerns that the proposed rule does not quantify the economic impacts of the process of designating new Special Areas nor the economic impacts of limitations on exploration and development within Special Areas and recommended that an economic impact analysis should accompany each decision.

BLM Response: The NPRPA requires the maximum protection of significant resources values in Special Areas subject to the requirements of the Act. Economic impacts are part of NEPA

analysis and will be disclosed as part of any such analysis.

Comment: Commenters requested clarity that Special Area designation will not interfere with the ANILCA section 1111(a) temporary access provisions.

BLM Response: Section 1111(a) of ANILCA requires the Secretary to authorize and permit temporary access by the State or a private landowner to or across certain lands in Alaska that have been designated to specific uses, including the Reserve, but only if such access will not result in permanent harm to the resources of such unit, area, Reserve or lands. This rule is consistent with that provision of ANILCA and would not alter the BLM's implementation.

Description of the Final Rule

Section 2361.30 is reorganized in the final rule, with a new paragraph (a) that outlines requirements applicable to all processes that will designate, de-designate, or otherwise change boundaries or management of Special Areas. In all processes, including those resulting in de-designation or removal of lands from a Special Area, the BLM is required to rely on the best available scientific information, including Indigenous Knowledge, as well as the best available information concerning subsistence uses and resources within the Reserve. The BLM must provide the public and interested stakeholders with meaningful opportunities to participate in the evaluation process and consult with any federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area. The BLM must also base decisions solely on the presence or absence of significant resource values and not the existence of measures that have been or may be adopted to protect or otherwise administer those values.

Section 2361.30(b) requires the BLM to evaluate all public lands within the Reserve for the presence of significant subsistence, recreational, fish and wildlife, historical, or scenic values every 10 years, or sooner if the authorized officer determines that changing conditions warrant. As part of this evaluation, the BLM will consider designating new Special Areas, expanding existing Special Areas, recognizing the presence of additional significant resource values in existing Special Areas, and requiring additional measures or strengthening existing measures to assure maximum protection of significant resource values within existing Special Areas. The evaluation may occur through an IAP amendment process but can occur separately.

The BLM is required to consider and respond to recommendations from the public and interested stakeholders in the evaluation process regarding lands that should be considered for designation as a Special Area, significant resource values that should be recognized in Special Areas, and measures that should be required to assure maximum protection of significant resource values within Special Areas. The rule lists information that should be submitted by the public to ensure the BLM can adequately review recommendations, including the size and location of the recommended lands, significant resource values that are present within or supported by the recommended lands, and measures that may be necessary to assure maximum protection of those values.

Section 2361.30(b)(4) provides that the BLM may implement interim measures to protect significant resource values while the agency is considering Special Area designations and changes to management. The BLM could implement interim measures at any point after receiving a recommendation for a new or modified Special Area. These measures must be consistent with the governing management prescriptions in the IAP. The BLM must provide public notice that interim measures are in place and such measures will be reassessed to determine if they are still needed if they remain in place for more than 5 years.

When the BLM decides to designate lands as a Special Area or recognizes the presence of additional significant resource values in a Special Area, the BLM must adopt measures to assure maximum protection of the significant resource values. These measures are not constrained by the provisions of the current IAP. Once adopted, these measures supersede inconsistent provisions of the IAP then in effect for the Reserve and will be incorporated into the IAP during the next revision or amendment. When the BLM designates lands as a Special Area, the agency must publish a legal description of those lands in the **Federal Register**, along with a concise summary of the significant resource values that support the designation. The BLM will maintain up-to-date maps of all designated Special Areas on its website and make maps available for public inspection at the Arctic District Office.

Section 2361.30(c) provides procedures for removing lands from or de-designating a Special Area. Lands may only be removed from Special Area designation when all of the significant resource values that support the designation are no longer present. In making such a determination, the BLM must prepare a summary of its proposed determination, including the underlying factual findings, and provide a public comment opportunity on the proposed determination. The BLM must also comply with all of the requirements in § 2361.30(a). The BLM's final determination must document how the views and information provided by the public, federally recognized Tribes, Alaska Native Claims Settlement Act corporations, federally qualified subsistence users, and other interested stakeholders have been considered. The BLM may not remove lands from the Teshekpuk Lake and Utukok River Uplands Special Areas unless directed to do so by statute.

Section 2361.40—Management of Oil and Gas Activities in Special Areas

Existing and Proposed Regulations

The current regulations paraphrase the maximum protection requirement of the NPRPA and provide examples of measures that the BLM could potentially take to assure maximum protection. See § 2361.1(c). Proposed new § 2361.40 enhanced the specificity of the current regulations on the mechanisms for assuring maximum protection of significant resource values in Special Areas by establishing new standards and procedures for achieving maximum protection of Special Areas' significant resource values, with a specific focus on addressing the impacts of oil and gas activities. Of note, this section affirmatively established that assuring maximum protection of significant resource values is the management priority for Special Areas. Under proposed paragraph (a), the BLM needed to comply with this standard and adopt maximum protection measures for each significant resource value associated with a Special Area. Proposed paragraph (b) required the BLM take such steps to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas, including by conditioning, delaying action on, or denying proposals for activities.

Proposed paragraph (c) required oil and gas leasing and new infrastructure to conform to the land use allocations and restrictions identified on maps 2 and 4 of the 2022 IAP ROD, unless the BLM makes revisions in accordance with § 2361.30 of these regulations. Map 2 shows the areas of the Reserve that are open and closed to oil and gas leasing. The map reflects that approximately 11.8 million acres are

open to leasing subject to the terms and conditions detailed in the IAP, while approximately 11 million acres are closed, including most of the Teshekpuk Lake and Utukok River Uplands Special Areas. The map also shows areas that are open to leasing but subject to no surface occupancy, and areas that are outside the BLM's subsurface authority.

Map 4 shows the areas of the Reserve that are available and unavailable for new infrastructure. The map shows that new infrastructure is prohibited on approximately 8.3 million acres of the Reserve, limited to ''essential'' infrastructure on approximately 3.3 million acres, and permitted on approximately 10.8 million acres.

The proposed purpose of requiring leasing and infrastructure in Special Areas to conform to IAP maps 2 and 4 was to codify the existing protections and restrictions from the 2022 IAP ROD. The BLM developed that land use plan through a lengthy public planning process involving all stakeholders, which stretches back to the development of the 2013 IAP ROD. The 2022 IAP ROD, which is based in large part on the framework set forth in the 2013 IAP ROD, incorporates aspects of the 2020 IAP ROD, and reflects now-settled expectations about the use of the Reserve. It also reflects what the BLM views as the floor of protections for the Reserve that grew out of the public planning process. By incorporating the two maps into the rule, the BLM intended to incorporate the land use allocations, restrictions, and stipulations from the 2022 IAP ROD into the rule without reprinting lengthy text.

Proposed paragraph (c) also established a presumption against leasing and new infrastructure on lands in Special Areas that are allocated as available for those activities. That presumption could have been overcome if specific information is available to the BLM that clearly demonstrates that those activities can be conducted with no or minimal adverse effects on the significant resource values of the Special Area. The intensive process that led to the IAP resulted in a comprehensive plan for protection of the Special Areas in the Reserve. To fulfill the BLM's statutory duty to assure maximum protection for those areas' significant resource values, the BLM believed that plan should be treated as a regulatory floor, and additional activities should only be allowed when maximum protection is assured.

The proposed definition of ''infrastructure'' in § 2361.5(g) excluded ''exploratory wells that are drilled in a single season; infrastructure in support of science and public safety; and construction, renovation, or replacement of facilities on existing gravel pads at previously disturbed sites where the facilities will promote safety and environmental protection.'' These exceptions were specifically analyzed and adopted in the 2022 IAP ROD. Proposed § 2361.40(d) established three additional exceptions to the oil and gas leasing and new infrastructure prohibitions in paragraph (c). The first exception permitted leasing and infrastructure solely to address drainage of Federal oil and gas resources. Drainage occurs ''when a well that is drilled or is in production adjacent to Federal or Indian leases or unleased lands is potentially draining Federal or Indian oil and gas resources.'' BLM MS–3160, Drainage Protection Manual 1–1 (2015), *available at https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3160.pdf.* The proposed rule prohibited surface disturbing activities on any lease tract issued for this purpose. The exception for drainage of Federal oil and gas resources was included because the regulations expressly provide for leasing of tracts that are subject to drainage in order to prevent loss of United States oil and gas resources and potential royalties. See 43 CFR 3130.3. No-surface-occupancy leases are an option the BLM may elect to use when the surface management agency has determined that surface oil and gas facilities and operations would pose an unacceptable risk to the surface resources. The second exception permitted the construction of new infrastructure, including roads, transmission lines, and pipelines, that would primarily benefit communities in and around the Reserve or would support subsistence activities. The BLM proposed to include that exception because communities in and around the Reserve must have some infrastructure to survive and thrive. The third exception allowed the BLM to approve new infrastructure if essential to support exploration or development of a valid existing lease and no practicable alternatives exist that would have less adverse impact on significant resource values of the Special Area. That exception was necessary to accommodate the rights of current leaseholders.

Proposed paragraph (e) required the BLM to document and consider any uncertainty regarding potential adverse effects on Special Areas and ensure that its actions account for such uncertainty. That provision was drafted to help the BLM fulfill its statutory mandate to assure maximum protection for Special Areas' significant resource values.

Proposed paragraph (f) required the BLM to prepare a Statement of Adverse Effect whenever it cannot avoid adverse effects on a Special Area. In each statement, the BLM was required to describe the significant resource values that may be affected; the nature, scope, and duration of the effects; measures the BLM evaluated to avoid those effects; a justification for not requiring those measures; and measures it would require to minimize and mitigate the adverse effects on significant resource values. Measures the BLM could require under this provision include compensatory mitigation. Such measures would be developed, evaluated, and, as necessary, adopted in project-specific analyses. Proposed paragraphs (g) and (h) required the BLM to provide the public with an opportunity to review and comment on any Statement of Adverse Effect and consult with federally recognized Tribes and Alaska Native Claims Settlement Act corporations that have ties to the area.

Finally, proposed paragraph (i) required the BLM to include in each oil- and gas-related decision or authorization ''terms and conditions that provide the Bureau with sufficient authority to fully implement the requirements of this section.'' That provision ensured that the BLM incorporates into decision documents the necessary language to implement any final rule.

Public Comments on § 2361.40

Comment: The BLM received comments generally supporting § 2361.40, particularly for reasons of reducing climate change and protecting areas that are important for wildlife habitat and subsistence use.

BLM Response: We agree the rule will help the BLM address these important issues.

Comment: Commenters stated that maximum protection in the proposed rule is being used as a management standard and a baseline to disqualify any resource development activity from proceeding contrary to congressional intent and the NPRPA.

BLM Response: The NPRPA specifically requires that oil and gas activities within Special Areas be ''conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act.'' The regulation is implementing this direction from Congress to balance resource development with resource protection, by requiring the application

of maximum protection measures to significant resource values in Special Areas when conducting oil and gas activities. The regulations will not prohibit oil and gas activities but rather ensure they proceed according to the intent of the NPRPA.

Comment: Commenters requested the rule clarify the process for identifying and adopting maximum protection measures for each significant resource value that is present in a Special Area. Commenters also recommended that the BLM be required to evaluate existing measures in addition to identifying new ones, and that this process rely on best available scientific information including Indigenous Knowledge.

Commenters requested the BLM discuss significant resource values and include clear definitions of the measures necessary to ensure maximum protection for each. Comments contained suggestions that the denial or reduction of proposed drilling sites, prohibition of roads, restrictions on sand and gravel extraction and water withdrawals, suspension of activities, and specified rates of development and production should be specifically listed as potential maximum protection measures.

BLM Response: The final rule clarifies that the BLM will identify and adopt maximum protection measures for each significant resource value that is present in a Special Area when Special Areas are designated. The BLM will also update maximum protection measures as appropriate thereafter, including in the IAP, lease terms, and permits to conduct oil and gas activities. The final rule also includes maximum protection measures that are identified in the existing regulation but had been eliminated in the proposed rule, as well as some additional categories of measures that may be included, such as limiting infrastructure and use of roads and restricting use of sand, gravel, and water. The BLM is not analyzing existing measures or adopting new ones for significant resource values in this rulemaking process. The rule provides informative categories of measures that could be applied, subject to existing management prescriptions for each Special Area and the terms of existing leases, and sets forth the process by which measures will be adopted moving forward.

Comment: Commenters expressed concern that the presumption against leasing and new infrastructure on lands within Special Areas that are allocated as open for those activities would affect valid existing rights and could constitute a breach of contract or regulatory taking. Commenters recommended that the rule be revised to expressly state that it does not apply to any existing leases or future activities carried out pursuant to the terms of those leases.

Commenters suggested that the presumption against new leasing and new infrastructure on lands within Special Areas that are allocated as open to those activities is contrary to the NPRPA and ANILCA section 1326.

BLM Response: The provisions of this section are consistent with the BLM's obligations to manage Special Areas to provide maximum protection for significant resource values, subject to the other directives in the NPRPA regarding conducting exploration, leasing, and development. The rule includes specific protections for valid existing rights. At the same time, we note that, while the terms of an existing lease and approved development project or permit would not be affected by the rule, a valid lease does not entitle the leaseholder the unfettered right to drill wherever it chooses or categorically preclude the BLM from considering alternative development scenarios within leased areas, nor does it give the leaseholder the right to produce all economically recoverable oil and gas on the lease. Future development of an existing lease is, by its terms, subject to additional terms and conditions. For example, the standard lease for activities in the Reserve states, ''An oil and gas lease does not in itself authorize any on-the-ground activity'' and notes that more restrictive stipulations may be added. Similarly, a standard lease stipulation entitled ''Conservation of Surface Values for NPR–A Planning Area Land'' provides: ''Operational procedures designed to protect resource values will be developed during Surface Use Plan preparation, and additional protective measures may be required beyond the general and special stipulations identified in the above-referenced documents.''

Comment: Commenters recommended § 2361.40(c) be revised to eliminate the phrase ''or minimal'' so that the presumption would only be overcome if it can be demonstrated that there will be no adverse effects on significant resource values.

BLM Response: The BLM included the term ''minimal'' to address situations where it is not possible to eliminate all adverse effects, and in recognition of the NPRPA's direction to apply the maximum protection standard consistent with exploration and production of the Reserve. However, the remainder of the process set out in this updated section will ensure thorough consideration, opportunity for review and comments, and documentation of how adverse effects have been avoided.

Comment: Commenters recommended the BLM provide a path for an applicant to overcome the presumption against new leasing and new infrastructure on lands within Special Areas that are allocated as open for those activities, such as requiring the applicant to explain why it cannot avoid locating new infrastructure in the Special Area and to provide maximum protection for resource values and subsistence users.

BLM Response: The final rule provides clarity around how the presumption against new leasing and new infrastructure on lands within Special Areas that are allocated as open for those activities would be overcome through the environmental review process. The rule provides that as part of the environmental analysis, the BLM may document justification for overcoming the presumption in § 2361.40(f), such as if the proposed infrastructure is necessary to comport with the terms of a valid existing lease, or if it will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve, and the proposal has been conditioned to avoid, minimize, or otherwise mitigate adverse effects.

Comment: Commenters recommended that § 2361.40(d)(1) be revised to clarify that seismic exploration is considered a ''surface-disturbing oil and gas activit[y]'' and that restrictions on new infrastructure would not be waived under this provision.

BLM Response: This rule maintains the current approach in the IAP that does not include geophysical exploration as surface occupancy to maintain consistency and because any changes to that approach should be made through the IAP process with associated NEPA analysis. This rule does not address waiver of limitations on infrastructure. However, as discussed above, waivers, exceptions, and modifications are subject to the conditions set out in the IAP.

Comment: Commenters recommended that the community infrastructure exception be clarified that it only applies if it has community benefit and is owned, operated, or managed by the appropriate community or Native entity, the North Slope Borough, of the State of Alaska.

BLM Response: The definition of the term ''infrastructure'' in the final rule has been revised to state that ''infrastructure'' does not include infrastructure that will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve.

Comment: Commenters urged the BLM to provide greater limits on ''essential infrastructure'' such as allowing permanent infrastructure if it can occur with no adverse impacts on significant resource values, rather than if no practicable alternatives exist that would have less adverse impact.

The BLM received comments stating that limiting infrastructure to that which is essential and for which no practicable alternatives exist would establish an implied presumption that no infrastructure can be installed in Special Areas, which violates the NPRPA and the terms of existing leases.

BLM Response: The BLM is not revising the approach to addressing infrastructure, which is consistent with the provisions of the IAP and the directive in the NPRPA to provide for maximum protection of significant resource values in Special Areas subject to the other purposes of the Act.

Comment: Commenters recommended that the final rule adopt a requirement based on precautionary principles in instances of significant uncertainty, which may mean requiring additional information from applicants or lessees or delaying action until relevant effects are better known.

BLM Response: The BLM believes the language in the rule is adequate for the agency to address uncertainty. The final rule requires the BLM to document and consider uncertainty concerning potential adverse effects on significant resource values of Special Areas and ensure that uncertainty is accounted for when taking actions to avoid, minimize, or mitigate adverse effects. The BLM has the authority under the regulations to delay action on activities where necessary to avoid adverse effects on significant resource values.

Comment: The BLM received comments about the requirement to mitigate residual effects that cannot be avoided or minimized, including:

- Commenters recommended the rule include provisions that authorize the BLM to review and modify mitigation measures as needed after oil and gas operations have commenced.
- Commenters suggested that the BLM lacks statutory authority to require compensatory mitigation, and none is provided in the NPRPA, FLPMA, or ANILCA.
- Commenters expressed concern that despite BLM mitigation and environmental review efforts, impacts to Nuiqsut from oil and gas activities have gotten worse. Commenters state that the current mitigation process requires stakeholders to advocate for mitigation measures, which places an unfair burden on the stakeholder, including Native villages. Commenters recommend the BLM include a regular process for identifying new mitigation measures and updating existing mitigation measures similar to the process for evaluating Special Areas in the proposed rule. Commenters also recommended that the rule include a requirement for establishing baseline data and monitoring of impacts.

BLM Response: The BLM has authority to require appropriate mitigation under a variety of authorities, including the NPRPA and FLPMA. Mitigation measures can continue to be regularly identified and updated through IAP and/or Special Area amendment processes and are also identified at the leasing and permitting stages of development. Similarly, baseline data and monitoring plans are established in NEPA analyses conducted to support amendments or revisions to the IAP and approval of other activities in the Reserve.

Comment: The BLM received comments regarding reclamation and bonding for oil and gas activities, including: the rule should include assessment methods to gauge the financial stability of oil and gas companies and bankruptcy risk before companies are allowed to purchase leases; the rule should require up-front payments to cover costs of damages due to climate change, loss of habitat, spills or accidents, and reclaiming development sites; and the rule should require all development activities to have comprehensive plans for reclamation and remediation.

Commenters requested that the proposed rule revise leasing program operations regarding water withdrawal to address the concern that lake water withdrawals for ice roads are leading to low stream water levels.

BLM Response: The BLM's oil and gas leasing program for the Reserve is governed by regulations at 43 CFR part 3130, which are not being revised in this rule, and additional aspects of operations are addressed in the current IAP. Impacts from water withdrawals for ice roads would be addressed as part of the analysis to permit construction of ice roads.

Comment: Commenters recommended that traditional transportation corridors be considered in the rule and requested clarity on how the proposed rule might affect local community winter access to trail rights-of-way.

BLM Response: The rule would not affect traditional transportation corridors or local community access. The BLM has clarified the definition of infrastructure to limit it to oil and gas activities and to include an exception for community access and projects. In addition, the rule requires consideration of impacts on community access in the development of management measures to protect surface resources.

Comment: Commenters proposed adding a legal mandate that allows the BLM to refrain from authorizing new leases in the Reserve if the U.S. is projected to meet its energy needs as the NPRPA's mandate to meet the energy needs of the nation is being fulfilled by other sources.

BLM Response: This comment is not within the regulatory framework of the rule, which is focused on protecting surface resources in the Reserve as the BLM carries out its oil and gas program. This regulation is not revising 43 CFR part 3130, which are the regulations governing the oil and gas program for the Reserve.

Comment: The BLM received comments regarding the proposal to include two of the 2022 IAP maps in the rule and require that oil and gas leasing and authorization of new infrastructure in Special Areas will conform to those maps. Comments and responses follow.

- Commenters expressed concern that the maps do not provide sufficient information to the public to identify and protect significant resource values, and maps can be misinterpreted. The BLM updated the maps for the final rule by adding the boundaries of the existing Special Areas to the maps from the 2022 IAP that show the current allocations for oil and gas leasing and infrastructure. We believe this addresses concerns that the maps contained in the IAP do not provide sufficient information to identify significant resource values. The maps included with this final rule depict the exact data from the IAP ROD, and do not change any designations or allocations from the 2022 IAP. The BLM believes including maps with the final rule will assist with public understanding of and agency implementation of the regulations, and we do not believe that benefit is outweighed by potential misinterpretation of maps.
- Commenters requested clarity on whether reliance on the maps means the ability to waive, except, and modify the stipulations otherwise applicable under the IAP would still apply. Inclusion of the maps in the final rule does not change the criteria for waivers, exceptions, and modifications adopted in the IAP.
- Commenters noted that maps 2 and 4 do not include the boundaries of the Special Areas themselves and therefore do not provide sufficient information. Commenters recommended that the BLM produce a map that shows the

Special Areas along with the land allocations and restrictions. We agree with this comment. The BLM updated the maps for the final rule by adding the boundaries of the existing Special Areas to the maps from the 2022 IAP that show the current allocations for oil and gas leasing and infrastructure. The maps depict the exact data from the IAP ROD, and do not change any designations or allocations from the 2022 IAP.

• Commenters requested clarity on whether the land use allocations and restrictions in the IAP maps are being considered as maximum protection measures. The allocations and restrictions in the 2022 IAP maps may be considered maximum protection measures, but they do not necessarily represent the full extent of maximum protection measures that may ultimately be required as a result of this rule. The final rule, in § 2361.30(b)(5), requires the BLM to adopt measures to assure maximum protection of significant resource values when designating lands as Special Areas or recognizing the presence of additional significant resource values in existing Special Areas. Once adopted, these measures become part of and supersede inconsistent provisions of the IAP then in effect for the Reserve. The final rule, in § 2361.40(b), also directs the BLM to update maximum protection measures as appropriate thereafter, including in the IAP, lease terms, and other approvals to conduct oil and gas activities.

• Commenters requested clarification on why K–4 areas, such as lagoons, inlets, and associated islands, that are otherwise unavailable for new infrastructure, allow essential pipeline crossings. The IAP decision to allow for essential pipeline crossings in these areas was to ensure that the prohibition on new infrastructure did not completely block development on neighboring Outer Continental Shelf or State Lands. The BLM is not reevaluating IAP decisions as part of this rulemaking process.

• Commenters stated that the Colville River Special Area is much larger than the land use allocations and restricted areas depicted on the maps, and it is not apparent from the proposed rule what maximum protections measures are needed in addition to those depicted on maps 2 and 4 to adequately protect the entire Special Area. Commenters are correct that there are additional protection measures for the Colville River Special Area which are in the Colville River Special Area management plan, which is a separate document from the IAP. The BLM is not adopting or changing management of Special Areas through this rulemaking process. Additional maximum protection measures that may be needed for the Colville River Special Area would be considered and adopted through a Special Area planning process, and/or through a project-level NEPA process for proposed development in the Colville River Special Area.

• Commenters requested that the BLM update the maps to show the level of activities and infrastructure currently in place in the NPR–A. Commenters also suggested that the maps be updated to explain why essential pipeline corridors, which were suggested in the 2020 IAP, are not available. Commenters further recommended the maps be updated to state that the BLM welcomes public participation to designate or expand Special Areas. The BLM declined to change the maps by showing existing levels of activities and infrastructure, discuss essential pipeline corridors, or state that public participation is welcome in Special Area designation decisions because those data are not germane to decisions made in the rule. The BLM's intention with providing maps is to display and help the public understand decisions codified in the rule, which include existing Special Area designations and leasing and infrastructure allocations adopted in the 2022 IAP. The rule does not make decisions regarding existing infrastructure, essential pipeline corridors, or future Special Area designation decisions.

Description of the Final Rule

Section 2361.40 affirms that the management priority within Special Areas is to assure maximum protection of significant resource values, consistent with the requirements of the NPRPA for exploration and production of the Reserve. The section sets forth procedures for fulfilling this duty at each stage in the decision-making process for oil and gas activities in the Reserve.

Section 2361.40(a) requires that the BLM must, to the extent consistent with the NPRPA, take such steps as are necessary to avoid the adverse effects of proposed oil and gas activities on significant resource values in Special Areas. Such steps may include conditioning, delaying action on, or denying proposals for activities.

Section 2361.40(b) directs the BLM to identify and adopt maximum protection measures for each significant resource value that is present in a Special Area when Special Areas are designated, and to update maximum protection measures as appropriate thereafter, including in the IAP, lease terms, and permits to conduct oil and gas activities. Section 2361.40(c) specifies examples of maximum protection measures, including rescheduling activities and use of alternative routes; limiting new infrastructure and roads; limiting extraction of sand and gravel or withdrawal of water; limiting types of vehicles and loadings; limiting types of aircraft in combination with minimum flight altitudes and distances from identified places; and applying special fuel handling procedures.

Section 2361.40(c) provides that oil and gas leasing and authorization of new infrastructure in Special Areas must conform to the land use allocations and restrictions identified on the map published with the final rule, until and unless those allocations are revised by a Special Area designation, amendment, or de-designation process as set forth in § 2361.30. The map shows Special Area designations and oil and gas leasing and new infrastructure allocations adopted in the 2022 IAP. The BLM produced one consolidated map for the final rule that includes multiple data included in the 2022 IAP maps but did not change any of the designations or allocations depicted on the 2022 IAP maps.

The map reflects that approximately 11.8 million acres of the Reserve are open to leasing subject to the terms and conditions detailed in the IAP, while approximately 11 million acres are closed, including most of the Teshekpuk Lake and Utukok River Uplands Special Areas. The map shows that new infrastructure is prohibited on approximately 8.3 million acres of the Reserve, limited to ''essential'' infrastructure on approximately 3.3 million acres, and permitted on approximately 10.8 million acres.

The restrictions identified on the map that would apply to new oil and gas leases and infrastructure are detailed in the 2022 IAP ROD and summarized in the following table.

Stipulation	Objective
K–1—River Setbacks	Minimize the disruption of natural flow patterns and changes to water quality; the loss of spawning, rearing, and over-wintering habitat for fish; and impacts to subsistence cabins and campsites, among other purposes.
K–2—Deep Water Lakes	Minimize the disruption of natural flow patterns and changes to water quality; the loss of spawning, rearing or over-wintering habitat for fish; and the disruption of subsistence activities, among other purposes.
K–4—Kogru River, Dease Inlet, Admiralty Bay, Elson Lagoon, Peard Bay, Wainwright Inlet/Kuk River, and Kasegaluk Lagoon, and their associated islands.	Protect fish and wildlife habitat; preserve air and water quality; and minimize impacts to subsistence activities and historic travel routes on the major coastal waterbodies.
K–5—Coastal Setback Areas	Protect coastal waters and their value as fish and wildlife habitat; minimize hindrance or alteration of caribou movement within caribou coastal insect-relief areas; and prevent impacts to subsistence resources and activities, among other purposes.
K–6—Goose Molting Area	Minimize disturbance to molting geese and loss of goose molting habitat in and around lakes in the Goose Molting Area.
K–8—Brant Survey Area	Minimize the loss or alteration of habitat for, or disturbance of, nesting and brood rearing brant in the Brant Survey Area.
K–9—Teshekpuk Lake Caribou Habitat Area	Minimize disturbance and hindrance of caribou, or alteration of caribou movements through portions of the Teshekpuk Lake Caribou Habitat Area that are essential for all-season use, including calving and rearing, insect-relief, and migration.
K–10—Teshekpuk Lake Caribou Movement Corridor.	Minimize disturbance and hindrance of caribou, or alteration of caribou movements (that are essential for all-season use, including calving and rearing, insect-relief, and migration) in the area extending from the eastern shore of Teshekpuk Lake eastward to the Kogru River.
K–11—Southern Caribou Calving Area	Minimize disturbance and hindrance of caribou, or alteration of caribou movements (that are essential for all-season use, including calving and post calving, and insect-relief) in the area south/southeast of Teshekpuk Lake.
K–12—Colville River Special Area	Prevent or minimize loss of raptor foraging habitat.
K–13—Pik Dunes	Retain unique qualities of the Pik Dunes, including geologic and scenic uniqueness, insect-relief habitat for caribou, and habitat for several uncommon plant species.
K–14—Utukok River Uplands Special Area	Minimize disturbance and hindrance of caribou, or alteration of caribou movements through the Utukok River Uplands Special Area that are essential for all-season use, including calving and rearing, insect-relief, and migration.

Section 2361.40(e) provides for limited circumstances in which certain uses may be authorized on lands within Special Areas that are allocated as closed to leasing or unavailable to new infrastructure. The BLM may issue oil and gas leases in areas closed to leasing if drainage is occurring. The BLM may authorize new roads, pipelines, transmission lines, and other types of infrastructure in unavailable areas if the infrastructure will primarily be used by and provide a benefit to local communities or will support subsistence activities. In those cases, the BLM must adopt measures to assure maximum protection of significant resource values. These measures, which are required by the NPRPA, would be specific to oil and gas activities and would be designed to limit potential impacts on subsistence use. Consistent with this approach, the BLM revised § 2361.50 to make clear that the BLM will ensure reasonable access to and within Special Areas for subsistence uses. The BLM may authorize new permanent infrastructure related to existing oil and gas leases in unavailable areas only if such infrastructure is necessary to comport with the terms of a valid existing lease.

Section 2361.40(f) directs that on lands within Special Areas that are allocated as available for future oil and gas leasing or new infrastructure, the BLM will presume that proposed oil and gas activities should not be permitted unless it can be clearly demonstrated that those activities can be conducted with no or minimal adverse effects on significant resource values, or unless they are necessary to comport with the terms of a valid existing lease. This provision only applies to designated Special Areas within the Reserve, and implements the obligation placed on the BLM by the NPRPA to assure the maximum protection of surface values to the extent consistent with the requirements of the Act. The presumption is based on the BLM's experience managing oil and gas exploration and development in the Reserve that all permitted oil and gas activities within a Special Area will result in significant adverse impacts to surface resources. Therefore, absent the need to honor the terms of a valid existing lease or a demonstration by the leaseholder that activities can be conducted with no or minimal adverse effect, the maximum protection mandate in the NPRPA requires the BLM to adopt this approach.

Section 2361.40(g) sets forth procedures that must be followed when the BLM prepares an environmental analysis of proposed oil and gas leasing, development, or new infrastructure within Special Areas in the Reserve. The BLM must provide meaningful opportunities for public participation, including responding to comments, and consult with federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area. The BLM must evaluate potential adverse effects on significant resource values and consider measures to avoid, minimize, or otherwise mitigate adverse effects to achieve maximum protection of significant resource values. The BLM must also document and consider uncertainty about potential adverse effects on significant resource values. Actions taken to avoid, minimize, or mitigate adverse effects must account for any uncertainty. These procedures are foundational to all NEPA processes the agency undertakes, with increased attention given to assuring maximum protection and long-term resilience of significant resource values, consistent with the NPRPA.

If the proposed project is on lands in a Special Area that are allocated as closed to leasing or unavailable to new infrastructure, then the BLM must document how the proposal falls within one of the exceptions provided for in § 2361.40(e). If the proposed project is

on lands in a Special Area that are allocated as available for future oil and gas leasing or new infrastructure, and the BLM proposes to authorize the project, then the BLM must document the justification for overcoming the presumption in § 2361.40(f). Section 2361.40(g)(4) provides examples of how the presumption might be overcome, such as if the proposed infrastructure is necessary to comport with the terms of a valid existing lease, or if it will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve, and the proposal has been conditioned to avoid, minimize, or otherwise mitigate adverse effects.

If the BLM determines through the environmental analysis that the proposal cannot avoid adverse effects on significant resource values in a Special Area, then the BLM must prepare a Statement of Adverse Effect. The Statement of Adverse Effect must describe the significant resource values that may be adversely affected; the nature, scope, and duration of those adverse effects; measures the BLM evaluated to avoid the adverse effects, including whether any practicable alternatives exist that would have less adverse impact on significant resource values of the Special Area; justification for not requiring those measures; measures the BLM will require to minimize adverse effects on significant resource values of the Special Area; and measures the BLM will require to mitigate any residual adverse effects that cannot be avoided or minimized. The Statement of Adverse Effect would be incorporated into the environmental analysis and provided to the public for review and comment.

Section 2361.40(h) requires that each decision and authorization related to oil and gas activity in the Reserve includes terms and conditions that provide the authorized officer with sufficient authority to fully implement the requirements of this section.

Section 2361.50—Management of Subsistence Uses Within Special Areas

Existing and Proposed Regulations

The BLM proposed this new section to require Special Areas to be managed to protect and support fish and wildlife and their habitats and the associated subsistence use of those areas by rural residents as defined in 50 CFR 100.4, the Department of the Interior's subsistence management regulations for public lands in Alaska. The proposed rule also required the BLM to provide appropriate access to and within Special Areas for subsistence purposes, and explicitly referenced assuring maximum protection of the significant resource values of the Special Areas in the context of providing that access.

Public Comments on § 2361.50

Comment: Commenters expressed concerns about the impacts of oil and gas production in the Reserve on subsistence values and requested the BLM include more information on the collaboration between regulatory agencies, Alaska Native stakeholders, and industry.

BLM Response: The BLM believes the final rule provides meaningful and necessary protections for subsistence values from the impacts of oil and gas production, consistent with the Department of the Interior's subsistence management regulations for public lands in Alaska. For example, the final rule specifies that all Special Area designation and amendment decisions will rely on Indigenous Knowledge and the best available information concerning subsistence uses and resources within the Reserve. It also details procedures for the BLM to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas, which include subsistence values. The final rule requires the BLM to ensure that Special Areas are managed to protect and support fish and wildlife and fish and wildlife habitat and associated subsistence use, and to provide appropriate access to and within Special Areas for subsistence purposes.

Comment: Commenters recommended the rule protect and enhance access for subsistence activities for local communities and ensure these activities do not harm the fragile ecosystem.

BLM Response: The BLM believes the regulations adequately address this comment. The final rule requires the BLM to ensure that Special Areas are managed to protect and support subsistence use of fish and wildlife and their habitats. It further requires that the BLM will provide appropriate access to and within Special Areas for subsistence purposes.

Comment: Comments noted that ANILCA section 811 requires the BLM to provide reasonable access to and within Special Areas for subsistence use of subsistence resources and recommended the final rule reference these provisions. Other commenters recommended that the BLM eliminate paragraph (b) because it is duplicative of ANILCA section 811.

Commenters requested the BLM clarify the differences between ''appropriate access'' as used in the proposed rule versus ''reasonable access'' under ANILCA section 811 and ensure the rule is not inconsistent with ANILCA. Commenters recommended that the BLM clarify the type of access anticipated by this provision. Commenters requested the rule be revised to clarify that the BLM's authority will never be used to restrict access for local subsistence users.

BLM Response: The final rule retains a separate section requiring management of Special Areas to both protect resources for subsistence and protect access for subsistence activities, in order to address these concerns. The BLM has revised the language in this section to refer to ''reasonable access'' instead of ''appropriate access'' for consistency with the language in section 811 of ANILCA.

Comment: Commenters recommended the BLM add language in the final rule that expressly recognizes section 810 of ANILCA mandates and ensures that the final rule reinforces BLM's duties to reduce or eliminate the use of lands that are needed for subsistence.

BLM Response: The BLM added reference to ANILCA in the Authorities section in the final rule, as discussed in more detail in the Statutory Authority section of this preamble.

Comment: Commenters recommended this section include a statement recognizing the ''traditional and ancestral cultural heritage of the Arctic Indigenous people in and around the NPR–A that continue to rely on critical subsistence resources within the NPR–A for their traditional, cultural, and spiritual way of life.''

BLM Response: The BLM believes this comment is reflected in the preamble of the proposed rule, which discussed in detail: the manner in which subsistence harvesting serves as the cornerstone of the traditional relationship of the Iñupiat people with their environment, such that residents of communities in and around the NPR–A rely on subsistence harvests of plant and animal resources for nutrition and their cultural, economic, and social well-being; how activities associated with subsistence provide a link between contemporary Alaska Natives and their ancestors; how traditional Iñupiaq values, with an emphasis on sharing, are embedded within all facets of Iñupiaq society, including subsistence hunting and harvesting traditions; and how the ability to pass on these values through the continuation of traditional subsistence activities in traditional places is essential to maintaining cultural traditions, traditional knowledge, and identity.

Including the recommended language within the regulatory text is

unnecessary as it does not direct specific action the agency must take. However, we appreciate the intent of the comment, and we believe the regulation will benefit subsistence use in the Reserve.

Comment: Commenters requested that the BLM assess Special Areas' significant resource values in a manner that assesses use for the intended purpose, as subsistence harvest may require more stringent impact assessment valuation than public use. For example, more stringent metrics may need to be used to consider consumption advisories and harmful levels of contaminants for subsistence users.

BLM Response: We appreciate that subsistence harvest may require a different management standard than other uses and protection needs of significant resource values. However, this issue is best addressed in the IAP or other process as provided for in § 2361.30 to address management of Special Areas, so that the BLM can consider and adopt site-specific management decisions to adequately protect subsistence use.

Description of the Final Rule

The final rule adopts the proposed rule but deletes from paragraph (b) the phrase ''to the extent consistent with assuring maximum protection of all significant resource values that are found in such areas.'' This phrase was causing confusion and was unnecessary because § 2361.30 requires the BLM to adopt measures to assure maximum protection of significant resource values when designating Special Areas.

Section 2361.60—Co-Stewardship Opportunities in Management of Special Areas and Subsistence

Existing and Proposed Regulations

The BLM proposed this new section to encourage the BLM to explore co-stewardship opportunities for Special Areas, including co-management, collaborative and cooperative management, and tribally led stewardship. The title of this section in the proposed rule was ''Co-stewardship opportunities in Special Areas.'' This provision was designed to further the Department of the Interior's trust relationship and obligation to protect Tribal interests and further the Nation-to-Nation relationship with Tribes. It also was designed to advance the Federal Government's commitment to strengthening the role of Tribal governments in Federal land management. (Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021; Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403, November 15, 2021.)

Public Comments on § 2361.60

Comment: Commenters generally expressed support for the BLM to maintain and strengthen co-stewardship principles in the final rule.

BLM Response: The BLM appreciates commenters' support for the inclusion of co-stewardship in the rule.

Comment: Commenters requested the rule define co-stewardship more clearly.

BLM Response: The term co-stewardship includes a broad range of cooperative efforts and is also defined in BLM guidance. The BLM has incorporated the definition that is used in BLM Permanent Instruction Memorandum No. 2022–011 (Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403).

Comment: Commenters recommended that the rule make clear that it is the Tribe or other partnering entity that determines the appropriate mechanism, such as co-management or co-stewardship.

BLM Response: The rule leaves it to the parties to determine the best co-stewardship approach based on their collaborative efforts. There may be limitations on the types of agreements that are available depending on applicable law for specific situations.

Comment: Commenters recommended strengthening this section of the rule to mandate co-stewardship and provide details on management models that may be adopted, rather than consider it as a potential management approach. Commenters recommended that meaningful requirements should include specificity and timelines for actions by the BLM.

Commenters supported use of the term ''tribally led stewardship.'' Commenters recommended strengthening the provision to fully support tribally led stewardship in alignment with the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters Order 3403.

BLM Response: The BLM is committed to fulfilling our trust relationship and the directives in the Joint Secretarial Order.[9] We expanded the section to specify that co-stewardship may be used for management of both Special Areas and subsistence resources.

Comment: Commenters requested that the BLM create a Governing Commission with a role for Tribes in decision-making over subsistence harvests and other land use management decisions throughout the NPR–A, that gives Tribal delegates true decision-making authority. Commenters provided detailed recommendations for such a Commission.

Commenters requested that the BLM create Indigenous-led stewardship groups that could perform activities such as monitoring harvests and ensuring permit compliance, collecting data on climate change indicators, invasive species control, collecting Traditional Indigenous Knowledge, and monitoring cultural sites.

Commenters recommended that the BLM establish a ''Western Arctic Indigenous Knowledge (IK) Expert Advisory Group'' to aid with co-management and co-stewardship.

BLM Response: This recommendation is outside the scope of the rule as written. These are very interesting concepts for reaffirming the importance of the Reserve to subsistence and the role of Indigenous Knowledge in management and would not require changes to the rule if implemented. The BLM is interested in further discussions about these ideas as we implement the rule.

Comment: Commenters requested the rule distinguish Tribal interests from those of ANCSA corporations. Commenters also recommended that the rule should not authorize co-stewardship with any non-native or non-local organizations.

BLM Response: Co-stewardship is only available to Tribes. Separately, the Bureau may partner with ANCSA corporations, local governments, or organizations as provided by law, which

[9] The Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters Order 3403 directs the Interior and Agriculture Departments, and their component Bureaus and Offices, to manage Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes; that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States' unique trust obligation to federally recognized Indian Tribes and their citizens. The Order enumerates actions the Departments must undertake, such as collaborating with federally recognized Tribes in the co-stewardship of Federal lands and waters, and principles of implementation. The Order is available online at *https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf.*

would not be co-stewardship arrangements but a different type of partnership. The text of the rule has been revised to make this distinction clearer.

Comment: Commenters requested that BLM consultation be more inclusive than just federally recognized Tribes and ANCSA corporations. Commenters proposed a multi-tiered approach to consultation that provides for additional self-governing bodies or cooperatives to be included in the first tier of consultation alongside the narrower categories of federally recognized Tribes and ANCSA corporations. Second and third tiers of consulting parties would include environmental organizations with close ties to the North Slope and inviting the public to informally comment at any time a consultation occurs.

BLM Response: The BLM did not propose a broader approach to consultation in the proposed rule. Rather, it relied on existing law, regulations, and guidance regarding consultation with Tribes and Alaska Native Corporations. Changing those obligations is beyond the scope of this rulemaking, and, because it was not proposed, the final rule cannot adopt such an approach. The BLM works closely with local communities when making management decisions for the Reserve and will continue to engage and communicate with local communities in implementing the rule, independent of formal Tribal consultation efforts.

Description of the Final Rule

In the final rule, the title is revised to read ''Co-stewardship opportunities in management of Special Areas and subsistence.'' The first sentence is also revised to add ''and subsistence resources throughout the NPR–A.'' Those revisions reflect that the BLM will seek co-stewardship opportunities not just in managing Special Areas, but also in managing subsistence resources more broadly. The first sentence is also revised to add ''federally recognized'' to clarify that the BLM engages in co-stewardship with federally recognized Tribes. This section of the final rule fulfills the special trust relationship that the Department of the Interior has with Tribes.

Section 2361.70—Use Authorizations

Existing and Proposed Regulations

Existing § 2361.2 is redesignated to § 2361.70 in the final rule. Existing paragraph (a) states that all use authorizations require approval from the authorized officer ''[e]xcept for petroleum exploration which has been authorized by the Act.'' The proposed rule omitted that exception. The NPRPA of 1976 authorized the Federal Government to conduct exploration activities; those activities did not require approval by an authorized officer. Since the 1980 amendments initiated a competitive oil and gas leasing program, all oil and gas activities are conducted by oil and gas companies and require authorization from a BLM authorized officer.

No substantive changes were proposed to § 2361.70(b).

The proposed rule modified § 2361.70(c) for clarity purposes and updated § 2361.70(d) to recognize the BLM's duties to protect surfaces resources and assure maximum protection of Special Areas' significant resource values in the NPR–A.

Public Comments on § 2361.70

Commenters recommended that the final rule specifically include trapping as a use that does not require a use authorization. Non-commercial trapping would not require a use authorization under the rule. The examples of activities exempted in § 2361.70(b) are not comprehensive, as indicated by ''*e.g.*'' preceding the lists. The BLM declined to change the final rule, as trapping for recreation and/or subsistence use is already excepted from requiring a use authorization by this section of the rule.

Description of the Final Rule

In paragraph (b), the phrase ''pursuant to §§ 2361.1 and 2361.2 or otherwise'' is deleted as unnecessary. Otherwise, the final rule adopts the proposed rule without changes.

Section 2361.80—Unauthorized Use and Occupancy

Existing and Proposed Regulations

Existing § 2361.3 is redesignated to § 2361.80 in the final rule. No substantive changes were proposed to this section.

Public Comments on § 2361.80

No substantive comments were received specific to this section.

Description of the Final Rule

The final rule adopts the section as proposed, which provides that any person who violates or fails to comply with regulations of this subpart is subject to prosecution, including trespass and liability for damages, pursuant to the appropriate laws.

V. Procedural Matters

Regulatory Planning and Review (Executive Orders (E.O.) 12866, 13563 and 14094)

E.O. 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) will review all significant regulatory actions. OIRA has determined that this rule is significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

The rule revises the framework for designating and assuring maximum protection of Special Areas and associated values and will protect and enhance access for subsistence activities throughout the NPR–A. It also incorporates aspects of the 2022 IAP. The rule will have no effect on currently authorized oil and gas operations in the NPR–A.

BLM's economic analysis concludes that most of the provisions of the final rule are editorial, administrative, or otherwise could have no quantifiable economic cost or benefit. There are two changes that may generate economic costs or benefits. First, the change requiring evaluation of the NPR–A for new Special Areas and associated values every 10 years (or sooner if the authorized officer determines that changing conditions warrant) could generate time and real costs related to public engagement. These can be minimized by combining this process with the existing process for revising the IAP. Second, the rule establishes the current management strategy governing oil and gas activity in Special Areas of the NPR–A in regulation. The current management strategy is described in the 2022 IAP ROD and is the baseline for the economic analysis. Compared to the baseline, there is either no or minimal change in oil and gas management. Future changes to the framework and

process for management of oil and gas activities in relation to Special Areas and surface resources will require regulatory action; changes to management of specific Special Areas or other areas in the NPR–A will be addressed in the process set out in the rule or through an IAP planning revision.

The BLM estimates the annual effect on the economy of the regulatory changes will be less than $200 million and will not 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 or tribal governments or communities. As such, the rule is not significant under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094. Pursuant to E.O. 12866, the BLM is required to conduct an economic analysis in accordance with section 6(a)(3)(B) of that Executive order. The BLM has complied with that directive.

Public Comments on Regulatory Review

Comment: The BLM received comments that the proposed rule would substantively change the BLM's management of the NPR–A, create uncertainty that may lead to reduced investment and economic opportunities, and does not contain merely administrative and procedural changes. The comment suggests that the BLM failed to comply with E.O. 12866, E.O. 13563, and E.O. 13132. The comment requests a full economic analysis, a federalism assessment, and an EIS.

BLM Response: As described in the BLM's economic analysis, this rule incorporates aspects of the 2022 IAP, which is the current management framework for the NPR–A and forms the baseline for the economic analysis. Compared to the baseline, there is either no or minimal change in oil and gas management. The rule will not alter the terms of existing leases and will have no effect on currently authorized oil and gas operations in the NPR–A. The rule establishes a framework for future decision-making processes that would result in management changes, such as requiring the BLM to maintain an IAP, which guides on-the-ground management and which could be updated in the future through a NEPA process, and establishing the process by which Special Areas would be designated, de-designated, and modified in the future. The BLM conducted an economic analysis for the rule consistent with the requirements under E.O. 12866. Comments requesting a federalism assessment and an EIS are responded to in the relevant areas that follow.

Comment: The BLM received comments stating: ''A proposed regulation is economically significant if it will have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product). For economically significant rules, a more rigorous cost-benefit analysis must be prepared pursuant to section 6(a)(3)(C).'' Comments requested BLM provide more background information on how a conclusion of an economic impact of less than $200 million per year was reached and requested participation of the NPR–A working group to provide a more rigorous cost benefit analysis.

BLM Response: The BLM reviewed the provisions of the rule and disclosed the potential impacts of the action relative to the existing management framework for the NPR–A. BLM's economic analysis concludes that most of the provisions of the final rule are editorial, administrative, or otherwise could have no quantifiable economic cost or benefit.

Comment: The BLM received comments expressing concern that neither the 2022 NPR–A IAP ROD nor the proposed rule's economic analysis accounted for the likely recoverable oil within the NPR–A and therefore potentially reduced the impact from the rule on the economic outlook from the NPR–A.

BLM Response: The 2022 NPR–A IAP ROD incorporates the analysis in the 2020 Final Environmental Impact Statement, which evaluated potential development in detail. The rule's use of the IAP as a baseline did not affect the economic analysis of potential impacts and the overall conclusion that the rule will not have substantial impacts on expected levels of oil and gas development in the NPR–A.

Comment: The BLM received comments stating that the economic analysis provided is ''insufficient and omits any analysis of the effects of regulatory provisions that will have economic impacts, such as the proposed presumption against permitting activities in Special Areas.'' Comments requested that if the BLM decides to proceed with the proposed rule, it must first prepare for public review and comment the proper analysis under section 6(a)(3)(C) of E.O. 12866.

BLM Response: The BLM's economic analysis fulfills the requirements of E.O. 12866 as amended. It discusses the incremental effect of the presumption that new leasing and infrastructure should not be permitted unless specific information clearly demonstrates they can be conducted with no or minimal adverse effects on significant resource values relative to the statutory mandate to assure maximum protection of Special Areas. Compared to the baseline for the analysis, the rule will not affect management of existing leases or areas identified as closed to leasing or new infrastructure. For a small portion of existing Special Areas that are not leased and are designated as open to leasing or available for new infrastructure, the rule will have a nominal or minimal effect on management of oil and gas activity. The effect will be nominal if the same leasing stipulations are imposed under the rule that would be imposed under the baseline. Even if the stipulations are more restrictive, the effect is expected to be minimal due to the low revealed demand for leasing in these areas. In the event there is a minimal change in leasing stipulations of the areas considered open for leasing, the welfare effects include those associated with the change in oil and gas production as well as the increased protection of the ecological, subsistence, cultural and other significant resource values.

Comment: The BLM received comments stating that the presumption that no additional leasing, development, and/or infrastructure within Special Areas will be allowed, paired with the proposed discretion of the authorized officer to establish interim/emergency protections on lands considered for Special Areas, is a significant regulatory action. As such, the economic analysis is insufficient to determine a significant regulatory action described in E.O. 12866 section 3(f)(1), as amended by E.O. 14094. The commenter asserts that the BLM's economic analysis fails to even acknowledge this fact.

BLM Response: The BLM's economic analysis discusses the incremental effect of the presumption that new leasing and infrastructure should not be permitted unless specific information clearly demonstrates that the resulting activities can be conducted with no or minimal adverse effects on significant resource values relative to the statutory mandate to assure maximum protection of Special Areas. See the BLM's response to a similar comment immediately preceding this one.

Comment: The BLM received comments stating that the scale of impacts could exceed the $200 million threshold of E.O. 12866. Commenters provided information supporting this statement including comparisons to the Greater Mooses Tooth 1 development that they state would likely exceed $1 billion in today's dollars. They provide

further information on costs for Willow and Pikka and state those projects would be in the multi-billion-dollar range. They use these statements to request that the BLM conduct a thorough economic analysis.

BLM Response: The commenters did not provide quantitative information establishing that the rule would increase costs more than $200 million beyond the costs involved in complying with the existing regulations. The rule will have no effect on currently authorized oil and gas operations in the NPR–A, like Greater Mooses Tooth 1. In addition, it does not affect operations on non-BLM lands or on operations outside of the NPR–A, like Pikka. Currently, the NPR–A is managed according to the 2022 IAP ROD. The rule will alter the procedural steps needed to change management of oil and gas activity within Special Areas in the future, though it will still require a public process, consultation, and appropriate NEPA analysis. The BLM's economic analysis for the rule discusses that incremental change.

Comment: The BLM received comments stating: ''It is unclear how BLM economic analysis considered the Reasonably Foreseeable Development Scenario (Appendix B of the NPR–A IAP). The proposed rule and continue[d] expansion of Special Areas would not allow for the scenarios described in the IAP but does not discuss the economic impacts from those changes/restrictions. Is BLM assuming that under this proposed rule that there would be no change to the reasonably foreseeable development scenario and that the proposed rule would allow for each of the development scenarios described in NPR–A IAP appendix B? If not, then potential impacts from each development scenario should be fully evaluated.'' [10]

BLM Response: We believe that the commenter is referencing the Final Environmental Impact Statement for the 2020 NPR–A IAP, issued in June 2020, which was the analysis used for the BLM's 2022 IAP ROD. This rule incorporates aspects of the 2022 IAP ROD. The economic analysis for this rule concludes that most of the provisions of the final rule are editorial, administrative, or otherwise have no economic cost or benefit. The BLM is not required to analyze alternatives that were posed and analyzed in previous planning efforts.

[10] The Reasonably Foreseeable Development Scenario is defined in appendix B of the 2020 Final IAP/EIS, available at *https://eplanning.blm.gov/public_projects/117408/200284263/20020421/250026625/Volume%202_Appendices%20B-Y.pdf.*

BLM notes that public commenters raised potential distributional impacts to specific communities. BLM expects limited impacts of this rule relative to the 2022 IAP baseline. However, to clarify the impacts to management of these areas when considering future leases or infrastructure, the economic analysis refers to the EIS of the 2022 IAP for a high-level summary of potential impacts to those communities from the broader scope of the IAP. That EIS addressed potential incremental effects to Iñupiat residents of the North Slope Borough and other communities of the North Slope.

Comment: The BLM received comments stating the position that the BLM should use the existing regulations rather than the 2022 IAP ROD as the baseline to compare to the proposed rule. They state that ''the appropriate baseline for this new Proposed Rule is the rule it replaces. The rule being replaced does not presume that leases or surface infrastructure in Special Areas cannot be permitted. The appropriate baseline for economic analysis is clear when the difference between adopting the Proposed Rule and not adopting the Proposed Rule is considered.''

BLM Response: Concerning the commenter's suggestion that the BLM did not use the appropriate baseline, OMB Circular A–4 (September 17, 2003) states that a baseline ''normally will be a 'no action' baseline: what the world will be like if the proposed rule is not adopted.'' If the BLM did not issue this rule, the 2022 IAP ROD would be the prevailing management framework for the NPR–A.

Comment: The BLM received comments stating that while the proposed rule ''argues that there is little interest in leasing of the Special Areas, BLM's own Table 3 in the Economic Analysis summarizes that, since 2011, for 5 out of 9 years, there has been greater leasing in the Special Areas than the rest of the NPRA.'' Commenters asserted that a proposed rule that presumes against development would likely result in decreased oil and gas activity, thereby causing economic impacts that should be acknowledged in the Economic Analysis.

BLM Response: There is no clear evidence of large, unmet demand for oil and gas leases inside current Special Areas (SAs). Three Special Areas (Peard Bay SA, Kasegaluk Lagoon SA, and Utukok River Uplands SA) are of low oil and gas potential and far away from existing infrastructure. As a result, these have been unaffected by past oil and gas activity. No leases have ever been offered or issued in the Kasegaluk Lagoon SA. Lease sales in 2013 and 2017 offered parcels in the Utukok River Uplands SA, but none were acquired. In 2004, one lease was acquired that included a very small overlap with the Peard Bay SA. That lease was relinquished in 2010 with no oil and gas activity recorded. In 2016, there were 933 acres inside the Peard Bay SA offered for lease, none were acquired. Meanwhile, two Special Areas (Colville River SA and Teshekpuk Lake SA) have seen substantial interest in oil and gas development, but large portions of those areas have already been leased or have been offered for lease and not acquired. Approximately 52.5 percent (1,282,050 acres) and 90.3 percent (3,292,338 acres) of the Colville River SA and Teshekpuk Lake SA, respectively, have already been offered for lease at least once since creation of the NPR–A. Since 2011, approximately 12.8 percent (313,000 acres) and 9.9 percent (361,000 acres) within the Colville River SA and the Teshekpuk Lake SA, respectively, were leased.

Comment: The BLM received comments stating that the economic analysis did not consider concepts that commenters suggested should be considered, such as: restricted production; whether royalty receipts would exceed the risks posed by projected oil and gas development; and what funds would be necessary if an oil and gas company fails to plug the wells or reclaim the land, or to clean up oil spills. Comments also suggested that IAPs should incorporate a cost-benefit analysis for future oil and gas leasing.

BLM Response: As described in the BLM's economic analysis, this rule incorporates aspects of the 2022 IAP, which is the current management framework for the NPR–A and forms the baseline for the economic analysis. Compared to the baseline, there is either no or minimal change in oil and gas management. The rule will alter the procedural steps needed to change management of oil and gas activity within Special Areas in the future, though it will still require a public process, consultation, and appropriate NEPA analysis. The rule will not alter the terms of existing leases and will have no effect on currently authorized oil and gas operations in the NPR–A.

Regarding the comments that IAPs should incorporate a cost-benefit analysis, the NEPA process that will occur when changes are made to an IAP does not require formal cost-benefit analysis, but it may examine socio-economic effects of the action, as appropriate. In addition, any future changes to management that require regulatory action are subject to

analytical requirements under E.O. 12866.

Comment: The BLM received comments stating: ''While the SCC [social cost of carbon] was excluded deliberately from the 2020 IAP/EIS, the proposed rule should explicitly implement SCC into its present and future analysis to promote informed, accurate decision making in the NPR–A.'' Commenters stated that the 2020 IAP/EIS correctly states that NEPA does not require a cost-benefit analysis and only requires a consideration of economic and social effects but that they ''believe both the public and future agency decision makers lack the information that could be provided by a robust cost-benefit analysis to make wise choices in this particularly pristine, remote, and vulnerable region. For instance, because the proposed rule does not require the inclusion of SCC in future environmental documents within the NPR–A, it will be difficult to determine the true break-even point of investment. Instead, agency decision makers and the public may miss opportunities to consider how renewable energy alternatives, either in the [NPR–A] or elsewhere, could outcompete the energy output of an oil project, all with minimal SCC.''

BLM Response: As discussed in section III(E) of this preamble above, the rule is focused on addressing impacts to surface values of the Reserve and consolidating and implementing the BLM's statutory obligations, primarily those in the NPRPA, to protect those values when authorizing oil and gas leasing and production. Thus, this rule does not analyze or specifically consider the climate impacts of oil and gas development in the Reserve, which is more appropriately addressed in the IAP or when conducting NEPA analysis for oil and gas leasing and production activities.

Regulatory Flexibility Act

The Secretary of the Interior certifies that this final rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The BLM is not required to prepare a Final Regulatory Flexibility Analysis with this final rule.

The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act. The size standards can be found in 13 CFR 121.201. For a specific industry identified by the North American Industry Classification System (NAICS), small entities are defined by the SBA as an individual, limited partnership, or small company considered at ''arm's length'' from the control of any parent company, which meet certain size standards.

The final rule is most likely to affect business currently operating in the oil and gas sector in the NPR–A. There are eight active lessees in NPR–A. These eight companies (and information about the companies obtained from the public domain) include: The Aklaq Company, Alaska (an Alaska-registered company); Borealis Alaska Oil, Inc (acquired by Pantheon Resources, a United Kingdom-based oil and gas company); Oil Search Alaska, LLC (a subsidiary of Santos Limited, a large Australian oil company); Armstrong Oil and Gas, Inc (a Colorado-based exploration company); North Slope Exploration, LLC (managed by Armstrong Oil and Gas, Inc.); Repsol E&P USA Inc (a subsidiary of Repsol, a large Spanish oil company); ConocoPhillips Alaska, Inc (a subsidiary of ConocoPhillips, a large American multinational corporation); and Emerald House LLC (owned by XCD Energy Ltd, an Australian-based oil company).

SBA size standards identify small business in the crude petroleum extraction (NAICS 211120) and natural gas extraction (NAICS 211130) industries to be those with 1,250 or fewer employees. Of the companies identified, based on information that BLM was able to obtain from the public domain, the BLM believes that the Aklaq Company Alaska, Borealis Alaska Oil Inc, Armstrong and North Slope Exploration, and Emerald House LLC meet the SBA's criteria of a small business. The BLM has determined that this is less than a substantial number of small entities potentially affected.

In addition to small business, the RFA also requires consideration of impacts on small governmental jurisdictions. There are four communities within the Reserve that are likely considered small government jurisdictions: Wainwright, Utqiagvik, Atqasuk, and Nuiqsut. However, this rule will not override the terms or status of existing leases, will not affect authorized operations, and does not impose direct regulatory cost on any business or community.

Further, this rule does not change management decisions regarding future leasing and oil and gas development in areas outside Special Areas, or within Special Areas where leasing or infrastructure is already restricted. In the remaining areas, the impact on future leasing is uncertain but expected to be nominal or minimal for the reasons identified above. Therefore, this rule will not have significant economic impact on small businesses holding these leases or small government jurisdictions in the Reserve.

Comment: The BLM received comments expressing the concern that development of the NPR–A provides a direct economic benefit to the regional government, local villages, and the State of Alaska and that a reduction in production from the NPR–A would mean less revenue to provide services to Alaskans. Commenters stated that the economic analysis fails to consider the impact to local communities of losing future revenues and that they perceive that the analysis does not consider the ''social implications of eliminating or dramatically restricting future development in the NPR–A that would remove jobs and a substantial portion of the tax base''.

BLM Response: The approval of existing development and the terms of existing leases are not affected by the final rule, nor does the rule eliminate or drastically restrict future development in the NPR–A. As discussed in more detail above and in the economic analysis, the BLM does not anticipate substantial impacts on leasing and development. Future development is already subject to conditions in the IAP, the BLM has not received significant interest in new leasing in response to lands offered in sales, and the costs associated with additional protective measures consistent with current lease terms would not impose a significant new cost on operators.

Comment: The BLM received comments expressing the opinion that the BLM constrained the economic analysis to eight active lessees in the NPR–A and did not include ''small government jurisdictions'' or other small entities that operate within the NPR–A. Commenters stated that the North Slope Borough and the four villages located within the NPR–A (Utqiagvik, Wainwright, Atqasuk, and Nuiqsut), and the Inupiat Community of the Arctic Slope all qualify as small government jurisdictions, and they requested these entities be included in the economic analysis. Several of these comments also referenced the benefits it perceives these entities receive from development of the NPR–A, including payments to the Mitigation Grant program, employment opportunities, and development of infrastructure.

BLM Response: The BLM recognizes the government jurisdictions should also be considered under the Regulatory Flexibility Act and has updated the economic analysis accordingly. However, while these small entities exist, the rule does not affect existing

leases and does not prevent future oil and gas development in the NPR–A. As such, the rule is not expected to significantly affect these communities any differently that the current management of the NPR–A.

Congressional Review Act

Based upon the economic analysis, this final rule does not meet the criteria under 5 U.S.C. 804(2), the Congressional Review Act. This rule will not:

(a) Have an annual effect on the economy of $100 million or more.

(b) Cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign based enterprises.

Unfunded Mandates Reform Act (UMRA)

The final rule will not have a significant or unique effect on State, local, or Tribal governments or the private sector. The final rule contains no requirements that will apply to State, local, or Tribal governments. The costs that the final rule will impose on the private sector are below the monetary threshold established at 2 U.S.C. 1532(a). A statement containing the information required by UMRA (2 U.S.C. 1531 *et seq.*) is therefore not required for the final rule. This final rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments, because it contains no requirements that apply to such governments, nor does it impose obligations upon them.

Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under E.O. 12630. Section 2(a) of E.O. 12630 identifies policies that do not have takings implications, such as those that abolish regulations, discontinue governmental programs, or modify regulations in a manner that lessens interference with the use of private property. The rule will not interfere with private property. A takings implication assessment is not required.

Federalism (E.O. 13132)

Under the criteria in section 3 of E.O. 13132, this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism impact statement is not required.

The final rule does 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 levels of government. It does not apply to States or local governments or State or local governmental entities. The final rule will affect the relationship between operators, lessees, and the BLM, but it does not directly impact the States. Therefore, in accordance with E.O. 13132, the BLM has determined that this final rule does not have sufficient federalism implications to warrant preparation of a federalism assessment.

Comment: Commenters question the BLM's statement that the rule does not apply to States or local governments and clarifies that the rule only ''affects the relationship between operators and lessees in the NPR–A and their relationships with the BLM.'' Commenters further believe that the area should be managed in a ''joint comprehensive management plan'' under the authority granted to Alaska. The commenter stated that Alaska's resource and regulatory agencies should be ''considered superior to any proposed Federal process and have final authority on any changes or rulemaking that would conflict with existing state programs.'' Commenters suggest that local counties and cities should have the ultimate decision on what happens on the land. The BLM and other stakeholders should provide input, but the State of Alaska and the residents should make the final decision.

BLM Response: While commenters take issue with the management framework Congress established for the Reserve, this is beyond the BLM's authority to address. Further, as discussed in the section III(C) above, the BLM did meet with the State of Alaska regarding the rule and will engage with State and local government agencies in the implementation of this rule, particularly during the development of future IAP and project-specific NEPA processes.

Comment: The BLM received comments that stated the position the proposed rule warrants preparation of a federalism assessment. The commenter recommended that the BLM undertake a federalism assessment to evaluate the impact of the proposed rule on the State's powers. For example, § 2361.50(a) of the proposed rule stated that the BLM ''will ensure that Special Areas are managed to protect and support fish and wildlife.'' The commenter argued that this ''direction conflicts with the State's broad trustee and police powers over fish and wildlife within [its] borders.'' The commenter opined that the BLM therefore needs to prepare a federalism assessment consistent with E.O. 13132. The commenter disagrees with the BLM's assertion that the proposed rule ''would 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.'' Rather, the commenter argued that because the Federal Government is required to pay 50 percent of all receipts from ''sales, rentals, bonuses, and royalties on leases'' in the NPR–A to the State of Alaska, by revising and creating procedures and requirements for exploration, development, and production in the NPR–A, ''the Proposed Rule has a direct impact on these revenues and, thus, the interests of the State and North Slope Borough. Neither the State nor the North Slope Borough were consulted on the Proposed Rule as E.O. 13132 requires. BLM should conduct the necessary consultation with States and local governments before proceeding with a revised version of the Proposed Rule.''

BLM Response: E.O. 13132 generally prohibits Federal agencies from promulgating rules that might have a substantial direct effect on States or local governments, on the relationship between Federal and State governments, or on the distribution of power and responsibilities among the various levels of government, without meeting certain conditions, such as consulting with elected State and local government officials early in the process to the extent practicable. In particular, administrative rules may not create substantial direct compliance costs for State or local governments that are not otherwise required by statute, and may not expressly or impliedly preempt State law, without Federal agencies undertaking additional processes. While this rule does modify the management approach the BLM will take in the Reserve, the regulations only affect oil and gas activity on Federal public lands; nothing in the rule preempts State law or requires State or local governments to comply with specific provisions. As a result, a federalism summary impact statement is not required. Further, as discussed in the section III(c) above, the BLM did engage with the State of Alaska and the North Slope Borough during the rulemaking process.

Civil Justice Reform (E.O. 12988)

This final rule complies with the requirements of E.O. 12988. More specifically, this final rule:

a. 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; and

b. Meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)

The BLM endeavors to maintain and 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 possible effects of the rule on federally recognized Indian Tribes under E.O. 13175, the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), and 512 Departmental Manual 2, as part of this rulemaking process and determined that the rule has tribal implications.

In conformance with the Secretary's policy on tribal consultation and 512 Departmental Manual 4–7, on August 25, 2023, the BLM invited via mail 45 Tribes and 30 Alaska Native Corporations to engage in consultation regarding the proposed NPR–A rule. The BLM engaged in Tribal consultation on the decisions and resulting actions related to the IAP, including the 2022 IAP ROD. This regulation incorporates those IAP decisions and also updates a 50-year-old framework to reflect the IAP and lessons learned through preparing IAPs. Prior consultation on the specific procedural changes that were being proposed provided the BLM with valuable feedback on how the regulatory language, in particular, might be improved to better reflect Tribal interests. The BLM felt that it would be more productive to seek new feedback after providing the proposal in the form of a proposed regulation, which necessarily differs from the process, content, and form of a management plan.

The BLM has continued to offer consultation to Tribes and Alaska Native Corporations that it determined would be most likely to have substantial direct effects from the rule, including the Native Village of Atqasuk, Atqasuk Corporation, Village of Wainwright, Olgoonik Corporation, Native Village of Nuiqsut, Kuupik Corporation, Native Village of Barrow, UIC, ICAS, and ASRC. BLM Leadership and State and Field Office staff met with the Mayor of Atqasuk on October 31, Native Village of Nuiqsut on November 1, ICAS on November 3 and February 6, Village of Wainwright on November 21, Olgoonik Corporation on December 19, ASRC on December 21, and Kuukpik Corporation on February 1. In addition, staff met and discussed the proposed rule with the NPR–A Working Group (consisting of representatives from North Slope local governments, Native corporations, and tribal entities, *https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/alaska/NPR-A/npr-a_working_group*) on September 26, October 17, and December 1. We also held in-person public meetings in Nuiqsut, Utqiagvik, and Wainwright where verbal comment was recorded, along with three informational sessions—one in Anchorage and two virtual. The BLM will continue to engage in consultation with Tribes and Alaska Native Corporations after the final rule is published.

As detailed in the public engagement section above, the BLM received requests, including from Tribes and Alaska Native Corporations, to extend the 60-day public comment period for the proposed rule for an additional 90 days, which would have resulted in a 150-day (5-month) comment period. A 5-month comment period far exceeds the typical duration for rulemaking comment periods. While the BLM was unable to grant the requested extension, we did extend the comment period for an additional 30 days, resulting in a 90-day comment period for the proposed rule. While the comment period for the proposed rule overlapped with the comment period on the Draft Supplemental EIS for the Coastal Plain, the Coastal Plain comment period was 60 days and ended one month before the close of the comment period on the proposed rule.

During consultation, the Tribes and Alaska Native Corporations raised similar concerns as they submitted during the comment period of the rule, which are addressed in the responses to comment above. Notable concerns raised during consultation include the potential for loss of revenue from oil and gas development, the need for protections to sustain tribal members' subsistence way of life, ensuring adequate consultation going forward, and ensuring that the rule allows access for communities and continued economic development opportunities for community members. Changes made in response to this input, include: revising sections of the rule that relate to consultation to clarify that an economic tie to a Special Area is a basis for consultation; ensuring consultation is consistently required throughout the processes for designating, de-designating and modifying Special Areas and evaluating proposed oil and gas activities in Special Areas; adding subsistence as an area for co-stewardship across the Reserve, broadening the language in the section on co-stewardship beyond opportunities in Special Areas; and revising the language in the section on subsistence to provide for reasonable access, to be consistent with ANILCA, rather than using the term ''appropriate'' access.

Paperwork Reduction Act (PRA)

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 through 3521) generally provides that an agency may not conduct or sponsor, and not withstanding any other provision of law a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. See 44 U.S.C. 3502(3); 5 CFR 1320.3(c) and (k).

This final rule contains an information-collection requirement that is subject to review by OMB under the PRA. This information-collection is located in § 2361.30(a)(4). One of the key principles of the final rule is the inclusion of stakeholder and the public notice and participation in the designation and removal of lands to be included in an SA. To help ensure that the BLM receives the information needed to inform its decision to include lands in an SA, § 2361.30(a)(4) includes a list of criteria that should be addressed when a member of the public recommends lands for such a designation. This information includes the following:

- The size and location of the recommended lands;
- The significant subsistence, recreational, fish and wildlife, historical, or scenic resource values that are present within or supported by the recommended lands;
- Measures that may be necessary to assure maximum protection of those values; and
- Any other pertinent information.

The BLM has submitted a request to OMB for the information-collection requirement contained in this final rule. The estimated burden associated with this information-collection is outlined below.

OMB Control Number: 1004–0221.

Title of Collection: Management and Protection of the National Petroleum Reserve in Alaska—Recommendations for Special Reserve Areas (§ 2361.30).

Form Number: None.

Type of Review: New collection (Request for new OMB Control Number).

Respondents/Affected Public: Person(s) who wish to recommend lands to be designated as a Special Area in the NPR–A.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion; every 5 years.

Number of Respondents: 100.

Annual Responses: 100.

Estimated Average Response time: 15 hours.

Annual Burden Hours: 1,500.

Annual Burden Cost: None.

If you want to comment on the information-collection requirements in this final rule, please send your comments and suggestions on this information-collection request within 30 days of publication of this final rule in the **Federal Register** to OMB by going to *www.reginfo.gov.* Click on the link, ''Currently under Review—Open for Public Comments.''

National Environmental Policy Act

This final rule meets the criteria set forth at 43 CFR 46.210(i) for a Departmental categorical exclusion in that this final rule is ''of an administrative, financial, legal, technical, or procedural nature.'' They do not involve any of the extraordinary circumstances listed in 43 CFR 46.215.

Public Comments on NEPA: The BLM received a number of comments objected to the BLM's intent to rely on a categorical exclusion to comply with NEPA and requested that the BLM prepare an environmental analysis, including a range of alternatives for certain aspects of the rule, in order to comply with NEPA.

BLM Response: The BLM disagrees with comments that environmental analysis under NEPA is required, or that extraordinary circumstances apply to this rulemaking. The BLM has determined that the categorical exclusion set out at 43 CFR 46.210(i) applies to this rulemaking. That provision excludes from NEPA analysis and review actions that are ''of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.'' That categorical exclusion applies because the final rule sets out a framework for managing oil and gas activity in the Reserve, but is not self-executing, meaning that it does not itself make substantive changes on the ground and does not restrict the BLM's discretion to undertake or authorize future on-the-ground action without new future decisions that implement the rule. As such, the rule fits within the categorical exclusion for rules, regulations, or policies to establish bureau-wide administrative procedures, program processes, or instructions. This final rule does not authorize any project or other on-the-ground activity and therefore will have no significant individual or cumulative effects on the quality of the human environment. The environmental effects of future actions undertaken to implement this rule are too speculative or conjectural to be meaningfully evaluated at this time but will be subject to the appropriate level of NEPA review prior to making a decision. The BLM has also determined that none of the extraordinary circumstances identified at 43 CFR 46.215 apply to this rulemaking. This categorical exclusion documentation is provided in docket BLM–2023–0006 on *regulations.gov*.

Effects on the Nation's Energy Supply (E.O. 13211)

Under E.O. 13211, agencies are required to prepare and submit to OMB a Statement of Energy Effects for significant energy actions. This statement is to include a detailed statement of ''any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies)'' for the action and reasonable alternatives and their effects.

Section 4(b) of E.O. 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, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under E.O. 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) that is designated by OIRA as a significant energy action.''

This final rule will not have a significant effect on the Nation's energy supply. It restates existing statutory standards and establishes a procedural framework for ensuring that the BLM meets those standards. It also codifies land use restrictions that already are legally binding in the 2022 IAP ROD. Further, the final rule presumes, in final § 2361.40(c), that oil and gas leasing or infrastructure on lands allocated as available for such activities ''should not be permitted unless specific information available to the Bureau clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values.'' That presumption merely implements the BLM's existing statutory duty to assure maximum protection of the significant resource values in Special Areas to the extent consistent with the requirements of this Act for the exploration and production of the Reserve. 42 U.S.C. 6504(a). The presumption is consistent with this statutory direction and limited by it, such that the actions that the BLM may take under this framework to assure maximum protection are within the same scope as those that could have been taken without the framework set out in the rule. As discussed in more detail in the regulatory impact analysis (RIA), based on the status of existing leases, most recent lease sales, and the fact that the rule will not alter the terms of approved leases or approved development, the BLM does not expect the rule to have a substantial impact on exploration and production from the Reserve. Therefore, the final rule will not change the supply, distribution, or use of energy.

Public Comments on E.O. 13211

The BLM received comments that the proposed rule constitutes a significant energy action as it would affect the supply, distribution, and use of energy, and thereby fails to comply with E.O. 13211. One commenter specified that ''actions taken to restrict and limit oil and gas development, access to the NPR–A for oil and gas development, and codification of BLM's authority to restrict, deny, and minimize oil and gas development in the NPR–A would logically have an impact on the Nation's energy supply.'' Commenters also asserted that oil production from the NPR–A will extend the economic lifetime of the Trans-Alaska Pipeline and enable domestic oil to reach the rest of the United States. For the reasons stated above, the rule will not change the supply, distribution, or use of energy.

Other commenters cited an estimate from the U.S. Geological Survey that there are 8.7 billion barrels of undiscovered oil in the NPR–A, an important reserve created specifically by Congress for energy production. Commenters added that '' . . . by denying development in the region,

BLM is denying the State of Alaska, and the U.S., billions of dollars in revenue.'' Furthermore, comments stated that BLM's proposed plan will also deny American consumers affordable and reliable energy at a time of persistently high fuel prices; the rule ''undermines the reality that oil produced from the NPR–A can displace imports and will increase the likelihood of imports from less environmentally regulated regions of the world.''

These comments misunderstand the rule; it does not prohibit exploration for and development of oil and gas in the Reserve. Rather, it allows oil- and gas-related activities to continue consistent with the NPRPA by establishing procedures for the BLM to mitigate reasonably foreseeable and significantly adverse effects of proposed oil and gas activities on the surface resources of the Reserve and to provide maximum protection for surface values within Special Areas for proposed oil and gas activities.

The BLM received comments discussing the Russian invasion of Ukraine and the importance of energy security and strengthening the supply chain for the U.S. and its allies. Commenters indicated that ''as one of the largest exporters of petroleum in the world, the United States' ability to facilitate global diversification from Russian energy can only be enhanced by NPR–A development.'' Again, these comments misunderstand the rule; it does not prohibit exploration for and development of oil and gas in the Reserve.

List of Subjects in 43 CFR Part 2360

Alaska, Oil and gas activity, Protection of surface resources, Special areas, Tribes.

Delegation of Signing Authority

This action by the Principal Deputy Assistant Secretary is taken pursuant to an existing delegation of authority.

Steven H. Feldgus,

Principal Deputy Assistant Secretary, Land and Minerals Management.

■ For the reasons set out in the preamble, the Bureau of Land Management revises 43 CFR part 2360 to read as follows:

PART 2360—NATIONAL PETROLEUM RESERVE IN ALASKA

Subpart 2361—Management and Protection of the National Petroleum Reserve in Alaska

Sec.

2361.1 Purpose.
2361.3 Authority.
2361.4 Responsibility.
2361.5 Definitions.
2361.6 Effect of law.
2361.7 Severability.
2361.10 Protection of surface resources.
2361.20 Existing Special Areas.
2361.30 Special Areas designation and amendment process.
2361.40 Management of oil and gas activities in Special Areas.
2361.50 Management of subsistence uses within Special Areas.
2361.60 Co-stewardship opportunities in management of Special Areas and subsistence.
2361.70 Use authorizations.
2361.80 Unauthorized use and occupancy.

Subpart 2362 [Reserved]

Authority: 42 U.S.C. 6501 *et seq.* and 43 U.S.C. 1701 *et seq.*

PART 2360—NATIONAL PETROLEUM RESERVE IN ALASKA

Subpart 2361—Management and Protection of the National Petroleum Reserve in Alaska

§ 2361.1 Purpose.

The purpose of the regulations in this subpart is to provide procedures for protection and control of the environmental, fish and wildlife, and historical and scenic values of the National Petroleum Reserve in Alaska from significantly adverse effects of oil and gas activities on the surface resources of the Reserve and assuring maximum protection of significant resource values in Special Areas pursuant to and consistent with the provisions of the Naval Petroleum Reserves Production Act of 1976 (90 Stat. 303; 42 U.S.C. 6501 *et seq.*), Alaska National Interest Lands Conservation Act (94 Stat. 2371, 16 U.S.C. 3101 *et seq.*), and other applicable authorities.

§ 2361.3 Authority.

The primary statutory authority for this subpart is the Naval Petroleum Reserves Production Act of 1976, as amended by the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96–514). Additional authority is provided by the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*)—other than the land use planning and wilderness study requirements, which do not apply to the Reserve under 42 U.S.C. 6506a(c)—and the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 *et seq.*).

§ 2361.4 Responsibility.

The Bureau of Land Management is responsible for the surface and subsurface management of the Reserve, including protecting surface resources from environmental degradation and assuring maximum protection of significant resource values in Special Areas. The Act authorizes the Bureau to prepare rules and regulations necessary to carry out surface management and protection duties.

§ 2361.5 Definitions.

As used in this subpart, the term:

Act means the Naval Petroleum Reserves Production Act of 1976 (as amended and codified at 42 U.S.C. 6501–6508).

Authorized officer means any employee of the Bureau of Land Management who has been delegated the authority to perform the duties of this subpart.

Bureau means the Bureau of Land Management (BLM).

Co-Stewardship broadly refers to cooperative and collaborative engagements of Bureau land managers and Tribes related to shared interests in managing, conserving, and preserving natural and cultural resources under the primary responsibility of Federal land managers. Such cooperative and collaborative engagements can take a wide variety of forms based on the circumstances and applicable authorities in each case. Forms of co-stewardship may include, among other forms, sharing of technical expertise; combining Tribal and Bureau capabilities to improve resource management and advance the responsibilities and interests of each; and making Tribal knowledge, experience, and perspectives integral to the public's experience of Federal lands.

Exploration means activities conducted on the Reserve for the purpose of evaluating petroleum resources, including crude oil, gases (including natural gas), natural gasoline, and other related hydrocarbons, oil shale, and the products of any such resources.

Indigenous Knowledge (IK) means a body of observations, oral and written knowledge, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment. It is applied to phenomena across biological, physical, social, and cultural systems. IK can be developed over millennia, continues to develop, and includes understanding based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. IK is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, and Alaska Natives.

Infrastructure means a permanent or semi-permanent structure or improvement on BLM-administered lands within the Reserve that is built to support commercial oil and gas activities, such as pipelines, gravel drilling pads, man camps, and other structures or improvements. Infrastructure does not include exploratory wells that are drilled in a single season; or construction, renovation, or replacement of facilities on existing gravel pads at previously disturbed sites where the facilities will promote safety and environmental protection. Additionally, infrastructure does not include: structures or improvements intended for use by subsistence hunters, trappers, fishers, berry-pickers, and other subsistence users to facilitate subsistence activities; construction that is ephemeral (such as snow or ice roads); infrastructure constructed in support of science or public safety; or infrastructure that will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve.

Integrated Activity Plan (IAP) means a land use management plan that governs the management of all BLM-administered lands and minerals throughout the Reserve.

Reserve means those lands within the National Petroleum Reserve in Alaska (prior to June 1, 1977, designated Naval Petroleum Reserve No. 4) which was established by Executive order, dated February 27, 1923, except for tract Numbered 1 as described in Public Land Order 2344 (the Naval Arctic Research–Laboratory—surface estate only) dated April 24, 1961.

Secretary means the Secretary of the Interior.

Significant resource value means any surface value, including subsistence, recreational, fish and wildlife, historical, scenic, or other surface value that the Bureau identifies as significant and supports the designation of a Special Area.

Special Areas means areas within the Reserve identified by the Secretary or by statute as having significant resource values and that are managed to assure maximum protection of such surface values, to the extent consistent with the requirements of the Act for the exploration and production of the Reserve.

Use authorization means a written approval of a request for use of land or resources.

§ 2361.6 Effect of law.

(a) Subject to valid existing rights, and except as provided by the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96–514), all lands within the exterior boundaries of the Reserve are reserved and withdrawn from all forms of entry and disposition under the public land laws, including the mining and mineral leasing laws, and all other acts.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Secretary is authorized to:

(1) Make dispositions of mineral materials pursuant to the Act of July 31, 1947 (61 Stat. 681), as amended (30 U.S.C. 601), for appropriate use by Alaska Natives and the North Slope Borough.

(2) Make such dispositions of mineral materials and grant such rights-of-way, licenses, and permits as may be necessary to carry out the Secretary's responsibilities under the Act.

(3) Convey the surface of lands properly selected on or before December 18, 1975, by Native village corporations pursuant to the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

(4) Grant such rights-of-way to the North Slope Borough, under the provisions of title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761 *et seq.*) or section 28 of the Mineral Leasing Act, as amended (30 U.S.C. 185), as may be necessary to permit the North Slope Borough to provide energy supplies to villages on the North Slope.

(c) All other provisions of law heretofore enacted and actions heretofore taken reserving such lands as a Reserve shall remain in full force and effect to the extent not inconsistent with the Act.

(d) To the extent not inconsistent with the Act, all other public land laws are applicable.

§ 2361.7 Severability.

If a court holds any provision of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of the regulations in this part and their applicability to other people or circumstances will remain unaffected.

§ 2361.10 Protection of surface resources.

(a) In administering the Reserve, the Bureau must protect surface resources by adopting whatever conditions, restrictions, and prohibitions it deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects of proposed oil and gas activities. Such conditions, restrictions, or prohibitions may involve conditioning, delaying action on, or denying some or all aspects of proposed oil and gas activities, and will fully consider community access and other infrastructure needs, after consultation with the North Slope Borough and consistent with § 2361.6.

(b) The Bureau will use the following procedures to protect surface resources from the reasonably foreseeable and significantly adverse effects of proposed oil and gas activities:

(1) The Bureau will maintain an Integrated Activity Plan (IAP) addressing management of all BLM-administered lands and minerals throughout the Reserve. When issuing a use authorization, the authorization must conform to the IAP and this subpart, including any subsequent designation or modifications of Special Areas. To the extent there is any inconsistency between the IAP and this subpart, this subpart governs;

(2) In each decision concerning proposed activity in the Reserve, the authorized officer will document consideration of, and adopt measures to mitigate, reasonably foreseeable and significantly adverse effects on fish and wildlife, water, cultural, paleontological, scenic, and any other surface resource. The authorized officer will take particular care to account for, and mitigate adverse effects on, surface resources that support subsistence uses and needs; and

(3) In assessing effects of a decision concerning proposed activity in the Reserve, the authorized officer will document consideration of any uncertainty concerning the nature, scope, and duration of potential effects on surface resources of the Reserve and shall ensure that any conditions, restrictions, or prohibitions on proposed oil and gas activities account for and reflect any such uncertainty.

(c) When affected surface resources are located in a Special Area, the authorized officer must comply with the procedures and requirements of §§ 2361.20 through 2361.60.

(d) The authorized officer must include in each decision and authorization related to proposed oil and gas activity in the Reserve such terms and conditions that provide the Bureau with sufficient ability to fully implement the requirements of this subpart.

(e)(1) To the extent consistent with the requirements of the Act, other applicable law, and the terms of any applicable existing authorization, and after consultation with appropriate Federal, State, and local agencies, federally recognized Tribes, and Alaska Native Claims Settlement Act corporations, the authorized officer may limit, restrict, or prohibit the use of or access to lands within the Reserve,

including Special Areas. Upon proper notice, as determined by the authorized officer, such actions may be taken to protect fish and wildlife breeding, nesting, spawning, lambing or calving, or migrations; subsistence uses and resources; and other environmental, scenic, or historic values.

(2) The consultation requirement in paragraph (e)(1) of this section is not required when the authorized officer determines that emergency measures are required.

(f) No site, structure, object, or other values of historical, cultural, or paleontological character, including, but not limited to, historic and prehistoric remains, fossils, and artifacts, shall be injured, altered, destroyed, or collected without authorization under an appropriate Federal permit and without compliance with applicable law governing cultural items, archaeological resources, and historic properties.

§ 2361.20 Existing Special Areas.

Any lands within the Reserve designated as a Special Area as of June 6, 2024, will continue to be managed as a Special Area except as modified pursuant to § 2361.30, including:

(a) *Colville River Special Area.* The Colville River Special Area encompasses the area within the boundaries depicted on maps that are published as of June 6, 2024, and available for public inspection at the Arctic District Office. The Colville River Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important habitat for raptor species, including, but not limited to, the Arctic peregrine falcon;

(2) Important habitat for other bird species, including, but not limited to, neotropical migratory birds, shorebirds, loons, waterfowl, inland dwelling sea birds, and passerines;

(3) Important habitat for moose;

(4) Important habitat for fish;

(5) Important subsistence activities;

(6) Important recreational activities;

(7) World-class paleontological deposits; and

(8) Significant cultural resources, including numerous sites from the prehistoric and historic eras.

(b) *Kasegaluk Lagoon Special Area.* The Kasegaluk Lagoon Special Area encompasses the area within the boundaries depicted on maps that are published as of June 6, 2024, and available for public inspection at the Arctic District Office. The Kasegaluk Lagoon Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important habitat for marine mammals;

(2) Unique ecosystem for the Arctic Coast;

(3) Opportunities for primitive recreational experiences;

(4) Important habitat for migratory birds; and

(5) Important subsistence activities.

(c) *Peard Bay Special Area.* The Peard Bay Special Area encompasses the area within the boundaries depicted on maps that are published as of June 6, 2024, and available for public inspection at the Arctic District Office. The Peard Bay Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Haul-out areas and nearshore waters for marine mammals; and

(2) High-use staging and migration areas for shorebirds and waterbirds.

(d) *Teshekpuk Lake Special Area.* The Teshekpuk Lake Special Area encompasses the area within the boundaries depicted on maps that are published as of June 6, 2024, and available for public inspection at the Arctic District Office. The Teshekpuk Lake Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important nesting, staging, and molting habitat for a large number of migratory and other waterbirds;

(2) Important caribou habitat;

(3) Important shorebird habitat;

(4) Subsistence hunting and fishing activities;

(5) Pik Dunes; and

(6) Overwintering habitat for fish.

(e) *Utukok River Uplands Special Area.* The Utukok River Uplands Special Area encompasses the area within the boundaries depicted on maps that are published as of June 6, 2024, and available for public inspection at the Arctic District Office. The Utukok River Uplands Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important habitat for the Western Arctic Caribou Herd;

(2) Subsistence hunting activities;

(3) Grizzly bear habitat; and

(4) Important wilderness values.

§ 2361.30 Special Areas designation and amendment process.

(a) In designating, de-designating, or otherwise changing boundaries or management of Special Areas, the authorized officer must:

(1) Rely on the best available scientific information, including Indigenous Knowledge, as well as the best available information concerning subsistence uses and resources within the Reserve;

(2) Provide the public and interested stakeholders with notice of, and meaningful opportunities to participate in, the evaluation process;

(3) Consult with any federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area; and

(4) In designating, de-designating, or otherwise changing boundaries of Special Areas, base their decisions solely on the presence or absence of significant resource values and not the existence of measures that have been or may be adopted to protect or otherwise administer those values.

(b) The Bureau must evaluate lands within the Reserve for the presence of significant subsistence, recreational, fish and wildlife, historical, or scenic values and shall designate lands as Special Areas containing such values in accordance with the following procedures:

(1) Every 10 years, or sooner if the authorized officer determines that changing conditions warrant, the authorized officer must evaluate and determine whether to:

(i) Designate new Special Areas;

(ii) Expand existing Special Areas;

(iii) Recognize the presence of additional significant resource values in existing Special Areas; or

(iv) Require additional measures or strengthen existing measures to assure maximum protection of significant resource values within existing Special Areas.

(2) The authorized officer may, but is not required to, conduct the evaluation and otherwise designate and amend Special Areas through amendment of the IAP.

(3) The authorized officer must provide the public and interested stakeholders with the opportunity to recommend lands that should be considered for designation as a Special Area, significant resource values that the authorized officer should consider recognizing for existing Special Areas, and measures that the authorized officer should consider requiring to assure

maximum protection of significant resource values within Special Areas. The authorized officer will evaluate and respond to recommendations that are made in completing its evaluation. Such recommendations should identify and describe:

(i) The size and location of the recommended lands;

(ii) The significant resource values that are present within or supported by the recommended lands;

(iii) Measures that may be necessary to assure maximum protection of those values; and

(iv) Any other pertinent information.

(4) If, at any point after receipt of an internal or external recommendation, the authorized officer determines that interim measures are required to assure maximum protection of significant resource values in lands under consideration for designation as a new or modified Special Area, the authorized officer may implement such measures that are consistent with the governing management prescriptions in the IAP during the period for which the lands remain under consideration; provided, however, that the authorized officer will provide public notice that interim measures are in place and such measures will be reassessed to determine if they are still needed if they remain in place for more than 5 years.

(5) When the authorized officer designates lands as Special Areas or recognizes the presence of additional significant resource values in existing Special Areas, the authorized officer must adopt measures to assure maximum protection of significant resource values. Such measures are not constrained by the provisions of the current IAP. Once adopted, these measures supersede inconsistent provisions of the IAP then in effect for the Reserve and will be incorporated into the IAP during the next revision or amendment.

(6) For any lands designated as a Special Area, the authorized officer will publish a legal description of those lands in the **Federal Register**, along with a concise summary of the significant resource values that support the designation. The Bureau will also maintain a map of the Special Area on its website and available for public inspection at the Arctic District Office.

(c) The Bureau may not remove lands from the Teshekpuk Lake and Utukok River Uplands Special Areas unless directed to do so by statute. The Bureau may remove lands within other Special Areas only when all of the significant resource values that support the designation are no longer present. When determining whether to remove lands from a Special Area designation, the authorized officer must:

(1) Prepare a summary of its proposed determination, including the underlying factual findings;

(2) Provide the public and interested stakeholders with the opportunity to review and comment on the proposed determination; and

(3) Issue a determination that documents how the views and information provided by the public, federally recognized Tribes, Alaska Native Claims Settlement Act corporations, federally qualified subsistence users, and other interested stakeholders have been considered.

§ 2361.40 Management of oil and gas activities in Special Areas.

The management priority within Special Areas is to assure maximum protection of significant resource values, consistent with the requirements of the Act for exploration and production of the Reserve. The Bureau must fulfill this duty at each stage in the decision-making process for oil and gas activities in the Reserve, and in accordance with the following procedures:

(a) The authorized officer must, to the extent consistent with the Act, take such steps as are necessary to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas. This includes, but is not limited to, conditioning, delaying action on, or denying proposals for activities, either in whole or in part, and ensuring that leasing and production is approved only subject to the provisions of this section.

(b) The authorized officer will identify and adopt maximum protection measures for each significant resource value that is present in a Special Area when Special Areas are designated. The authorized officer will update maximum protection measures as appropriate thereafter, including in the IAP, lease terms, and permits to conduct oil and gas activities.

(c) Maximum protection may include, but is not limited to, requirements for:

(1) Rescheduling activities, including specifying rates of development, and requiring use of alternative routes;

(2) Limiting new infrastructure and roads;

(3) Limiting extraction of sand and gravel or withdrawal of water;

(4) Limiting types of vehicles and loadings;

(5) Limiting types of aircraft in combination with minimum flight altitudes and distances from identified places; and

(6) Applying special fuel handling procedures.

(d) Subject to any revisions made pursuant to § 2361.30, oil and gas leasing and authorization of new infrastructure in Special Areas will conform to the land use allocations and restrictions identified on the maps published as of June 6, 2024, and available for public inspection at the Arctic District Office.

(e) On lands within Special Areas that are allocated as closed to leasing or unavailable to new infrastructure, certain uses may be authorized under limited circumstances:

(1) The authorized officer may issue oil and gas leases in Special Areas if drainage is occurring. Any lease issued for drainage purposes will include provisions that prohibit surface-disturbing oil and gas activities on the entire lease tract.

(2) The authorized officer may approve new roads, pipelines, transmission lines, and other types of infrastructure in Special Areas provided that:

(i) The infrastructure will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve or will support subsistence activities; and

(ii) Appropriate measures are adopted to assure maximum protection of significant resource values.

(3) The authorized officer may approve new permanent infrastructure related to existing oil and gas leases only if such infrastructure is necessary to comport with the terms of a valid existing lease.

(f) On lands within Special Areas that are allocated as available for future oil and gas leasing or new infrastructure, the authorized officer will presume that proposed oil and gas activities should not be permitted unless specific information available to the authorized officer clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values or unless they are necessary to comport with the terms of a valid existing lease.

(g) When preparing an environmental analysis of proposed leasing, exploration, development, or new infrastructure in Special Areas, and reaching a final decision, the authorized officer will:

(1) Provide the public with a meaningful opportunity to review and comment, and consider and respond to any relevant comment they receive;

(2) Consult with federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic, cultural, or economic ties to the Special Area;

(3) Evaluate potential adverse effects and measures to avoid, minimize, or otherwise mitigate such effects to achieve maximum protection of significant resource values;

(4) Document how the proposal falls within one of the exceptions in paragraph (e) of this section or the justification for overcoming the presumption in paragraph (f) of this section, such as if the proposed infrastructure is necessary to comport with the terms of a valid existing lease, or if it will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve, and the proposal has been conditioned to avoid, minimize, or otherwise mitigate adverse effects;

(5) Document and consider any uncertainty concerning the nature, scope, and duration of potential adverse effects on significant resource values of Special Areas and ensure that any actions taken to avoid, minimize, or mitigate such effects account for and reflect any such uncertainty; and

(6) Prepare a Statement of Adverse Effect, if the authorized officer determines that the proposal cannot avoid adverse effects on significant resource values in a Special Area. The Statement of Adverse Effect will describe the:

(i) Significant resource values that may be adversely affected;

(ii) Nature, scope, and duration of those adverse effects;

(iii) Measures the Bureau evaluated to avoid the adverse effects, including whether any practicable alternatives exist that would have less adverse impact on significant resource values of the Special Area;

(iv) Justification for not requiring those measures;

(v) Measures the authorized officer will require to minimize, to the maximum extent possible, adverse effects on significant resource values of the Special Area; and

(vi) Measures the authorized officer will require to mitigate any residual adverse effects that cannot be avoided or minimized, including compensatory mitigation, along with an explanation of how those measures will assure maximum protection of significant resource values.

(h) The authorized officer must include in each decision and authorization related to oil and gas activity in the Reserve terms and conditions that provide the authorized officer with sufficient authority to fully implement the requirements of this section.

§ 2361.50 Management of subsistence uses within Special Areas.

(a) The Bureau will ensure that Special Areas are managed to protect and support fish and wildlife and fish and wildlife habitat and associated subsistence use of such areas by rural residents as defined in 50 CFR 100.4.

(b) The Bureau will provide reasonable access to and within Special Areas for subsistence purposes.

§ 2361.60 Co-stewardship opportunities in management of Special Areas and subsistence.

In accordance with the Bureau's co-stewardship guidance, the Bureau will seek opportunities to engage federally recognized Tribes in co-stewardship for management of Special Areas and subsistence resources throughout the Reserve. Co-stewardship opportunities may include co-management, collaborative and cooperative management, and tribally led stewardship, and can be implemented through cooperative agreements, memoranda of understanding, self-governance agreements, and other mechanisms. The Bureau may also partner with Alaska Native Claims Settlement Act corporations, local governments, or organizations as provided by law.

§ 2361.70 Use authorizations.

(a) Use authorizations must be obtained from the authorized officer prior to any use within the Reserve. Only uses that are consistent with the purposes and objectives of the Act and this subpart will be authorized.

(b) Except as may be limited, restricted, or prohibited by the authorized officer, use authorizations are not required for:

(1) Subsistence uses (*e.g.,* hunting, fishing, and berry-picking); and

(2) Non-commercial recreational uses (*e.g.,* hunting, fishing, backpacking, and wildlife observation).

(c) Applications for use authorizations shall be filed in accordance with applicable regulations in this chapter. In the absence of such regulations, the authorized officer may consider and act upon applications for uses allowed under the Act.

(d) In addition to other statutory or regulatory requirements, approval of applications for use authorizations shall be subject to such terms and conditions as the authorized officer determines to be necessary to protect the environmental, subsistence, recreational, fish and wildlife, historical, and scenic values of the Reserve and to assure maximum protection of significant resource values within Special Areas.

§ 2361.80 Unauthorized use and occupancy.

Any person who violates or fails to comply with regulations of this subpart is subject to prosecution, including trespass and liability for damages, pursuant to the appropriate laws.

Subpart 2362 [Reserved]

[FR Doc. 2024–08585 Filed 5–6–24; 8:45 am]

BILLING CODE 4331–29–P

FEDERAL REGISTER

Vol. 89 Tuesday,

No. 89 May 7, 2024

Part VIII

Department of Energy

10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products; Direct Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2020–BT–STD–0039]

RIN 1904–AF62

Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products

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

ACTION: Direct final rule.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including miscellaneous refrigeration products. In this direct final rule, the U.S. Department of Energy (''DOE'') is adopting amended energy conservation standards for miscellaneous refrigeration products. DOE has determined that the amended energy conservation standards for these products would result in significant conservation of energy, and are technologically feasible and economically justified.

DATES: The effective date of this rule is September 4, 2024. If adverse comments are received by August 26, 2024 and DOE determines that such comments may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o), a timely withdrawal of this rule will be published in the **Federal Register**. If no such adverse comments are received, compliance with the amended standards established for miscellaneous refrigeration products in this direct final rule is required on and after January 31, 2029. Comments regarding the likely competitive impact of the standards contained in this direct final rule should be sent to the Department of Justice contact listed in the **ADDRESSES** section on or before June 6, 2024.

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

The docket web page can be found at *www.regulations.gov/docket/EERE-2020-BT-STD-0039*. The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov*.

The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the standards contained in this direct final rule. Interested persons may contact the Antitrust Division at *www.energy.standards@usdoj.gov* on or before the date specified in the **DATES** section. Please indicate in the ''Subject'' line of your email the title and Docket Number of this direct final rule.

FOR FURTHER INFORMATION CONTACT:

Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5904. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

Ms. Kristin Koernig, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 243–3383. Email: *kristin.koernig@hq.doe.gov*.

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I. Synopsis of the Direct Final Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317, as codified) Title III, Part B of EPCA [2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309, as codified) These products include miscellaneous refrigeration products (''MREFs''), the subject of this direct final rule.

Pursuant to EPCA, any new or amended energy conservation standard must, among other things, be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

In light of the statutory authority above and under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule amending the energy conservation standards for MREFs.

The adopted standard levels in this direct final rule were proposed in a letter submitted to DOE jointly by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility. This letter, titled ''Energy Efficiency Agreement of 2023'' (hereafter, the ''Joint Agreement'' [3]), recommends specific energy conservation standards for MREFs that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o). DOE subsequently received letters of support from states, including California, Massachusetts, and New York,[4] as well as San Diego Gas and Electric (''SDG&E'') and Southern California Edison (''SCE'') advocating for the adoption of the recommended standards.[5]

In accordance with the direct final rule provisions at 42 U.S.C. 6295(p)(4), DOE has determined that the recommendations contained therein are compliant with 42 U.S.C. 6295(o). As required by 42 U.S.C. 6295(p)(4)(A)(i), DOE is also simultaneously publishing a notice of proposed rulemaking (''NOPR'') that contains the identical standards to those adopted in this direct final rule. Consistent with the statute, DOE is providing a 110-day public comment period on the direct final rule. (42 U.S.C. 6295(p)(4)(B)) If DOE determines that any comments received may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o), or any other applicable law, DOE will publish the reasons for withdrawal and continue the rulemaking under the NOPR. (42 U.S.C. 6295(p)(4)(C)) See section II.A of this document for more details on DOE's statutory authority.

The amended standards that DOE is adopting in this direct final rule are the efficiency levels recommended in the Joint Agreement (shown in Table I.1) expressed in terms of kilowatt hours per year (''kWh/yr'') as measured according to DOE's current MREF test procedure codified at title 10 of the Code of Federal Regulations (''CFR'') part 430, subpart B, appendix A (''appendix A'').

The amended standards recommended in the Joint Agreement are represented as trial standard level (''TSL'') 4 in this document (hereinafter the ''Recommended TSL'') and are described in section V.A of this document. The Joint Agreement's standards for MREFs apply to all products listed in Table I.1 and manufactured in or imported into the United States starting on January 31, 2029.

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[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0034.*

[4] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0035.*

[5] This document is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0036.*

Table I.1 Energy Conservation Standards for MREFs (Compliance Starting January 31. 2029)

Product Class ("PC")	Equations for maximum energy use (kWh/yr)
	Based on AV (ft^3)
1. Freestanding Compact Coolers (FCC)	5.52AV +109.1
2. Freestanding Coolers (FC)	5.52AV +109.1
3. Built-in Compact Coolers (BICC)	5.52AV +109.1
4. Built-in Coolers (BIC)	6.30AV + 124.6
C-3A. Cooler with all-refrigerator – automatic defrost	4.11AV + 117.4
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost	4.67AV + 133.0
C-5-BI. Built-in cooler with refrigerator-freezer – automatic defrost with bottom-mounted freezer	5.47AV + 196.2 +28I
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C-13A. Compact cooler with all-refrigerator – automatic defrost	4.74AV + 155.0
C-13A-BI. Built-in compact cooler with all-refrigerator – automatic defrost	5.22AV + 170.5
AV = Total adjusted volume, expressed in ft^3, as determined in appendices A and B of subpart B of 10 CFR part 430. av = Total adjusted volume, expressed in Liters. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.	

A. Benefits and Costs to Consumers

Table I.2 summarizes DOE's evaluation of the economic impacts of the adopted standards on consumers of MREFs, as measured by the average life-cycle cost ("LCC") savings and the simple payback period ("PBP") [6] The average LCC savings are positive for all product classes, and the PBP is less than the average lifetime of MREFs, which varies by product class (see section IV.F of this document).

Table I.2 Impacts of Adopted Energy Conservation Standards on Consumers of MREFs (The Recommended TSL)

MREF Class	Average LCC Savings *2022$*	Simple Payback Period *Years*
BIC	53.56	4.4
BICC	1.53	8.1
C-13A	10.60	7.3
C-13A-BI	12.81	7.1
C-3A	30.95	1.7
C-3A-BI	36.19	1.6
FC	26.22	8.5
FCC	12.97	6.8

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DOE's analysis of the impacts of the adopted standards on consumers is described in section IV.F of this document.

B. Impact on Manufacturers [7]

The industry net present value ("INPV") is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2024–2058). Using a real discount rate of 7.7 percent, DOE estimates that the INPV for manufacturers of MREFs in the case without amended standards is $807.7 million. Under the adopted standards, which align with the Recommended TSL (*i.e.,* TSL 4) for MREFs, DOE estimates the change in INPV to range

[6] The average LCC savings refer to consumers that are affected by a standard and are measured relative to the efficiency distribution in the no-new-standards case, which depicts the market in the compliance year in the absence of new or amended standards (see section IV.F.9 of this document). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline product (see section IV.C of this document).

[7] All monetary values in this document are expressed in 2022 dollars. unless indicated otherwise. For purposes of discounting future monetary values, the present year in the analysis was 2024.

from −11.4 percent to −7.5 percent, which is approximately −$92.1 million to −$60.3 million. In order to bring products into compliance with amended standards, it is estimated that industry will incur total conversion costs of $130.7 million.

DOE's analysis of the impacts of the adopted standards on manufacturers is described in sections IV.J and V.B.2 of this document.

C. National Benefits and Costs

DOE's analyses indicate that the adopted energy conservation standards for MREFs would save a significant amount of energy. Relative to the case without amended standards, the lifetime energy savings for MREFs purchased in the 30-year period that begins in the anticipated year of compliance with the amended standards (2029–2058) amount to 0.32 quadrillion British thermal units (''Btu''), or quads.[8] This represents a savings of 26 percent relative to the energy use of these products in the case without amended standards (referred to as the ''no-new-standards case'').

The cumulative net present value (''NPV'') of total consumer benefits of the standards for MREFs ranges from $0.17 billion (at a 7-percent discount rate) to $0.77 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased product costs for MREFs purchased in 2029–2058.

In addition, the adopted standards for MREFs are projected to yield significant environmental benefits. DOE estimates that the standards will result in cumulative emission reductions (over the same period as for energy savings) of 5.85 million metric tons (''Mt'')[9] of carbon dioxide (''CO_2''), 1.84 thousand tons of sulfur dioxide (''SO_2''), 10.77 thousand tons of nitrogen oxides (''NO_X''), 48.64 thousand tons of methane (''CH_4''), 0.06 thousand tons of nitrous oxide (''N_2O''), and 0.01 tons of mercury (''Hg'').[10]

DOE estimates the value of climate benefits from a reduction in greenhouse gases (''GHG'') using four different estimates of the social cost of CO_2 (''SC–CO_2''), the social cost of methane (''SC–CH_4''), and the social cost of nitrous oxide (''SC–N_2O''). Together these represent the social cost of GHG (''SC–GHG''). DOE used interim SC–GHG values (in terms of benefit per ton of GHG avoided) developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (''IWG'').[11] The derivation of these values is discussed in section IV.L of this document. For presentational purposes, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are estimated to be $0.32 billion. DOE does not have a single central SC–GHG point estimate and it emphasizes the value of considering the benefits calculated using all four sets of SC–GHG estimates. DOE notes, however, that the adopted standards would be economically justified even without inclusion of the estimated monetized benefits of reduced GHG emissions.

DOE estimated the monetary health benefits of SO_2 and NO_X emissions reductions, using benefit per ton estimates from the Environmental Protection Agency (''EPA''),[12] as discussed in section IV.L of this document. DOE estimated the present value of the health benefits would be $0.24 billion using a 7-percent discount rate, and $0.62 billion using a 3-percent discount rate.[13] DOE is currently only monetizing health benefits from changes in ambient fine particulate matter (''$PM_{2.5}$'') concentrations from two precursors (SO_2 and NO_X), and from changes in ambient ozone from one precursor (for NO_X), but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions.

Table I.3 summarizes the monetized benefits and costs expected to result from the amended standards for MREFs. There are other important unquantified effects, including certain unquantified climate benefits, unquantified public health benefits from the reduction of toxic air pollutants and other emissions, unquantified energy security benefits, and distributional effects, among others.

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[8] The quantity refers to full-fuel-cycle (''FFC'') energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.1 of this document.

[9] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[10] DOE calculated emissions reductions relative to the no-new-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2023* (''*AEO2023*''). *AEO2023* represents current Federal and State legislation and final implementation of regulations as of the time of its preparation. See section IV.K of this document for further discussion of *AEO2023* assumptions that affect air pollutant emissions.

[11] To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG. (''February 2021 SC–GHG TSD''). *www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf* (last accessed November 29, 2023.)

[12] U.S. EPA. Estimating the Benefit per Ton of Reducing Directly Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors. Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-pm25-precursors-21-sectors* (last accessed November 29, 2023.)

[13] DOE estimates the economic value of these emissions reductions resulting from the considered TSLs for the purpose of complying with the requirements of Executive Order 12866.

Table I.3 Summary of Monetized Benefits and Costs of Adopted Energy Conservation Standards for Miscellaneous Refrigeration Products Shipped in 2029-2058 (TSL 4, the Recommended TSL)

	Billion $2022
3% discount rate	
Consumer Operating Cost Savings	2.00
Climate Benefits*	0.32
Health Benefits**	0.62
Total Benefits†	2.94
Consumer Incremental Product Costs‡	1.23
Net Benefits	1.71
Change in Producer Cashflow (INPV)‡‡	(0.09) - (0.06)
7% discount rate	
Consumer Operating Cost Savings	0.86
Climate Benefits* (3% discount rate)	0.32
Health Benefits**	0.24
Total Benefits†	1.42
Consumer Incremental Product Costs‡	0.69
Net Benefits	0.73
Change in Producer Cashflow (INPV)‡‡	(0.09) - (0.06)

Note: This table presents the costs and benefits associated with MREFs shipped during the period 2029−2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped in 2029−2058.
* Climate benefits are calculated using four different estimates of the social cost of carbon (SC-CO_2), methane (SC-CH_4), and nitrous oxide (SC-N_2O) (model average at 2.5 percent, 3 percent, and 5 percent discount rates; 95th percentile at 3 percent discount rate) (see section IV.L of this document). Together these represent the global SC-GHG. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.
** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.
† Total and net benefits include those consumer, climate, and health benefits that can be quantified and monetized. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate.
‡ Costs include incremental equipment costs.
‡‡Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. See sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price

experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). See section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. Change in INPV is calculated using the industry weighted average cost of capital value of 7.7 percent that is estimated in the manufacturer impact analysis (see chapter 12 of the direct final rule TSD for a complete description of the industry weighted average cost of capital). For MREFs, the change in INPV ranges from -$92 million to -$60 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. See section V.C of this document. DOE is presenting the range of impacts to the INPV under two manufacturer markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this direct final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the INPV into the net benefit calculation for this direct final rule, the net benefits would range from $1.62 billion to $1.65 billion at 3-percent discount rate and would range from $0.64 billion to $0.67 billion at 7-percent discount rate. Parentheses indicate negative (-) values.

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increase in product purchase prices and installation costs, plus (3) the value of climate and health benefits of emission reductions, all annualized.[14]

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products and are measured for the lifetime of MREFs shipped during the period 2029 – 2058. The benefits associated with reduced emissions achieved as a result of the adopted standards are also calculated based on the lifetime of MREFs shipped during the period 2029–2058. Total benefits for both the 3-percent and 7-percent cases are presented using the average GHG social costs with 3-percent discount rate. Estimates of SC–GHG values are presented for all four discount rates in section IV.L of this document.

Table I.4 presents the total estimated monetized benefits and costs associated with the standards adopted in this direct final rule, expressed in terms of annualized values. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced NO_X and SO_2 emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards adopted in this direct final rule is $72.7 million per year in increased equipment costs, while the estimated annual benefits are $90.6 million in reduced equipment operating costs, $18.3 million in climate benefits, and $25.6 million in health benefits. In this case, the net benefit would amount to $61.7 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the standards is $70.8 million per year in increased equipment costs, while the estimated annual benefits are $115 million in reduced operating costs, $18.3 million in climate benefits, and $35.6 million in health benefits. In this case, the net benefit amounts to $98.0 million per year.

[14] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2022, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2030), and then discounted the present value from each year to 2022. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

Table I.4 Annualized Benefits and Costs of Adopted Standards for MREFs Shipped 2028 to 2057 (TSL 4, the Recommended TSL)

	Million 2022$/year		
	Primary Estimate	Low-Net-Benefits Estimate	High-Net-Benefits Estimate
3% discount rate			
Consumer Operating Cost Savings	115.0	111.5	116.3
Climate Benefits*	18.3	17.7	18.5
Health Benefits**	35.6	34.5	36.0
Total Monetized Benefits†	168.9	163.7	170.7
Consumer Incremental Product Costs‡	70.8	74.9	68.7
Monetized Net Benefits	98.0	88.8	102.0
Change in Producer Cashflow (INPV)‡‡	(7.7) - (5.0)		
7% discount rate			
Consumer Operating Cost Savings	90.6	88.1	91.5
Climate Benefits* (3% discount rate)	18.3	17.7	18.5
Health Benefits**	25.6	24.9	25.8
Total Benefits†	134.4	130.7	135.7
Consumer Incremental Product Costs‡	72.7	75.8	70.9
Net Benefits	61.7	54.9	64.8
Change in Producer Cashflow (INPV)‡‡	(7.7) - (5.0)		

Note: This table presents the costs and benefits associated with MREFs shipped during the period 2029−2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped in 2029−2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low Net Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.H.3 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC-GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown, but DOE does not have a single central SC-GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate.
‡ Costs include incremental equipment costs.
‡‡Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. See sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). See section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 7.7 percent that is estimated in the MIA (see chapter 12 of the direct final rule technical support document for a complete description of the industry weighted average cost of capital). For MREFs, the annualized change in INPV ranges from $7.7 million to $5.0 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. See section V.C of this document. DOE is presenting the range of impacts to the INPV under two manufacturer markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annual change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this direct final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this direct final rule, the annualized net benefits would range from $90.3 million to $93.0 million at 3-percent discount rate and would range from $54.0 million to $56.7 million at 7-percent discount rate. Parentheses indicate negative (-) values.

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DOE's analysis of the national impacts of the adopted standards is described in sections IV.H, IV.K, and IV.L of this document.

D. Conclusion

DOE has determined that the Joint Agreement was submitted jointly by interested persons that are fairly representative of relevant points of view, in accordance with 42 U.S.C. 6295(p)(4)(A). After considering the analysis and weighing the benefits and burdens, DOE has determined that the recommended standards are in accordance with 42 U.S.C. 6295(o), which contains the criteria for prescribing new or amended standards. Specifically, the Secretary has determined that the adoption of the recommended standards would result in the significant conservation of energy and is technologically feasible and economically justified. In determining whether the recommended standards are economically justified, the Secretary has determined that the benefits of the recommended standards exceed the burdens. The Secretary has concluded that the recommended standards, when considering the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings, would yield benefits outweighing the negative impacts on some consumers and on manufacturers, including the conversion costs that could result in a reduction in INPV for manufacturers.

Using a 7-percent discount rate for consumer benefits and costs and NOx and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the standards for MREFs is $72.7 million per year in increased product costs, while the estimated annual benefits are $90.6 million in reduced product operating costs, $18.3 million in climate benefits, and $25.6 million in health benefits. The net benefit amounts to $61.7 million per year. DOE notes that the net benefits are substantial even in the absence of the climate benefits,[15] and DOE would adopt the same standards in the absence of such benefits.

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[16] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

As previously mentioned, the standards are projected to result in estimated national energy savings of 0.32 quads full-fuel-cycle ("FFC"), the equivalent of the primary annual energy use of 2.1 million homes. In addition, they are projected to reduce cumulative CO_2 emissions by 5.85 million metric tons. Based on these findings, DOE has determined the energy savings from the standard levels adopted in this direct final rule are "significant" within the meaning of 42 U.S.C. 6295(o)(3)(B). A more detailed discussion of the basis for

[15] The information on climate benefits is provided in compliance with Executive Order 12866.

[16] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

these conclusions is contained in the remainder of this document and the accompanying technical support document (''TSD'').[17]

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule amending the energy conservation standards for MREFs. Consistent with this authority, DOE is also simultaneously publishing elsewhere in this issue of the **Federal Register** a NOPR proposing standards that are identical to those contained in this direct final rule. *See* 42 U.S.C. 6295(p)(4)(A)(i).

II. Introduction

The following section briefly discusses the statutory authority underlying this direct final rule, as well as some of the relevant historical background related to the establishment of standards for MREFs.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA [18] established the Energy Conservation Program for Consumer Products Other Than Automobiles, which, in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016 (the ''July 2016 Final Coverage Determination''). 81 FR 46768. MREFs are consumer refrigeration products other than refrigerators, refrigerator-freezers, or freezers, which include coolers and combination cooler refrigeration products. 10 CFR 430.2. MREFs include refrigeration products such as coolers (*e.g.,* wine chillers and other specialty products) and combination cooler refrigeration products (*e.g.,* wine chillers and other specialty compartments combined with a refrigerator, refrigerator-freezers, or freezers). EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) Not later than 3 years after issuance of a final determination not to amend standards, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B))

The energy conservation program under EPCA, consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of the EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6297(d))

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedure for MREFs appears at appendix A (*Uniform Test Method for Measuring the Energy Consumption of Refrigerators, Refrigerator-Freezers, and Miscellaneous Refrigeration Products*).

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including MREFs. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3))

Moreover, DOE may not prescribe a standard (1) for certain products, including MREFs, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (''Secretary'') considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

[17] The direct final rule TSD is available in the docket for this rulemaking at *www.regulations.gov/docket/EERE-2020-BT-STD-0039/document.*

[18] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. A rule prescribing an energy conservation standard for a type (or class) of product must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE considers such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. (*Id.*) Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Additionally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, final rules for new or amended energy conservation standards promulgated after July 1, 2010, are required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedure for MREFs addresses standby mode and off mode energy use, as do the amended standards adopted in this direct final rule.

Finally, EISA 2007 amended EPCA, in relevant part, to grant DOE authority to issue a final rule (*i.e.,* a ''direct final rule'') establishing an energy conservation standard upon receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, that contains recommendations with respect to an energy or water conservation standard. (42 U.S.C. 6295(p)(4)) Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

The direct final rule must be published simultaneously with a NOPR that proposes an energy or water conservation standard that is identical to the standard established in the direct final rule, and DOE must provide a public comment period of at least 110 days on this proposal. (42 U.S.C. 6295(p)(4)(A)–(B)) While DOE typically provides a comment period of 60 days on proposed standards, for a NOPR accompanying a direct final rule, DOE provides a comment period of the same length as the comment period on the direct final rule—*i.e.,* 110 days. Based on the comments received during this period, the direct final rule will either become effective, or DOE will withdraw it not later than 120 days after its issuance if: (1) one or more adverse comments is received, and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(C)) Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. (*Id.*)

DOE has previously explained its interpretation of its direct final rule authority. In a final rule amending the Department's ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' at 10 CFR part 430, subpart C, appendix A (''Process Rule''), DOE noted that it may issue standards recommended by interested persons that are fairly representative of relative points of view as a direct final rule when the recommended standards are in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. 86 FR 70892, 70912 (Dec. 13, 2021). But the direct final rule provision in EPCA does not impose additional requirements applicable to other standards rulemakings, which is consistent with the unique circumstances of rules issued as consensus agreements under DOE's direct final rule authority. *Id.* DOE's discretion remains bounded by its statutory mandate to adopt a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified—a requirement found in 42 U.S.C. 6295(o). *Id.* As such, DOE's review and analysis of the Joint Agreement is limited to whether the recommended standards satisfy the criteria in 42 U.S.C. 6295(o).

B. Background

1. Current Standards

In a direct final rule published on October 28, 2016 (''October 2016 Final Rule''), DOE prescribed the current energy conservation standards for MREFs manufactured on and after October 28, 2019. 81 FR 75194. These standards are set forth in DOE's regulations at 10 CFR 430.32(aa)(1)–(2). These standards are consistent with a negotiated term sheet submitted to DOE by interested parties representing manufacturers, energy and environmental advocates, and consumer groups.[19]

2. Current Test Procedures

On October 12, 2021, DOE published a test procedure final rule (''October 2021 TP Final Rule'') amending the test procedure for MREFs, at appendix A. 86 FR 56790. The test procedure amendments included adopting the latest version of the relevant industry standard published by the Association of Home Appliance Manufacturers (''AHAM''), updated in 2019, AHAM Standard HRF–1, ''Energy and Internal Volume of Refrigerating Appliances'' (''HRF–1–2019''). 10 CFR 430.3(i)(4). The standard levels adopted in this direct final rule are based on the annual energy use (''AEU'') metrics as measured according to appendix A.

[19] The negotiated term sheets are available in docket ID EERE–2011–BT–STD–0043 on *www.regulations.gov.*

3. History of Standards Rulemaking for MREFs

On April 1, 2015, DOE published a notice announcing its intention to establish a negotiated rulemaking working group under the Appliance Standards Rulemaking Advisory Committee (''ASRAC'') to negotiate energy conservation standards for refrigeration products such as wine chillers. 80 FR 17355. DOE then created a working group of interested parties to develop a series of recommended energy conservation standards for MREFs. On July 18, 2016, DOE published the July 2016 Final Coverage Determination that added MREFs as covered products. 81 FR 46768. In that determination, DOE noted that MREFs, on average, consume more than 150 kilowatt hours per year (''kWh/yr'') and that the aggregate annual national energy use of these products exceeds 4.2 terawatt hours (''TWh''). 81 FR 46768, 46775. In addition to establishing coverage, the July 2016 Final Coverage Determination established definitions for ''miscellaneous refrigeration products,'' ''coolers,'' and ''combination cooler refrigeration products'' in 10 CFR 430.2. 81 FR 46768, 46791–46792.

On October 28, 2016, a negotiated term sheet containing a series of recommended standards and other related recommendations were submitted to ASRAC for approval and, subsequently, DOE published the October 2016 Direct Final Rule adopting energy conservation standards consistent with the recommendations contained in the term sheet. 81 FR 75194. Concurrent with the October 2016 Direct Final Rule, DOE published a NOPR in which it proposed and requested comments on the standards set forth in the direct final rule. 81 FR 74950. On May 26, 2017, DOE published a notice in the **Federal Register** in which it determined that the comments received in response to the October 2016 Direct Final Rule did not provide a reasonable basis for withdrawing the rule and, therefore, confirmed the adoption of the energy conservation standards established in that direct final rule. 82 FR 24214.

4. The Joint Agreement

On September 25, 2023, DOE received a joint statement of recommended standards (*i.e.,* the Joint Agreement) for various consumer products, including MREFs, submitted jointly by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility.[20] In addition to the recommended standards for MREFs, the Joint Agreement also included separate recommendations for several other covered products.[21] And, while acknowledging that DOE may implement these recommendations in separate rulemakings, the Joint Agreement also stated that the recommendations were recommended as a complete package and each recommendation is contingent upon the other parts being implemented. DOE understands this to mean that the Joint Agreement is contingent upon DOE initiating rulemaking processes to adopt all of the recommended standards in the agreement. That is distinguished from an agreement where issuance of an amended energy conservation standard for a covered product is contingent on issuance of amended energy conservation standards for the other covered products. If the Joint Agreement were so construed, it would conflict with the anti-backsliding provision in 42 U.S.C. 6295(o)(1), because it would imply the possibility that, if DOE were unable to issue an amended standard for a certain product, it would have to withdraw a previously issued standard for one of the other products. The anti-backsliding provision, however, prevents DOE from withdrawing or amending an energy conservation standard to be less stringent. As a result, DOE will be proceeding with individual rulemakings that will evaluate each of the recommended standards separately under the applicable statutory criteria. The Joint Agreement recommends amended standard levels for MREFs as presented in Table II.3. (Joint Agreement, No. 34 at p. 4) Details of the Joint Agreement recommendations for other products are provided in the Joint Agreement posted in the docket.[22]

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[20] The signatories to the Joint Agreement include AHAM, American Council for an Energy-Efficient Economy, Alliance for Water Efficiency, Appliance Standards Awareness Project, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, and Pacific Gas and Electric Company. Members of AHAM's Major Appliance Division that manufacture the affected products include: Alliance Laundry Systems, LLC; Asko Appliances AB; Beko US Inc.; Brown Stove Works, Inc.; BSH; Danby Products, Ltd.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber; Fotile America; GEA, a Haier Company; L'Atelier Paris Haute Design LLG; LGEUSA; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Appliances Refrigeration Systems (PAPRSA) Corporation of America; Perlick Corporation; Samsung; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; The Middleby Corporation; U-Line Corporation; Viking Range, LLC; and Whirlpool.

[21] The Joint Agreement contained recommendations for 6 covered products: refrigerators, refrigerator-freezers, and freezers; clothes washers; clothes dryers; dishwashers; cooking products; and miscellaneous refrigeration products.

[22] The term sheet is available in the docket at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0034.*

Table II.1 Recommended Amended Energy Conservation Standards for Miscellaneous Refrigeration Products

Product Class	Level (Based on AV (ft^3))	Compliance Date
1. Freestanding Compact Coolers (FCC)	5.52AV +109.1	January 31, 2029
2. Freestanding Coolers (FC)	5.52AV +109.1	January 31, 2029
3. Built-in Compact Coolers (BICC)	5.52AV +109.1	January 31, 2029
4. Built-in Coolers (BIC)	6.30AV + 124.6	January 31, 2029
C-3A. Cooler with all-refrigerator – automatic defrost	4.11AV + 117.4	January 31, 2029
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost	4.67AV + 133.0	January 31, 2029
C-5-BI. NEW PRODUCT CLASS: Built-in cooler with refrigerator-freezer – automatic defrost with bottom-mounted freezer	5.47AV + 196.2 +28I	January 31, 2029
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I	January 31, 2029
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I	January 31, 2029
C-13A. Compact cooler with all-refrigerator – automatic defrost	4.74AV + 155.0	January 31, 2029
C-13A-BI. Built-in compact cooler with all-refrigerator – automatic defrost	5.22AV + 170.5	January 31, 2029
AV = Total adjusted volume, expressed in ft^3, as determined in appendices A and B of subpart B of 10 CFR part 430. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.		

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When the Joint Agreement was submitted, DOE was conducting a rulemaking to consider amending the standards for MREFs. As part of that process, DOE published a NOPR and announced a public meeting on March 31, 2023 (''March 2023 NOPR'') seeking comment on its proposed amended standards to inform its decision consistent with its obligations under EPCA and the Administrative Procedure Act (''APA''). 88 FR 19382. DOE held a public webinar on May 2, 2023, to discuss and receive comments on the March 2023 NOPR and NOPR TSD (''May 2, 2023, public meeting''). The NOPR TSD is available at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0026.* The March 2023 NOPR proposed amended standards defined in terms of the AEU metrics as measured according to appendix A. *Id.* at 88 FR 19383–19384.

Although DOE is adopting the Joint Agreement as a direct final rule and no longer proceeding with its prior rulemaking, DOE did consider relevant comments, data, and information obtained during that rulemaking process in determining whether the recommended standards from the Joint Agreement are in accordance with 42 U.S.C. 6295(o). Any discussion of comments, data, or information in this direct final rule that were obtained during DOE's prior rulemaking will include a parenthetical reference that provides the location of the item in the public record.[23]

III. General Discussion

DOE is issuing this direct final rule after determining that the recommended standards submitted in the Joint Agreement meet the requirements in 42 U.S.C. 6295(p)(4). More specifically, DOE has determined that the recommended standards were submitted by interested persons that are fairly representative of relevant points of view and the recommended standards satisfy the criteria in 42 U.S.C. 6295(o).

A. Scope of Coverage

This direct final rule covers those consumer products that meet the definition of ''miscellaneous refrigeration product,'' as codified at 10 CFR 430.2, which states that it is a consumer refrigeration product other than a refrigerator, refrigerator-freezer, or freezer, which includes coolers and combination cooler refrigeration products.

The differences between miscellaneous refrigeration products and other consumer refrigeration products, which were addressed in a separate rulemaking for refrigerators, refrigerator-freezers, and freezers, are largely in compartment temperature capability. Refrigerators are broadly defined as a cabinet capable of maintaining a compartment temperature above 32 °F and below 39 °F. Freezers are broadly defined as a cabinet capable of maintaining compartment temperature of 0 °F or below. Refrigerator-freezers have two or more compartments, with one capable of maintaining compartment temperatures above 32 °F and below 39 °F (*i.e.,* a fresh food or refrigerator compartment), and the other capable of maintaining a compartment temperature of 8 °F with adjustability down to 0 °F or below (*i.e.,* a frozen food or freezer compartment). Miscellaneous refrigeration products generally include a cooler compartment that is incapable of maintaining the low temperatures achieved by refrigerators, refrigerator-freezers, and freezers.

[23] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for MREFs. (Docket No. EERE–2020–BT–STD–0039, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

Coolers (and cooler compartments) have temperature ranges that either extend no lower than 39 °F, or no lower than 37 °F but at least as high as 60 °F. Combination-coolers contain a fresh food and/or frozen food compartment in addition to one or more cooler compartments. *See* 10 CFR 430.2 for more information regarding consumer refrigeration products definitions.

When evaluating and establishing energy conservation standards, DOE divides covered products into product classes by the type of energy used, or by capacity, or based upon performance-related features that justify a higher or lower standard. (42 U.S.C. 6295(q)) In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (*Id.*)

The Joint Agreement proposed approach for MREF product classes embeds within the energy use equations the difference between classes for MREFs that are otherwise identical except for presence of an icemaker, using a logical variable I (equal to 1 for a product with an icemaker and equal to 0 for a product without an icemaker) multiplied by the constant icemaker energy use adder.

The product class representation simplification in the Joint Agreement is consistent with what was proposed by DOE in the March 2023 NOPR. Based on the comments received in response to the March 2023 NOPR and DOE's evaluation of the Joint Agreement, this direct final rule adopts this change. See section IV.A.1 of this document for further detail and discussion regarding the product classes analyzed in this direct final rule.

B. Fairly Representative of Relevant Point of View

Under the direct final rule provision in EPCA, recommended energy conservation standards must be submitted by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates) as determined by DOE. (42 U.S.C. 6295(p)(4)(A)) With respect to this requirement, DOE notes that the Joint Agreement included a trade association, AHAM, which represents 15 manufacturers of MREFs.[24] The Joint Agreement also included environmental and energy-efficiency advocacy organizations, consumer advocacy organizations, and a gas and electric utility company. As a result, DOE has determined that the Joint Agreement was submitted by interested persons who are fairly representative of relevant points of view. Additionally, DOE received a letter in support of the Joint Agreement from the States of New York, California, and Massachusetts. (See NYSERDA, et al., No. 35 at p. 2) DOE also received a letter in support of the Joint Agreement from the gas and electric utility, SDG&E, and the electric utility, SCE (See SDG&E, et al., No. 36 at p. 1).

C. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. Sections 6(b)(3)(i) and 7(b)(1) of appendix A to 10 CFR part 430, subpart C (''Process Rule'').

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety and (4) unique-pathway proprietary technologies. Sections 7(b)(2)–(5) of the Process Rule. Section IV.B of this document discusses the results of the screening analysis for MREFs, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the direct final rule TSD.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt a new or amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(o)(2)(A)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for MREFs, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.C of this document and in chapter 5 of the direct final rule TSD.

D. Energy Savings

1. Determination of Savings

For each TSL, DOE projected energy savings from application of the TSL to MREFs purchased in the 30-year period that begins in the year of compliance with the amended standards (2029–2058).[25] The savings are measured over the entire lifetime of products purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of amended energy conservation standards.

DOE used its national impact analysis (''NIA'') spreadsheet models to estimate national energy savings (''NES'') from potential amended standards for MREFs. The NIA spreadsheet model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports national energy savings in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. For natural gas, the primary energy savings are considered to be equal to the site energy savings. DOE also calculates NES in terms of FFC energy savings. The FFC metric includes the energy consumed in

[24] Manufacturers listed in the Joint Agreement include: Asko Appliances AB, BSH Home Appliances Corporation, Danby Products, Ltd., Electrolux Home Products, Inc, GE Appliances, a Haier Company, Liebherr USA, Co., Electronics America Inc., LG Electronics, Midea America Corp., Miele, Inc., Panasonic Appliances Refrigeration Systems (PAPRSA) Corporation of America, Smeg S.p.A, Sub-Zero Group, Inc., The Middleby Corporation (listed with subsidiaries U-Line Corporation and Viking Range, LLC).

[25] DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[26] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.2 of this document.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6295(o)(3)(B))

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking. For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis, taking into account the significance of cumulative FFC national energy savings, the cumulative FFC emissions reductions, and the need to confront the global climate crisis, among other factors.

As stated, the standard levels adopted in this direct final rule are projected to result in national energy savings of 0.32 quads (FFC), the equivalent of the primary annual energy use of 2.1 million homes. Based on the amount of FFC savings, the corresponding reduction in emissions, and need to confront the global climate crisis, DOE has determined the energy savings from the standard levels adopted in this direct final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

E. Economic Justification

1. Specific Criteria

As noted previously, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)(VII)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

[26] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of potential amended standards on manufacturers, DOE conducts an MIA, as discussed in section IV.J of this document. DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a standard.

b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of a product (including its installation) and the operating cost (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first year of compliance with new or amended standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new or amended standards. DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H of this document, DOE uses the NIA spreadsheet models to project national energy savings.

d. Lessening of Utility or Performance of Products

In establishing product classes, and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards adopted in this document would not reduce the utility or performance of the products under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the

Attorney General, that is likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) DOE will transmit a copy of this direct final rule to the Attorney General with a request that the Department of Justice (''DOJ'') provide its determination on this issue. DOE will consider DOJ's comments on the rule in determining whether to withdraw the direct final rule. DOE will also publish and respond to the DOJ's comments in the **Federal Register** in a separate notice.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the adopted standards are likely to provide improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M of this document.

DOE finds that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The adopted standards are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (''GHGs'') associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K of this document; the estimated emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described previously, DOE could consider such information under ''other factors.''

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effect potential amended energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F of this document.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this rulemaking with regard to MREFs. Separate subsections address each component of DOE's analyses, including relevant comments DOE received in its separate rulemaking to amend the energy conservation standards for MREFs prior to receiving the Joint Agreement.

DOE used several analytical tools to estimate the impact of the standards considered in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential amended energy conservation standards. The national impacts analysis uses a second spreadsheet set that provides shipments projections and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (''GRIM''), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *www.regulations.gov/docket/EERE-2020-BT-STD-0039.* Additionally, DOE used output from the latest version of the Energy Information Administration's (''EIA's'') *Annual Energy Outlook* (''*AEO*'') for the emissions and utility impact analyses.

A. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly-available information. The subjects addressed in the market and technology assessment for this rulemaking include (1) a determination of the scope of the rulemaking and product classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends, and (6) technologies or design options that could improve the energy efficiency of MREFs. The key findings of DOE's market assessment are summarized in the following sections. See chapter 3 of the direct final rule TSD for further discussion of the market and technology assessment.

1. Product Classes

The Joint Agreement specifies 11 product classes for MREFs. (Joint Agreement, No. 34 at p. 7) In particular, the Joint Agreement recommends a consolidated product class representation, which incorporates icemaker energy adders and door allowances into the energy use equations for product classes in which they are applicable. As discussed further in section IV.A.1.a of this document, DOE notes that the consolidation of product class representation in the Joint Agreement does not combine the product classes, but rather serves to simplify the list of classes, in particular for those product classes with and without icemakers, and facilitates the implementation of a single equation for representation of their maximum allowable energy use. In this direct final rule, DOE is adopting the product classes from the Joint Agreement, as listed in Table IV.1.

Table IV.1 Recommended Product Classes for Miscellaneous Refrigeration Products

Product Class
1. Freestanding Compact Coolers (FCC)
2. Freestanding Coolers (FC)
3. Built-in Compact Coolers (BICC)
4. Built-in Coolers (BIC)
C-3A. Cooler with all-refrigerator – automatic defrost
C-3A-BI. Built-in cooler with all-refrigerator – automatic defrost
C-5-BI. Built-in cooler with all-refrigerator
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker
C-13A. Compact cooler with all-refrigerator – automatic defrost
C-13A-BI. Built-in compact cooler with all-refrigerator – automatic defrost

DOE further notes that product classes established through EPCA's direct final rule authority are not subject to the criteria specified at 42 U.S.C. 6295(q)(1) for establishing product classes. Nevertheless, in accordance with 42 U.S.C. 6295(o)(4)—which is applicable to direct final rules—DOE has concluded that the standards adopted in this direct final rule will not result in the unavailability in any covered product type (or class) of performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States currently.[27] DOE's findings in this regard are discussed in detail in section V.B.4 of this document.

a. Product Classes With Automatic Icemakers

The Joint Agreement includes a proposed simplification of maximum allowable energy and expresses the maximum allowable energy use for both icemaking and non-icemaking classes in the same equation, thus consolidating the presentation of classes and their energy conservation standards. The energy use equations will, for those classes that may or may not have an icemaker, include a term equal to the icemaking energy use adder multiplied by a factor that is defined to equal 1 for products with icemakers and to equal 0 for products without icemakers. This approach does not combine classes that are the same other than the presence of an icemaker but does simplify the list of classes and representation of their maximum allowable energy use, providing for each set of classes with and without ice makers a single equation for maximum energy use. This simplification is consistent with the approach proposed in the March 2023 NOPR. *See* 88 FR 19382, 19395.

In this direct final rule, DOE is adopting the Joint Agreement proposal to express the maximum allowable energy use for any set of classes differing only in whether the class includes an icemaker or not within a single equation. The single equation does this by including the icemaker energy use adder multiplied by logical variable I that is set equal to 1 for a product with an icemaker present and 0 for a product without an icemaker.

b. Addition of Product Class C–5–BI

The Joint Agreement recommends the addition of a new product class C–5–BI (*i.e.,* built-in combination cooler-refrigerator-freezers with bottom-mounted freezers and automatic icemakers) and specific energy efficiency standards for the new product class (''PC''). (Joint Agreement, No. 34 at p. 7) The current energy conservation standards for MREFs do not include a separate product class for products of this configuration. However, DOE has previously proposed establishing a separate product class for C–5–BI configurations in the March 2023 NOPR, with a baseline level of 6.08AV + 246 kWh/yr, based in part on input from commenters, and considered increased efficiency levels using PC C–3A–BI as a proxy. 88 FR 19382, 19395.

The Joint Agreement recommends a standard equation of 5.47AV + 196.2 + 28I kWh/yr for product class C–5–BI. DOE notes that this recommended level is consistent with the level proposed in the March 2023 NOPR for product class C–5–BI, which represents a 10 percent more stringent level than the baseline level identified in the March 2023 NOPR.

Considering that the recommendation is consistent with the proposed level in the March 2023 NOPR and carries support from a broad cross-section of interests, including trade associations representing these manufactures, environmental and energy-efficiency advocacy organizations, consumer advocates, and electric utility providers as well as the support of several States, DOE believes it appropriate to adopt this new product class, C–5–BI, and the recommended standard equation. DOE's direct rulemaking authority under 42 U.S.C. 6295(p)(4) is constrained only by the requirements of 42 U.S.C. 6295(o), which does not include the product class requirements in 42 U.S.C. 6295(q). However, DOE notes that the addition of a PC C–5–BI is warranted as the application of bottom-mounted freezer and icemaker on a built-in cooler with refrigerator-freezer provides consumers the utility of storage compartments at freezing, fresh food, and cooler temperature levels, whereas the current classes combine a cooler compartment with either a freezer or fresh food compartment, but not both. In addition, establishing separate classes of this configuration both with and without automatic icemaking addresses the unique utility of icemaking that may be

[27] EPCA specifies that DOE may not prescribe an amended or new standard if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4))

included as part of the product. As a result of this additional utility, the application of a bottom-mounted freezer and icemaker constitutes a performance related feature.

Given the indication from the Joint Agreement that such a product class standard would be beneficial in its implementation, the classification of a bottom-mounted freezer and icemaker as performance related features, and the recommendation's consistency with the other adopted standards, DOE is adopting a PC C–5–BI standard in this direct final rule.

See section V of this document for more information regarding the TSL configuration and discussion of the adopted level for this product class. See chapter 5 of the direct final rule TSD for more discussion regarding the addition of this product class.

2. Technology Options

In the preliminary market analysis and technology assessment, DOE identified 36 technology options initially determined to improve the efficiency of MREFs, as measured by the DOE test procedure. In this direct final rule, DOE considered the technology options listed in Table IV.2, consistent with the table of technology options presented in the March 2023 NOPR. 88 FR 19382, 19395–19396. Chapter 3 of the direct final rule TSD includes a detailed list and descriptions of all technology options identified for MREFs.

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Table IV.2 Technology Options Identified for MREFs

Insulation
1. Improved resistivity of insulation (insulation type)
2. Increased insulation thickness
3. Vacuum-insulated panels
4. Gas-filled insulation panels
Gaskets and Anti-Sweat Heat
5. Improved gaskets
6. Double door gaskets
7. Anti-sweat heat
Doors
8. Low-E coatings
9. Inert gas fill
10. Vacuum-insulated glass
11. Additional panes
12. Frame design
13. Solid door
Compressor
14. Improved compressor efficiency
15. Variable-speed compressors
16. Linear compressors
Evaporator
17. Increased surface area
18. Forced-convection evaporator
19. Tube and fin enhancements (including microchannel designs)
20. Multiple evaporators
Condenser
21. Increased surface area
22. Tube and fin enhancements (including microchannel designs)
23. Forced-convection condenser
Defrost System
24. Off-cycle defrost
25. Reduced energy for active defrost
26. Adaptive defrost
27. Condenser hot gas defrost
Control System
28. Electronic temperature control
29. Air-distribution control
Other Technologies
30. Fan and fan motor improvements
31. Improved expansion valve
32. Fluid control or solenoid off-cycle valve
33. Alternative refrigerants
34. Improved refrigerant piping
35. Component location
36. Alternative refrigeration systems

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B. Screening Analysis

DOE uses the following five screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility.* If a technology is determined to have a significant adverse impact on the utility of the product to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) *Safety of technologies.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-pathway proprietary technologies.* If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns.

10 CFR part 430, subpart C, appendix A, sections 6(b)(3) and 7(b).

In sum, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed in the following sections.

The subsequent sections include DOE's evaluation of each technology option against the screening analysis criteria and whether DOE determined that a technology option should be excluded (''screened out'') based on the screening criteria.

1. Screened-Out Technologies

In this direct final rule, DOE screened out the technologies presented in Table IV.3 on the basis of technological feasibility, practicability to manufacture, install, and service, adverse impacts on utility or availability, adverse impacts on health and safety, and/or unique-pathway proprietary technologies. Chapter 4 of the direct final rule TSD includes a detailed description of the screening analysis for each of these technology options.

Table IV.3 Technologies Screened Out in the Direct Final Rule

Technologies
Solid doors
Ultra-low-E (reflective) glass doors
Vacuum-insulated glass
Improved gaskets and double gaskets
Linear compressors
Fluid control or solenoid off-cycle valves
Evaporator tube and fin enhancements
Condenser tube and fin enhancements (except microchannel condensers)
Condenser hot gas defrost
Improved refrigerant piping
Component location
Alternative refrigeration systems
Improved VIPs

2. Remaining Technologies

Through a review of each technology, DOE concludes that all of the other identified technologies listed in section IV.B.2 of this document met all five screening criteria to be examined further as design options in DOE's direct final rule analysis. In summary, DOE did not screen out the following technology options:

Table IV.4 Technologies Remaining in the Direct Final Rule

Insulation
1. Improved resistivity of insulation (insulation type)
2. Increased insulation thickness
3. Gas-filled insulation panels
4. Vacuum-insulated panels
Gasket and Anti-Sweat Heat
5. Anti-sweat heat
Doors
6. Low-E coatings
7. Inert gas fill
8. Additional panes
9. Frame design
Compressor
10. Improved compressor efficiency
11. Variable-speed compressors
Evaporator
12. Forced-convection evaporator
13. Increased surface area
14. Multiple evaporators
Condenser
15. Increased surface area
16. Microchannel designs
17. Forced-convection condenser
Defrost System
18. Reduced energy for automatic defrost
19. Adaptive defrost
20. Off-cycle defrost
Control System
21. Electronic Temperature control
22. Air-distribution control
Other Technologies
23. Fan and fan motor improvements
24. Improved expansion valve
25. Alternative Refrigerants

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DOE determined that these technology options are technologically feasible because they are being used or have previously been used in commercially-available products or working prototypes. DOE also finds that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety). For additional details, see chapter 4 of the direct final rule TSD.

C. Engineering Analysis

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of MREFs. There are two elements to consider in the engineering analysis; the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency products, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each product class, DOE estimates the baseline cost, as well as the incremental cost for the product/equipment at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the LCC and PBP analyses and the NIA).

1. Efficiency Analysis

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the

incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing products (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual products on the market) may be extended using the design option approach to interpolate to define ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the ''max-tech'' level (particularly in cases where the ''max-tech'' level exceeds the maximum efficiency level currently available on the market).

The approach used for this direct final rule to define the efficiency levels for analysis is largely the same as the approach DOE had used for the March 2023 NOPR analysis.

For its analysis in this direct final rule, DOE used a combined efficiency level and design option approach to directly analyze five products classes: freestanding compact coolers, freestanding coolers, and combination cooler classes C–13A, C–3A, and C–9. First, an efficiency-level approach was used to establish an analysis tied to existing products on the market. Several products from the cooler class (compact and standard size) and one product from the combination cooler class (C–13A) were used in physical teardowns. Additional analyses were conducted on classes C–3A and C–9; however, a lack of physical teardown products for these classes led DOE to rely heavily on adjusted analyses from the consumer refrigerator, refrigerator-freezer, and freezers (''RF'') classes 3 and 9, respectively. Then, a design option approach was used to extend the analysis through ''built-down'' efficiency levels and ''built-up'' efficiency levels where there were gaps in the range of efficiencies of products that were reverse engineered. As discussed in the section that follows, DOE applied its direct analyses of freestanding products to the corresponding built-in product classes. DOE's direct analysis informed the adopted standards for those product classes that were not directly analyzed. See section 5.4.1 of the direct final rule TSD for more discussion on DOE's efficiency analysis.

a. Built-in Classes

In this direct final rule analysis, DOE used the freestanding MREF classes as proxies for built-in classes. DOE conducted analysis of the current market for miscellaneous refrigeration products and found that built-in and freestanding products occupy the same range of efficiencies, and DOE did not identify any unique characteristic that would inhibit efficiency improvements for built-in products relative to freestanding products based on a review on the market. As a result, DOE chose to apply its freestanding products analyses to built-in classes.

In response to the March 2023 NOPR, AHAM and Sub-zero Group Inc. (''Sub-zero'') argued that freestanding product classes are not a proxy for built-in product classes and DOE should evaluate them separately. (AHAM, No. 31 at p. 6; Sub-zero, No. 30 at p. 1) AHAM and Sub-zero stated that built-in products have constraints, such as incorporation into kitchen designs and needing to be flush with cabinetry, that affect that the technology options for achieving higher efficiency levels. (AHAM, No. 31 at pp. 6–7; Sub-zero, No. 30 at p. 2) AHAM and Sub-Zero also stated that different testing requirements for built-ins (*e.g.,* two inches or less of rear clearance for freestanding products as opposed to no rear clearance for built-in products) creates inherent design differences between the freestanding and built-in products. *Id.* AHAM and Sub-zero encouraged DOE to revise its analysis to separately analyze freestanding and built-in products, contending that these products are fundamentally different. (AHAM, No. 31 at p. 7; Sub-zero, No. 30 at p. 2)

As discussed in section IV.C.1.c of this document, the efficiency levels analyzed for this direct final rule represent a percentage reduction in energy use below the currently applicable standard for each product class. DOE's analysis of the freestanding product classes as a proxy for the built-in product classes does not presume that the two product types have the same nominal costs at each higher efficiency level, but rather reflects that *incremental* design changes associated with reducing energy use on a percentage basis—relative to the currently applicable standard for each respective product type—are substantially similar between freestanding and built-in products. To reflect the inherent design differences between built-in products compared to free-standing products, as described by commenters, DOE applied a $30, $50, or $150 adder (depending on product size) to the baseline costs for the built-in product classes compared to their freestanding counterparts. *See* chapter 5 of the direct final rule TSD for further details regarding the engineering analysis conducted for each product class.

b. Baseline Efficiency/Energy Use

For each product class, DOE generally selects a baseline model as a reference point for each class, and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each product class represents the characteristics of a product/equipment typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market. When selecting units for the analysis, DOE selects units at baseline from various manufacturers for each directly analyzed product class.

For this direct final rule, DOE chose baseline efficiency levels represented by the current Federal energy conservation standards, expressed as maximum annual energy consumption as a function of the product's adjusted volume. The baseline levels differ for coolers and combination coolers to account for design differences; all coolers share the same baseline level, *i.e.,* the baseline is the same function of adjusted volume for both freestanding and built-in models, for both compact and standard-size models. The current standards incorporate an allowance of a constant 84 kWh/yr icemaker adder for product classes with automatic icemakers, consistent with the current test procedure, which requires adding this amount of annual energy use to the products tested performance if the product has an automatic icemaker. DOE adjusted the baseline energy usage levels for each class to account for the planned revision in the test procedure to reduce the icemaker energy use adder to 28 kWh/yr.[28]

[28] See the October 12, 2021, test procedure final rule for refrigeration products for more information regarding the adoption of the 28 kWh/yr icemaker adder. 86 FR 56790.

DOE directly analyzed a sample of market representative models from within five product classes from multiple manufacturers. Directly analyzed classes include three different AV coolers (AVs of 3 ft^3, 5 ft^3, and 15 ft^3) and three combination cooler classes (C–13A, C–9 and C–3A). In conducting these analyses, eight teardown units were used in construction of cost curves, and their characteristics were determined in large part by testing and reverse-engineering. Further information on the design characteristics of specific analyzed baseline models is summarized in section 5.4.1 of the direct final rule TSD.

c. Higher Efficiency Levels

As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also defines a ''max-tech'' efficiency level to represent the maximum possible efficiency for a given product.

For this direct final rule, DOE analyzed up to five incremental efficiency levels beyond the baseline for each of the analyzed product classes. The efficiency levels begin at EL 1, which was 10 percent more efficient than the current MREF energy conservation standards. For the compact coolers analysis, DOE extended the efficiency levels in steps of 10 percent of the current energy conservation standard up to EL 4 at 40 percent; for full-size coolers, EL 4 is analyzed at 35 percent. For combination coolers (excluding C–9) efficiency levels above EL 1 are in steps of roughly 5 percent up to EL 4. Finally, EL 5 represents maximum technology (''max-tech''), which uses design option analysis to extend the analysis beyond EL 4 by using all applicable design options, including max efficiency variable-speed compressors and maximum practical use of vacuum-insulated panels (''VIPs''). For compact coolers, max tech stands at either 59 percent or 50 percent for the two directly analyzed AVs—3.1 ft^3 and 5.1 ft^3 respectively; full-size coolers max-tech stands at 38 percent. For combination coolers C–13A and C–3A, max tech stands at 28 percent and 24 percent, respectively.

DOE conducted analysis for product class C–9 starting with analysis for a class 9 upright freezer with comparable total refrigerated volume. In its analysis, DOE concluded that application of all of the design options being considered at max-tech would be required for the product to be compliant with the current energy conservation standards. Currently, the Compliance Certification Database (''CCD'') includes only one product that is certified as C–9—an LG product certified with energy use 17 percent below the standard. DOE did not purchase, test, and reverse-engineer this product, in-part because of the limited product offering and expected insignificant potential for energy savings for the class. Thus, DOE is relying primarily on its analysis of the RF product class 9 freezer, to suggest that opportunities for energy savings are likely limited and likely not cost-effective, even if improved efficiency is technically feasible. DOE has not analyzed efficiency levels beyond baseline for this product class in this direct final rule but has taken into consideration all design options applied at max-tech in its analysis.

DOE notes the current Energy Star specifications correspond to EL 1 for freestanding full-size coolers (10 percent), EL 2 for freestanding compact coolers (20 percent), and EL 3 for both classes of built-in coolers (30 percent).[29]

The efficiency levels analyzed beyond the baseline are shown in Table IV.5 as follows.

Table IV.5 Incremental Efficiency Levels for Analyzed Products (% Energy Use Less than Baseline)

	Coolers			Combination Coolers	
Product Class (AV, cu.ft.)	FCC (3.1)	FCC (5.1)	FC (15.3)	C-13A (5)	C-3A (21)
EL 1	10%	10%	10%*	10%	10%
EL 2	20%*	20%*	20%	16%	15%
EL 3	30%	30%	30%	20%	20%
EL 4	40%	40%	35%	25%	24%
EL 5	59%	50%	38%	28%	

* Efficiencies at or slightly better than the ENERGY STAR® efficiency

d. Variable-Speed Compressor Supply Chain

In response to the March 2023 NOPR, AHAM suggested that DOE evaluate the robustness of the supply chains for variable-speed compressors (''VSCs'') while considering the growing demand given more stringent standards for cooling appliances, including both air conditioning and refrigeration. (AHAM, No. 31 at p. 5)

In considering this comment and comments provided in response to the RF rulemaking, DOE interviewed relevant compressor manufacturers to gather information regarding the level of VSC implementation that would be required at the efficiency levels analyzed in this direct final rule, the current and predicted supply of VSCs into the U.S. market, the predicted time to ramp up production of VSCs, and pricing of VSCs and components. None of the compressor manufacturers interviewed expressed any concerns regarding the ability to ramp-up VSC capacity in response to more stringent MREF standards. Compressor manufacturers additionally noted that any previous bottlenecks in the VSC supply chain are no longer a factor at this time, and that they have been modifying sourcing strategies to ensure a reliable supply of VSCs going forward. DOE concluded from these interviews that compressor manufacturers will be able to readily meet any increased demand for VSCs as a result of the adopted standards within the 5-year

[29] See EnergyStar, ''Refrigerators & Freezers Key Product Criteria,'' Available at *www.energystar.gov/products/appliances/refrigerators/key_product_criteria* (last accessed July 14, 2023).

timeframe between publication of this direct final rule and the compliance date. DOE further notes that the amended standards adopted in this final rule reflect the recommendations of the Joint Agreement, of which AHAM was a signatory.

2. Cost Analysis

The cost analysis portion of the engineering analysis is conducted using one or a combination of cost approaches. The selection of cost approach depends on a suite of factors, including the availability and reliability of public information, characteristics of the regulated product, the availability and timeliness of purchasing the product on the market. The cost approaches are summarized as follows:

☐ *Physical teardowns:* Under this approach, DOE physically dismantles a commercially available product, component-by-component, to develop a detailed bill of materials for the product.

☐ *Catalog teardowns:* In lieu of physically deconstructing a product, DOE identifies each component using parts diagrams (available from manufacturer websites or appliance repair websites, for example) to develop the bill of materials for the product.

☐ *Price surveys:* If neither a physical nor catalog teardown is feasible (for example, for tightly integrated products such as fluorescent lamps, which are infeasible to disassemble and for which parts diagrams are unavailable) or cost-prohibitive and otherwise impractical (*e.g.,* large commercial boilers), DOE conducts price surveys using publicly available pricing data published on major online retailer websites and/or by soliciting prices from distributors and other commercial channels.

In the present case, DOE conducted the analysis using primarily physical teardowns. Where possible, physical teardowns were used to provide a baseline of technology options and pricing for a specific product class at a specific EL. Then with technology option information, DOE estimated the cost of various design options including compressors, VIPs, and insulation, by extrapolating the costs from price surveys. With specific costs for technology options, DOE was then able to ''build-up'' or ''build-down'' from the various teardown models to finish the cost-efficiency curves. DOE used this approach to calibrate the analysis to certified or measured energy use of specific available models where possible, while allowing a broader range of potential efficiency levels to be considered.

The resulting bill of materials provides the basis for the manufacturer production cost (''MPC'') estimates.

To account for manufacturers' non-production costs and profit margin, DOE applies a multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (''MSP'') is the price at which the manufacturer distributes a unit into commerce. DOE developed an average manufacturer markup by examining corporate annual reports and Securities and Exchange Commission (''SEC'') 10–K reports [30] filed by publicly traded manufacturers in primarily engaged in appliance manufacturing and whose combined product range includes MREFs. DOE then compared the manufacturer markups derived from the financials to the manufacturer markups estimated in the October 2016 Direct Final Rule. 81 FR 75194, 75224–75225. See chapter 12 of the direct final rule TSD for additional detail on the manufacturer markup.

[30] U.S. Securities and Exchange Commission, Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. Available at *www.sec.gov/edgar/search/* (last accessed January 30, 2024).

3. Cost-Efficiency Results

The results of the engineering analysis are reported as cost-efficiency data (or ''curves'') in the form of AEU (in kWh) versus MPC (in dollars), which form the basis for subsequent analyses.

DOE developed estimates of MPCs for each unit in the teardown sample, and also performed additional modeling for each of the teardown samples, to extend the analysis to cover the range of efficiency levels appropriate for a representative product. To estimate the MPCs necessary to achieve higher efficiency levels, in particular those beyond the highest-efficiency products in the test sample, DOE considered design options that were most likely to be considered and implemented by manufacturers to achieve the higher efficiency levels. Based on input from manufacturers and an understanding of the markets, DOE then estimated the costs associated with those design options to determine the MPCs at each of the analyzed efficiency levels.

The resulting weighted average incremental design option by efficiency level and cost curves for each directly analyzed product class are (*i.e.,* the additional costs manufacturers would likely incur by producing miscellaneous refrigeration products at each efficiency level compared to the baseline) are provided in Tables IV.6 and IV.7 as follows. See chapter 5 of the direct final rule TSD for additional detail on the engineering analysis and formulation of cost curves.

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Table IV.6 Incremental Design Options* by Efficiency Level and Product Class

Product Class (AV***)		EL1	EL2	EL3	EL4	EL5
FCC (3.1)	EL Percent	10%	20%	30%	40%	59%
	Design Options Added	Higher EER Compressor; Argon Filled Glass	Tube and Fin Condenser; Brushless DC Evaporator Fan	Higher-EER Compressor; Tube and Fin Evaporator; Brushless DC Condenser Fan	Variable-Speed Compressor; Higher EER Compressor; Roll Bond Evaporator; Increased Insulation Thickness	Partial VIP Coverage; Triple Pane Glass**; Tube and Fin Bond Evaporator
FCC (5.1)	EL Percent	10%	20%	30%	40%	50%
	Design Options Added	Argon Filled Glass; Higher-EER Compressor	Higher-EER Compressor	Higher-EER Compressor; Hot Wall + Tube and Fin Condenser	Higher-EER Compressor; Tube and Fin Evaporator; Increased Insulation Thickness	Variable-Speed Compressor; Partial VIP Coverage; Triple Pane Glass**
FC (15.3)	EL Percent	10%	20%	30%	35%	38%
	Design Options Added	Higher-EER Compressor; Hot Wall + Tube and Fin Condenser	Higher-EER Compressor	Variable-Speed Compressor; Variable Defrost; 3x Tube and Fin Evaporator; Increased Insulation Thickness	Triple Pane Glass**	Partial VIP Coverage
C-13A (5)	EL Percent	10%	16%	20%	25%	28%

	Design Options Added	Higher-EER Compressor	Higher-EER Compressor	Variable-Speed Compressor	Triple Pane Glass**	Partial VIP Coverage
C-3A (20.6)	EL Percent	10%	15%	20%	24%	
	Design Options Added	Higher-EER Compressor	Variable-Speed Compressor; Variable (off-cycle) Defrost	Triple Pane Glass**; Timed (off-cycle) Defrost; Higher-EER Variable Speed Compressor	Partial VIP Coverage; Variable (off-cycle) Defrost	

*Design options are cumulative between efficiency levels (except for component replacements)
** Triple-pane glass pack consists of soft-coated low-E glass and argon gas fill (with a reduced gap size to maintain door thickness)
*** AV represented in ft^3

Table IV.7 Cost-Efficiency Curves for Miscellaneous Refrigeration Products

Product Class (AV*)		**EL0**	**EL1**	**EL2**	**EL3**	**EL4**	**EL5**
FCC (3.1)	EL Percent	0%	10%	20%	30%	40%	59%
	MPC	$298.10	$301.43	$317.16	$334.32	$367.99	$425.94
	Incremental MPC	$0.00	$3.33	$19.06	$36.22	$69.88	$127.83
FCC (5.1)	EL Percent	0%	10%	20%	30%	40%	50%
	MPC	$337.79	$340.92	$343.33	$359.55	$386.02	$477.10
	Incremental MPC	$0.00	$3.13	$5.53	$21.76	$48.23	$139.31
FC (15.3)	EL Percent	0%	10%	20%	30%	35%	38%
	MPC	$699.52	$714.82	$718.24	$762.98	$921.40	$957.10
	Incremental MPC	$0.00	$15.30	$18.72	$63.46	$221.87	$257.57
C-13A (5)	EL Percent	0%	10%	16%	20%	25%	28%
	MPC	$571.07	$573.07	$574.83	$603.56	$651.33	$677.23
	Incremental MPC	$0.00	$2.00	$3.76	$32.48	$80.26	$106.16
C-3A (20.6)	EL Percent	0%	10%	15%	20%	24%	
	MPC	$540.00	$543.17	$578.47	$698.50	$742.55	
	Incremental MPC	$0.00	$3.17	$38.47	$158.50	$202.55	
C-9 (20)**	EL Percent	0%					
	MPC	$800					
	Incremental MPC	$0.00					

* Adjusted volumes provided in ft^3
** Only considered at baseline

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D. Markups Analysis

The markups analysis develops appropriate markups (*e.g.,* retailer markups, distributor markups, contractor markups) in the distribution chain and sales taxes to convert the MSP estimates derived in the engineering analysis to consumer prices, which are then used in the LCC and PBP analysis. At each step in the distribution channel, companies mark up the price of the product to cover business costs and profit margin.

For MREFs, DOE identified two distribution channels: (1) manufacturers to retailers to consumers, and (2) manufacturers to wholesalers to dealers/retailers to consumers. The parties involved in the distribution channel are retailers, wholesalers, and dealers.

DOE developed baseline and incremental markups for each actor in the distribution chain. Baseline markups are applied to the price of products with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher-efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup and is designed to maintain similar per-unit operating profit before and after new or amended standards.[31]

DOE relied on economic data from the U.S. Census Bureau to estimate average baseline and incremental markups. Specifically, DOE used the 2017 Annual Retail Trade Survey for the ''electronics and appliance stores'' sector to develop retailer markups,[32] and the 2017 Annual Wholesaler Trade Survey for the ''household appliances, and electrical and electronics goods merchant wholesalers'' sector to estimate wholesaler markups.[33] For the wholesaler to dealer/retailer channel, DOE assumed that the dealer markups are half of the retailer markups in the retailer channel.

For this direct final rule, DOE considered comments it had received regarding the markups analysis conducted for the March 2023 NOPR. The approach used for this direct final rule is largely the same as the approach DOE had used for the March 2023 NOPR analysis.

In response to the March 2023 NOPR, AHAM commented on DOE's reliance on the concept of incremental markups, stating that it is based on discredited theory, and it is in contradiction to empirical evidence provided by AHAM during a 2014 proposed rulemaking for energy conservation standards for residential dishwashers. (AHAM, No. 31 at p. 9)

DOE's incremental markup approach assumes that an increase in profitability, which is implied by keeping a fixed markup when the product price goes up due to higher efficiency standards, is unlikely to be viable over time in a reasonably competitive market like household appliance retailers. The Herfindahl-Hirschman Index (''HHI'') reported by the 2017 Economic Census indicates that the household appliance stores sector (NAICS 443141) is a highly competitive marketplace.[34] DOE recognizes that actors in the distribution chains are likely to seek to maintain the same markup on appliances in response to changes in manufacturer selling prices after an amendment to energy conservation standards. However, DOE believes that retail pricing is likely to adjust over time as those actors are forced to readjust their markups to reach a medium-term equilibrium in which per-unit profit is relatively unchanged before and after standards are implemented.

DOE acknowledges that markup practices in response to amended standards are complex and vary with business conditions. However, DOE's analysis necessarily only considers changes in appliance offerings that occur in response to amended standards and isolate the effect of amended standards from other factors. Obtaining data on markup practices in the situation described previously is very challenging. Hence, DOE continues to maintain that its assumption that standards do not facilitate a sustainable increase in profitability is reasonable.

Chapter 6 of the direct final rule TSD provides details on DOE's development of markups for MREFs.

E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of MREFs at different efficiencies in representative U.S. households, and to assess the energy savings potential of increased MREF efficiency. The energy use analysis estimates the range of energy use of MREFs in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of amended or new standards.

DOE determined a range of annual energy use of MREFs as a function of unit volume. As shown in Table IV.8, DOE developed distributions of adjusted volume of product classes with more than one representative unit base on the capacity distributions reported in the TraQline® wine chiller data spanning from 2020 Q1 to 2022 Q1.[35] DOE also developed a sample of households that use MREFs based on the TraQline wine chiller data (see section IV.F of this document for details). For each volume and considered efficiency level, DOE derived the energy consumption as measured by the DOE MREF test procedure at appendix A.

[31] Because the projected price of standards-compliant products is typically higher than the price of baseline products, using the same markup for the incremental cost and the baseline cost would result in higher per-unit operating profit. While such an outcome is possible, DOE maintains that in markets that are reasonably competitive it is unlikely that standards would lead to a sustainable increase in profitability in the long run.

[32] U.S. Census Bureau, *Annual Retail Trade Survey.* 2017. Available at *www.census.gov/programs-surveys/arts.html.*

[33] U.S. Census Bureau, *Annual Wholesale Trade Survey.* 2017. Available at *www.census.gov/awts.*

[34] 2017 Economic Census, Selected sectors: Concentration of largest firms for the U.S. Available at *www.census.gov/data/tables/2017/econ/economic-census/naics-sector-44-45.html.* The Herfindahl-Hirschman Index value can be found by navigating to the ''Concentration of largest firms for the U.S.'' table and then filtering the industry code to NAICS 443141.The Herfindahl-Hirschman Index reported for the largest 50 firms in household appliance stores sector, is 123.8. Generally, a market with an HHI value of under 1,000 is considered to be competitive.

[35] TraQline is a market research company that specialized in tracking consumer purchasing behavior across a wide range of products using quarterly online surveys.

Table IV.8 Distribution of Adjusted Interior volumes by Product Class

Adjusted Volume (ft^3)	Percentage
Cooler-FC	
3.1	83.4
5.1	16.6
Cooler-BIC	
3.1	81.3
5.1	18.7
Cooler-F and Cooler-BI	
15.3	100.0
C-3A	
21	100.0
C-9	
20	100.0
C-13A	
5	100.0

For this direct final rule, DOE considered comments it had received regarding the energy use analysis conducted for the March 2023 NOPR. The approach used for this direct final rule is largely the same as the approach DOE had used for the March 2023 NOPR analysis.

In response to the March 2023 NOPR, AHAM commented that DOE relies heavily on the EIA's Residential Energy Consumption Survey (''RECS'') data for estimating energy use and how consumption varies at the household level. Specifically, AHAM expressed concern that the use of RECS data to estimate energy consumption at the household level may introduce ''outlier values,'' resulting in uncertainty and inaccuracies (AHAM, No. 31 at p. 11) In this direct final rule, as well as in the March 2023 NOPR, DOE did not tie the energy consumption of MREFs to RECS survey data. 87 FR 35678. No household or demographic information from RECS was used in the energy use analysis for MREFs. Instead, as mentioned above, DOE used the TraQline wine chiller data to develop a sample of households representing MREF purchasers and derived the energy consumption of MREFs as measured by the DOE MREF test procedure. DOE further notes that AHAM is a party to the Joint Agreement and is supportive of the recommended standards adopted in this direct final rule.

Chapter 7 of the direct final rule TSD provides details on DOE's energy use analysis for MREFs.

F. Life-Cycle Cost and Payback Period Analysis

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for MREFs. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

□ The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (manufacturer selling price, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.

□ The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended or new standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case, which reflects the estimated efficiency distribution of MREFs in the absence of new or amended energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline product.

For this direct final rule, DOE considered comments it had received regarding the LCC analysis conducted for the March 2023 NOPR. The LCC approach used for this direct final rule is largely the same as the approach DOE had used for the March 2023 NOPR analysis.

During the May 2, 2023, public meeting, Edison Electric Institute (''EEI'') questioned the cost-effectiveness of the proposed TSL (TSL 4), due to the high percentage of consumers experiencing a net LCC cost and the simple payback period results ranging from 6.8 to 8 years, and urged DOE to consider selecting another TSL that may be more cost-effective for consumers. (May 2, 2023, Public Meeting Transcript, No. 33 at pp. 5–6). In response, DOE notes that when deciding whether a proposed standard is economically justified, DOE determines whether the benefits of the standard exceed its burdens by considering the seven statutory factors discussed in section II.A of this document. DOE considered the seven statutory factors when evaluating the Recommended TSL in the Joint Agreement. As discussed in section V.C.1 of this document, overall, the LCC savings would be positive for all MREF product classes, and, while 43.7 percent of MREF consumers would experience a net cost, slightly more than half of MREF consumers would experience a net benefit (52.9 percent). DOE provides a detailed comparative discussion and rigorous justification on the adopted

TSL (the Recommended TSL) in section V.C.1 of this document.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of MREF purchasers. As stated previously, DOE developed purchaser samples based on TraQline wine chiller survey data. The survey panel is weighted against the U.S. Census based on their demographic characteristics to make the sample representative of the U.S. population. The wine chiller survey asked respondents about the product features of the wine chillers they recently purchased, as well as the purchasing channel of the products. To account for the more recent MREF consumers, DOE used the last 2 years of survey data (2020 Q1 to 2022 Q1) to construct the household sample used in this direct final rule.

For each sample purchaser, DOE determined the energy consumption for the MREFs and the appropriate energy price. By developing a representative sample of purchasers, the analysis captured the variability in energy consumption and energy prices associated with the use of MREFs.

Inputs to the calculation of total installed cost include the cost of the product—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, and discount rates. DOE created distributions of values for product lifetime, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and MREF user samples. The model calculated the LCC for products at each efficiency level for 10,000 MREF purchasers per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency level relative to the no-new-standards case efficiency distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency.

DOE calculated the LCC for consumers of MREFs as if each were to purchase a new product in the first year of required compliance with amended standards. As discussed earlier in this document, the compliance date of amended standards is January 31, 2029, for TSL 4 (the Recommended TSL detailed in the Joint Agreement). For all other TSLs considered in this direct final rule, standards apply to MREFs manufactured 5 years after the date on which any amended standard is published. (42 U.S.C. 6295(l)(2)) Therefore, DOE used 2029 as the first year of compliance with any amended standards for MREFs for all TSLs.

Table IV.9 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the direct final rule TSD and its appendices.

Table IV.9 Summary of Inputs and Methods for the LCC and PBP Analysis*

Inputs	Source/Method
Product Cost	Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate. Used historical data to derive a price scaling index to project product costs.
Installation Costs	Assumed no change with efficiency level. Not considered in the analysis.
Annual Energy Use	Derived from engineering inputs (see chapter 5 of the direct final rule TSD). Variability: Based on the product class and rep unit volume, where applicable.
Energy Prices	Electricity: Based on 2022 average and marginal electricity price data from the Edison Electric Institute. Variability: Electricity prices vary by region.
Energy Price Trends	Based on *AEO2023* price projections.
Repair and Maintenance Costs	Assumed no change with efficiency level. Not considered in the analysis.
Product Lifetime	Sample weighted average: 12.6 years
Discount Rates	Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances.
Compliance Date	2029

* Not used for PBP calculation. References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the direct final rule TSD.

In response to the March 2023 NOPR, AHAM commented that should be conducting a purchase decision analysis in its LCC model to reflect the actual conditions and expectations of the purchaser rather than relying on an outcome modeling approach. (AHAM, No. 31 at pp. 8–9) In the current setup of LCC analysis, DOE is not explicitly modeling the purchase decision made by purchasers when the standard becomes effective. DOE's analysis is intended to model the range of individual outcomes likely to result from a hypothetical amended energy

conservation standard at various levels of efficiency. DOE does not discount the consumer decision theory established in the broad behavioral economics field but rather notes that its methodological decision was made after considering the existence of various systematic market failures and their implication in rational versus actual purchase behavior. Furthermore, the outcome of the LCC is not considered in isolation, but in the context of the broader set of analyses, including the NIA. Moreover, the type of data required to facilitate a robust consumer choice modeling of a specific household appliance at the individual household level is currently lacking and AHAM did not provide much data. DOE further notes that AHAM is a party to the Joint Agreement and is supportive of the recommended standard adopted in this direct final rule.

1. Product Cost

To calculate consumer product costs, DOE multiplied the MPCs developed in the engineering analysis by the markups described previously (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because DOE applies an incremental markup to the increase in MSP associated with higher-efficiency products.

Economic literature and historical data suggest that the real costs of many products may trend downward over time according to ''learning'' or ''experience'' curves. Experience curve analysis implicitly includes factors such as efficiencies in labor, capital investment, automation, materials prices, distribution, and economies of scale at an industry-wide level.[36] In the experience curve method, the real cost of production is related to the cumulative production or ''experience'' with a manufactured product. As MREFs use similar technologies to RF, DOE applied the same experience curve developed for RF to MREFs. DOE used inflation-adjusted historical Producer Price Index (''PPI'') data for ''household refrigerator and home freezer manufacturing'' from the Bureau of Labor Statistics' (''BLS'') spanning the time period between 1981 and 2022,[37] along with the cumulative production of RF to derive the experience curve. The estimated learning rate (defined as the fractional reduction in price expected from each doubling of cumulative production) is 39.4 ± 1.9 percent.

DOE included variable-speed compressors as a technology option for higher efficiency levels. To develop future prices specific for that technology, DOE applied a different price trend to the controls portion of the variable-speed compressor, which represents part of the price increment when moving from an efficiency level achieved with the highest efficiency single-speed compressor to an efficiency level with variable-speed compressor. DOE used PPI data on ''semiconductors and related device manufacturing'' between 1967 and 2022 to estimate the historic price trend of electronic components in the control.[38] The regression, performed as an exponential trend line fit, results in an R-square of 0.99, with an annual price decline rate of 6.3 percent. See chapter 8 of the TSD for further details on this topic.

In response to the March 2023 NOPR, AHAM commented that there is no theoretical underpinning for the implementation of an experience or learning curve and the functional form it should take. In addition, AHAM stated that the data that DOE used merely represents an empirical relationship, and a clear connection between the actual products in question and the data used needs to be made. AHAM noted that there is little reason to support the concept that price learning through manufacturing efficiencies should extend beyond the labor and materials in the product itself, and that such a relationship should not hold for other cost components. (AHAM, No. 31 at p. 10)

DOE notes that there is considerable empirical evidence of consistent price declines for appliances in the past few decades. Several studies examined retail prices of a wide range of household appliances during different periods of time and showed that prices had been steadily falling while efficiency had been increasing, for example Dale, *et al.* (2009) [39] and Taylor, *et al.* (2015).[40] As mentioned in Taylor and Fujita (2013),[41] Federal agencies have adopted different approaches to account for ''the changing future compliance costs that might result from technological innovation or anticipated behavioral changes.'' Given the limited data availability on historical manufacturing costs broken by different components, DOE utilized the PPI published by the BLS as a proxy for manufacturing costs to represent the analyzed product as a whole.[42] While products may experience varying degrees of price learning during different product stages, given that MREFs share similar cooling technologies with RF, DOE applied the same learning rate developed for RF to MREFs. DOE modeled the average learning rate based on the full historical PPI series for ''household refrigerator and home freezer manufacturing'' to capture the overall price evolution in relation to the cumulative shipments. DOE also conducted sensitivity analyses that are based on a particular segment of the PPI data to investigate the impact of alternative product price projections (low price learning and high price learning) in the NIA of this direct final rule. DOE further notes that AHAM is a party to the Joint Agreement and is supportive of the recommended standard adopted in this direct final rule.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE is not aware of any data that suggest the cost of installation changes as a function of efficiency for MREFs. DOE therefore assumed that installation costs are the same regardless of EL and do not impact the LCC or PBP. As a result, DOE did not include installation costs in the LCC and PBP analysis.

3. Annual Energy Consumption

For each sampled consumer, DOE determined the energy consumption for MREFs at different efficiency levels using the approach described previously in section IV.E of this document.

[36] Taylor, M. and Fujita, K.S. Accounting for Technological Change in Regulatory Impact Analyses: *The Learning Curve Technique.* LBNL–6195E. Lawrence Berkeley National Laboratory, Berkeley, CA. April 2013. Available at *escholarship.org/uc/item/3c8709p4#page-1.*

[37] Household refrigerator and home freezer manufacturing PPI series ID: PCU3352203352202. Available at *www.bls.gov/ppi/.*

[38] Semiconductors and related device manufacturing PPI series ID: PCU334413334413. Available at *www.bls.gov/ppi/.*

[39] Dale, L., C. Antinori, M. McNeil, James E. McMahon, and K.S. Fujita. Retrospective evaluation of appliance price trends. Energy Policy. 2009. 37 pp. 597–605.

[40] Taylor, M., C.A. Spurlock, and H.-C. Yang. Confronting Regulatory Cost and Quality Expectations. An Exploration of Technical Change in Minimum Efficiency Performance Standards. 2015. Lawrence Berkeley National Lab. (LBNL), Berkeley, CA (United States). Report No. LBNL–1000576. (last accessed June 30, 2023.) Available at *www.osti.gov/biblio/1235570/* (last accessed June 30, 2023).

[41] Taylor, M. and K.S. Fujita. Accounting for Technological Change in Regulatory Impact Analyses: The Learning Curve Technique. 2013. Lawrence Berkeley National Lab (LBNL), Berkeley, CA (United States). Report No. LBNL–6195E. Available at *https://escholarship.org/uc/item/3c8709p4* (last accessed March 24, 2024).

[42] PPI is a proxy for manufacturing costs as certain effects (such as market structure and competitive effects) could influence PPI in a way that would not be reflected in manufacturing costs.

4. Energy Prices

Because marginal electricity price more accurately captures the incremental savings associated with a change in energy use from higher efficiency, it provides a better representation of incremental change in consumer costs than average electricity prices. Therefore, DOE applied average electricity prices for the energy use of the product purchased in the no-new-standards case, and marginal electricity prices for the incremental change in energy use associated with the other efficiency levels considered.

DOE derived electricity prices in 2022 using data from EEI Typical Bills and Average Rates reports. Based upon comprehensive, industry-wide surveys, this semi-annual report presents typical monthly electric bills and average kilowatt-hour costs to the customer as charged by investor-owned utilities. For the residential sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2018).[43]

DOE's methodology allows electricity prices to vary by sector, region, and season. In the analysis, variability in electricity prices is chosen to be consistent with the way the consumer economic and energy use characteristics are defined in the LCC analysis. See chapter 8 of the direct final rule TSD for details.

To estimate energy prices in future years, DOE multiplied the 2022 energy prices by the projection of annual average price changes from the Reference case in *AEO2023,* which has an end year of 2050.[44] To estimate price trends after 2050, the 2046–2050 average was used for all years.

5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing product components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. Typically, small incremental increases in product efficiency entail no, or only minor, changes in repair and maintenance costs compared to baseline efficiency products. DOE is not aware of any data that suggest the cost of repair or maintenance for MREFs changes as a function of efficiency. DOE therefore assumed that these costs are the same regardless of EL and do not impact the LCC or PBP. As a result, DOE did not include maintenance and repair costs in the LCC and PBP analysis.

6. Product Lifetime

For MREFs, DOE used lifetime estimates from products that operate using the same refrigeration technology: covered refrigerators and refrigerator-freezers, based on the Refrigerators, Refrigerator-Freezers, and Freezers direct final rule analysis. 89 FR 3026 (January 17, 2024). DOE estimated a maximum lifetime of 40 years for all product classes and an average lifetime of 10.6 years for compact coolers and 14.6 years for full-size coolers. The weighted average lifetime over the sample population, considering the market distribution, was 12.6 years. DOE also assumed that the probability function for the annual survival of MREFs would take the form of a Weibull distribution. See chapter 8 of the direct final rule TSD for a more detailed discussion.

7. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to households to estimate the present value of future operating cost savings. DOE estimated a distribution of discount rates for MREFs based on consumer financing costs and the opportunity cost of consumer funds.

DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[45] The LCC analysis estimates net present value over the lifetime of the product, so the appropriate discount rate will reflect the general opportunity cost of household funds, taking this time scale into account. Given the long-time horizon modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's triennial Survey of Consumer Finances[46] (''SCF'') starting in 1995 and ending in 2019. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 4.2 percent. See chapter 8 of the direct final rule TSD for further details on the development of consumer discount rates.

8. Energy Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of product efficiencies under the no-new-standards case (*i.e.,* the case without amended or new energy conservation standards).

For this direct final rule, DOE is using the efficiency distribution by product class as provided by AHAM in response to a notice of public meeting and availability of the preliminary technical support document for MREFS. 87 FR 3229 (Jan. 21, 2022) (See AHAM, No. 18, pp. 2–5) DOE understands that this approach inherently assumes that the rest of the MREF market has a similar distribution of efficiencies. However, due to lack of efficiency data from non-AHAM members, DOE has no reason to question that assumption. DOE also assumed that the current distribution of product efficiencies would remain constant in 2029, and during the

[43] Coughlin, K. and B. Beraki.2018. Residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001169. Available at *https://ees.lbl.gov/publications/residential-electricity-prices-review.*

[44] EIA. Annual Energy Outlook 2023. Available at *www.eia.gov/outlooks/aeo/* (last accessed November 29, 2023).

[45] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend. The implicit discount rate is not appropriate for the LCC analysis because it reflects a range of factors that influence consumer purchase decisions, rather than the opportunity cost of the funds that are used in purchases.

[46] U.S. Board of Governors of the Federal Reserve System. Survey of Consumer Finances. 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019. Available at *https://www.federalreserve.gov/econresdata/scf/scfindex.htm* (last accessed November 29, 2023).

analysis period, in the no-new-standards case.

The estimated market shares for the no-new-standards case for MREFs are shown in Table IV.10. See chapter 8 of the direct final rule TSD for further information on the derivation of the efficiency distributions.

Table IV.10 Efficiency Distributions for the No-New-Standards Case in the Compliance Year

Product Class	Total Adjusted Volume (cu. ft.)	2029 Market Share (%)						
		EL 0	EL 1	EL 2	EL 3	EL 4	EL 5	Total*
Cooler-FC	3.1	79	18	3	0	0	0	100
	5.1							
Cooler-BIC	3.1	18	6	1	1	0	74	100
	5.1							
Cooler-F	15.3	42	58	0	0	0	0	100
Cooler-BI	15.3	72	8	20	0	0	0	100
C-13A	5	99	1	0	0	0	0	100
C-3A	21	100	0	0	0	0		100

* The total may not sum to 100% due to rounding.

The LCC Monte Carlo simulations draw from the efficiency distributions and randomly assign an efficiency to the MREF purchased by each sample household in the no-new-standards case. The resulting percent shares within the sample match the market shares in the efficiency distributions.

9. Payback Period Analysis

The payback period is the amount of time (expressed in years) it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. DOE refers to this as a ''simple PBP'' because it does not consider changes over time in operating cost savings. The PBP calculation uses the same inputs as the LCC analysis when deriving first-year operating costs.

As noted previously, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price projection for the year in which compliance with the amended standards would be required.

G. Shipments Analysis

DOE uses projections of annual product shipments to calculate the national impacts of potential amended or new energy conservation standards on energy use, NPV, and future manufacturer cash flows.[47] The shipments model takes an accounting approach, tracking market shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

DOE defined two broad MREF product categories (coolers and combination cooler refrigeration products) and developed models to estimate shipments for each category. DOE used various data and assumptions to develop the shipments for each product class considered in this rulemaking.

Given the limited available data sources on historical shipments of coolers, DOE assumed a constant penetration rate of 13.3 percent in the U.S. households throughout the analysis period based on online surveys[48] to estimate the annual shipments starting from 2016.[49 50] DOE multiplied the estimated penetration by the total number of households from the *AEO2023,* and then determined the number of new shipments by dividing the total stock by the mean product lifetime. DOE projected the annual shipments by incorporating the lifetime distributions by product class and assuming that the growth of new sales is consistent with the housing

[47] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

[48] DOE also reviewed the recent release of the EIA 2020 RECS (''RECS 2020''), which identified wine chillers in representative U.S. households. DOE found that the penetration rate of wine chillers in RECS 2020 is significantly lower compared to that estimated by DOE for MREFs based on previous market surveys. Due to the uncertainty on the breakdown of MREFs between wine chillers and other miscellaneous refrigeration applications in the U.S. market, DOE continued to use the 13.3 percent penetration rate for MREFs in this direct final rule. However, DOE also modeled an alternative shipments scenario based on the lower penetration rate of MREFs in American homes derived from the RECS 2020 data. For more details on this alternative scenario and the resulting NES and NPV results, see chapter 9 and appendix 10C of the direct final rule TSD, respectively.

[49] Greenblatt, J.B., S.J. Young, H.-C. Yang, T. Long, B. Beraki, S.K. Price, S. Pratt, H. Willem, L.-B. Desroches, and S.M. Donovan. U.S. Residential Miscellaneous Refrigeration Products: Results from Amazon Mechanical Turk Surveys. 2014. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL–6537E.

[50] Donovan, S.M., S.J. Young, and J.B. Greenblatt. Ice-Making in the U.S.: Results from an Amazon Mechanical Turk Survey. Lawrence Berkeley National Laboratory. Report No. LBNL–183899.

projections from *AEO2023.* To estimate shipments prior to 2016, DOE assumed a flat historical shipment trend at the 2016 level. With even more limited available data sources on historical shipments of combination cooler refrigeration products, DOE estimated total shipments of combination cooler refrigeration products in 2014 to be 36,000 units, based on feedback from manufacturers from the October 2016 Direct Final Rule. DOE assumed sales would increase in line with the increase in the number of households in *AEO2023.* Finally, DOE incorporated the 2021 shipment data provided by AHAM (see AHAM, No. 18 at pp. 3, 5) [51] to re-calibrate total shipments for each product class considered in this rulemaking.

DOE used the efficiency distributions by product class to match the data submitted by AHAM. DOE also assumed that the market share of each product class (in relation to the total MREF shipments) matched the market shares provided by AHAM. To estimate total MREF shipments, DOE utilized the AHAM shipments data and AHAM-member information and reviewed the TraQline data from 2020 Q1 to 2022 Q1 to estimate non-AHAM-member shipments.[52] Based on this approach, DOE's estimate of the MREF shipments for the whole market was consistent with the total number of shipments estimated using DOE's approach discussed earlier and used in the March 2023 NOPR. Hence, DOE continued using the same approach to develop the total MREF shipments in this direct final rule but incorporated the product class breakdown provided by AHAM to re-distribute the total shipments by product class.

H. National Impact Analysis

The NIA assesses the NES and the NPV from a national perspective of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.[53] ("Consumer" in this context refers to consumers of the product being regulated.) DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual product shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of MREFs sold from 2029 through 2058.

DOE evaluates the impacts of new or amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in the absence of new or amended energy conservation standards. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV.11 summarizes the inputs and methods DOE used for the NIA analysis for this direct final rule. Discussion of these inputs and methods follows the table. See chapter 10 of the direct final rule TSD for further details.

Table IV.11 Summary of Inputs and Methods for the National Impact Analysis

Inputs	Method
Shipments	Annual shipments from shipments model.
Compliance Date of Standard	2029
Efficiency Trends	No trend assumed.
Annual Energy Consumption per Unit	Calculated for each efficiency level based on inputs from energy use analysis.
Total Installed Cost per Unit	Calculated for each efficiency level based on inputs from energy use analysis.
Annual Energy Cost per Unit	Calculated for each efficiency level using the energy use per unit, and electricity prices and trends.
Repair and Maintenance Cost per Unit	Annual values do not change with efficiency level.
Energy Price Trends	*AEO2023* projections (to 2050) and fixed at 2050 prices thereafter.
Energy Site-to-Primary and FFC Conversion	A time-series conversion factor based on *AEO2023*.
Discount Rate	Three and seven percent.
Present Year	2024

1. Product Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. Section IV.F.8 of this document describes how DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered product classes for the year of anticipated compliance with an amended standard.

For the standards cases, DOE used a "roll-up" scenario to establish the

[51] This shipments information was provided by AHAM in a confidential document. The reference points to the public version of this document, where confidential business information is redacted.

[52] DOE also collected and reviewed manufacturer interview data but was unable to collect a representative sample that would allow it to estimate non-AHAM-member shipments data.

[53] The NIA accounts for impacts in the United States and U.S. territories.

shipment-weighted efficiency for the year that standards are assumed to become effective (2029). In this scenario, the market shares of products in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the new standard level, and the market share of products above the standard would remain unchanged.

In the absence of data on trends in efficiency, DOE assumed no efficiency trend over the analysis period for both the no-new-standards and standards cases. For a given case, market shares by efficiency level were held fixed to their 2029 distribution.

2. National Energy Savings

The NES analysis involves a comparison of national energy consumption of the considered products between each potential standards case (''TSL'') and the case with no new or amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2023.* Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency products is sometimes associated with a direct rebound effect, which refers to an increase in utilization of the product due to the increase in efficiency. DOE did not find any data on the rebound effect specific to MREFs that would indicate that consumers would alter their utilization of their product due to an increase in efficiency. MREFs are typically plugged in and operate continuously; therefore, DOE assumed a rebound rate of 0. DOE did not receive any comments regarding this assumption in response to the March 2023 NOPR.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [54] that EIA uses to prepare its *Annual Energy Outlook.* The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the direct final rule TSD.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each product shipped during the projection period.

As discussed in section IV.F.1 of this document, DOE developed MREF price trends based on an experience curve calculated using historical PPI data. DOE applied the same trends to project prices for each product class at each considered efficiency level including baseline. By 2058, which is the end date of the projection period, the average price of single-speed compressor MREFs is projected to drop 33.2 percent and the average price of MREFs with a variable-speed compressor is projected to drop about 33.8 percent relative to 2029.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different product price projections on the consumer NPV for the considered TSLs for MREFs. In addition to the default price trend, DOE considered high and low-price-decline sensitivity cases. For the single-speed compressor MREFs and the non-variable- speed controls portion of MREFs, DOE estimated the high-price- decline and the low- price-decline scenarios based on household refrigerator and home freezer PPI data limited to the period between the period 1981–2008 and 2009–2022, respectively. For the variable-speed controls portion of MREFs, DOE estimated the high price decline and the low- price- decline scenarios based on an exponential trend line fit of the semiconductor PPI between the period 1994–2022 and 1967–1993, respectively. The derivation of these price trends is described in Chapter 8 and the results of these sensitivity cases are given in appendix 10C of the direct final rule TSD.

The energy cost savings are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average residential energy price changes in the Reference case from *AEO2023,* which has an end year of 2050. To estimate price trends after 2050, the 2046–2050 average was used for all years. As part of the NIA, DOE also analyzed scenarios that used inputs from variants of the *AEO2023* Reference case that have lower and higher economic growth. Those cases have lower and higher energy price trends compared to the Reference case. The resulting consumer NPV for the low-economic growth scenario, combined with the low-price-decline scenario is up to 24% lower compared to the Reference case scenario, while the consumer NPV for the high-economic growth scenario combined with the high-price-decline scenario is up to 12% higher compared to the Reference case. See appendix 10C of the direct final rule TSD for more details.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this direct final rule, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (''OMB'') to Federal agencies on the development of regulatory analysis.[55]

[54] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2009,* DOE/EIA–0581(2009), October 2009. Available at *www.eia.gov/analysis/pdfpages/0581(2009)index.php* (last accessed November 29, 2023).

[55] United States Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. Section E. Available at *https://www.whitehouse.gov/wp-content/uploads/*

The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value.

I. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard. The purpose of a subgroup analysis is to determine the extent of any such disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For this direct final rule, DOE analyzed the impacts of the considered standard levels on senior-only households. Low-income consumers were not considered in the subgroup analysis, as MREFs are not products generally used by this subgroup. Based on the TraQline wine chiller data, less than 4 percent of MREF owners are below the Federal household income threshold for poverty. The analysis used a subset of the TraQline consumer sample composed of households that meet the criteria for this subgroup. DOE used the LCC and PBP computer model to estimate the impacts of the considered efficiency levels on senior-only households. Chapter 11 in the direct final rule TSD describes the consumer subgroup analysis.

J. Manufacturer Impact Analysis

1. Overview

DOE performed an MIA to estimate the financial impacts of amended energy conservation standards on manufacturers of MREFs and to estimate the potential impacts of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of projected industry cash flows, the INPV, investments in research and development (''R&D'') and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how amended energy conservation standards might affect manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the GRIM, an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact on domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of more-stringent energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various standards cases (*i.e.,* ''TSLs''). To capture the uncertainty relating to manufacturer pricing strategies following amended standards, the GRIM estimates a range of possible impacts under different manufacturer markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as a potential standard's impact on manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the direct final rule TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the MREF manufacturing industry based on the market and technology assessment and publicly-available information. This included a top-down analysis of MREF manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (''SG&A''); and R&D expenses). DOE also used public sources of information to further calibrate its initial characterization of the MREF manufacturing industry, including corporate annual reports filed by publicly traded manufacturers in primarily home appliance manufacturing and MREFs, the U.S. Census Bureau's *Annual Survey of Manufactures* (''*ASM*''),[56] and reports from D&B Hoovers.[57]

In Phase 2 of the MIA, DOE prepared a framework industry cash-flow analysis to quantify the potential impacts of amended energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of the standard and extending over a 30-year period following the compliance date of the standard. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) creating a need for increased investment, (2) raising production costs per unit, and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

In addition, during Phase 2, DOE developed interview guides to distribute to manufacturers of MREFs in order to develop other key GRIM inputs, including product and capital conversion costs, and to gather additional information on the anticipated effects of energy conservation standards on revenues, direct employment, capital assets, industry competitiveness, and subgroup impacts.

In Phase 3 of the MIA, DOE conducted structured, detailed interviews with representative manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. As part of Phase 3, DOE also evaluated subgroups of manufacturers that may be disproportionately impacted by amended standards or that may not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. Such manufacturer subgroups may include small business manufacturers, low-volume manufacturers, niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified one subgroup for a separate impact analysis:

legacy_drupal_files/omb/circulars/A4/a-4.pdf (last accessed November 10, 2023).

[56] U.S. Census Bureau, *Annual Survey of Manufactures.* ''Summary Statistics for Industry Groups and Industries in the U.S. (2021).'' Available at *www.census.gov/programs-surveys/asm/data.html* (last accessed July 5, 2023).

[57] The D&B Hoovers login is available at *app.dnbhoovers.com* (last accessed November 29, 2023).

small business manufacturers. The small business subgroup is discussed in chapter 12 of the direct final rule TSD.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to new or amended standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash-flow analysis that incorporates manufacturer costs, markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from an amended energy conservation standard. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2024 (the base year of the analysis) and continuing to 2058. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of MREFs, DOE used a real discount rate of 7.7 percent, which was derived from industry financials and then modified according to feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the new or amended energy conservation standard on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, results of the shipments analysis, and information gathered from industry stakeholders during the course of manufacturer interviews. The GRIM results are presented in section V.B.2 of this document. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the direct final rule TSD.

a. Manufacturer Production Costs

Manufacturing more efficient products is typically more expensive than manufacturing baseline products due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered products can affect the revenues, gross margins, and cash flow of the industry. For its analysis in this direct final rule, DOE used a combined efficiency level and design option approach. First, an efficiency-level approach was used to establish an analysis tied to existing products on the market. A design option approach was then used to extend the analysis through ''built-down'' efficiency levels and ''built-up'' efficiency levels where there were gaps in the range of efficiencies of products that were reverse engineered.

For a complete description of the MPCs, see section IV.C of this document and chapter 5 of the direct final rule TSD.

b. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment projections derived from the shipments analysis from 2024 (the base year) to 2058 (the end year of the analysis period). See section IV.G of this document and chapter 9 of the direct final rule TSD for additional details.

c. Product and Capital Conversion Costs

New or amended energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and product designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with new or amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

Product Conversion Costs

DOE based its estimates of the product conversion costs necessary to meet the varying efficiency levels on information from manufacturer interviews, the design paths analyzed in the engineering analysis, the prior MREF rulemaking analysis (*see* 81 FR 75194), and market share and model count information. Generally, manufacturers indicated a preference to meet amended standards with design options that were direct and relatively straightforward component swaps. However, at higher efficiency levels, manufacturers anticipated the need for platform redesigns. Efficiency levels that significantly altered cabinet construction would require very large investments to update designs. Manufacturers noted that increasing foam thickness would require complete redesign of the cabinet, liner, and shelving due to loss of interior volume. Additionally, extensive use of VIPs would require redesign of the cabinet to maximize the benefits of VIPs.

Capital Conversion Costs

DOE relied on information from manufacturer interviews and the engineering analysis to evaluate the level of capital conversion costs would likely incur at the considered standard levels. During interviews, manufacturers provided estimates and descriptions of the required tooling changes that would be necessary to upgrade product lines to meet the various efficiency levels. Based on these inputs, DOE modeled incremental capital conversion costs for efficiency levels that could be reached with individual components swaps. However, based on feedback, DOE modeled higher capital conversion costs when manufacturers would have to redesign their existing product platforms. DOE used information from manufacturer interviews to determine the cost of the manufacturing equipment and tooling necessary to implement complete redesigns.

Increases in foam thickness require either reductions to interior volume or increases to exterior volume. Many MREFs are sized to fit standard widths, meaning any increase in foam thickness would likely result in the loss of interior volume. Additionally, many MREFs are sized to maximize storage of specific products (*e.g.,* canned beverages or wine bottles) and small changes in wall thickness could dramatically decrease the unit storage capacity for those products. The reduction of interior volume has significant consequences for manufacturing. Redesigning the cabinet to increase the effectiveness of insulation likely requires manufacturers to update designs and tooling associated with the interior of the product. This could require investing in new tooling to accommodate changes to the liner, shelving, drawers, and doors.

To minimize reductions to interior volume, manufacturers may choose to adopt VIP technology. Extensive incorporation of VIPs into designs requires significant upfront capital due to differences in the handling, storing, and manufacturing of VIPs as compared to typical polyurethane foams. VIPs are

relatively fragile and must be protected from punctures and rough handling. If VIPs have leaks of any size, the panel will eventually lose much of its thermal insulative properties and structural strength. If already installed within a cabinet wall, a punctured VIP may significantly reduce the structural strength of the MREF cabinet. As a result, VIPs require careful handling and installation. Manufacturers noted the need to allocate special warehouse space to ensure the VIPs are not jostled or roughly handled in the manufacturing environment. VIPs require significantly more warehouse space than polyurethane foams. The application of VIPs can be difficult and may require investment in hard-tooling or robotic systems to ensure the panels are positioned properly within the cabinet or door. Manufacturers noted that producing cabinets with VIPs are much more labor and time intensive than producing cabinets with typical polyurethane foams and the increase in labor can affect total production capacity.

To develop industry conversion cost estimates, DOE estimated the number of product platforms in DOE's CCD [58] and California Energy Commission's Modernized Appliance Efficiency Database System (''MAEDbS'') [59] and scaled up the product and capital conversion costs associated with the number of product platforms that would require updating at each efficiency level. DOE adjusted the conversion cost estimates developed in support of the March 2023 NOPR to 2022$ for this analysis.

DOE acknowledges that manufacturers may follow different design paths to reach the various efficiency levels analyzed. An individual manufacturer's investments depend on a range of factors, including the company's current product offerings and product platforms, existing production facilities and infrastructure, and make vs. buy decisions for components. DOE's conversion cost methodology incorporated feedback from all manufacturers that took part in interviews and extrapolated industry values. While industry average values may not represent any single manufacturer, DOE's model provides reasonable estimates of industry-level investments.

In general, DOE assumes all conversion-related investments occur between the year of publication of the direct final rule and the year by which manufacturers must comply with the new standard. The conversion cost figures used in the GRIM can be found in section V.B.2 of this document. For additional information on the estimated product and capital conversion costs, see chapter 12 of the direct final rule TSD.

d. Manufacturer Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied manufacturer markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these manufacturer markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards case scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) a preservation-of-gross-margin-percentage scenario; and (2) a preservation-of-operating-profit scenario. These scenarios lead to different manufacturer markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation-of-gross-margin-percentage scenario, DOE applied a single uniform ''gross margin percentage'' markup across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. As manufacturer production costs increase with efficiency, this scenario implies that the per-unit dollar profit will increase. DOE assumed a gross margin percentage of 20 percent for FCC and 28 percent for all other product classes.[60] Manufacturers tend to believe it is optimistic to assume that they would be able to maintain the same gross margin percentage as their production costs increase, particularly for minimally efficient products. Therefore, this scenario represents a high bound of industry profitability under an amended energy conservation standard.

In the preservation-of-operating-profit scenario, as the cost of production goes up under a standards case, manufacturers are generally required to reduce their manufacturer markups to a level that maintains base-case operating profit. DOE implemented this scenario in the GRIM by lowering the manufacturer markups at each TSL to yield approximately the same earnings before interest and taxes in the standards case as in the no-new-standards case in the year after the expected compliance date of the amended standards. The implicit assumption behind this scenario is that the industry can only maintain its operating profit in absolute dollars after the standard takes effect.

A comparison of industry financial impacts under the two manufacturer markup scenarios is presented in section V.B.2.a of this document.

3. Discussion of MIA Comments

For this direct final rule, DOE considered comments it had received regarding its MIA presented in the March 2023 NOPR. The approach used for this direct final rule is largely the same approach DOE had used for the March 2023 NOPR analysis.

In response to the March 2023 NOPR, AHAM stated that it cannot comment on the accuracy of DOE's approach for including how manufacturers might or might not recover potential investments (*i.e.,* the accuracy of DOE's manufacturer markup scenarios) but that AHAM supports DOE's intent in the microwave ovens supplemental notice of proposed rulemaking (''SNOPR'') (''August 2022 SNOPR'') energy conservation standards rulemaking to include those costs and investments in the actual costs of products and retail prices. (AHAM, No. 31 at p. 12) AHAM urged DOE to apply the same conceptual approach used in the August 2022 SNOPR in the MREF rulemaking and all future rulemakings (*i.e.,* to analyze a conversion-cost-recovery manufacturer markup scenario). (*Id.*)

As discussed in section IV.J.2.d of this document, DOE modeled two standards-case manufacturer markup scenarios to represent the uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards. For the March 2023 NOPR, DOE applied the preservation-of-gross-margin-percentage scenario to reflect an upper bound of industry profitability and a preservation-of-operating-profit scenario

[58] U.S. Department of Energy's Compliance Certification Database is available at *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A** (last accessed August 17, 2023).

[59] California Energy Commission's Modernized Appliance Efficiency Database System is available at *cacertappliances.energy.ca.gov/Pages/ApplianceSearch.aspx* (last accessed August 17, 2023). DOE used this database to gather product information not provided in DOE's CCD *(e.g.,* manufacturer names).

[60] The gross margin percentages of 20 percent and 28 percent are based on manufacturer markups of 1.25 and 1.38 percent, respectively.

to reflect a lower bound of industry profitability under amended standards. DOE used these scenarios to reflect the range of realistic profitability impacts under more stringent standards. Manufacturing more efficient MREFs is generally more expensive than manufacturing baseline MREFs, as reflected by the MPCs estimated in the engineering analysis. Under the preservation-of-gross-margin scenario for MREFs, incremental increases in MPCs at higher efficiency levels result in an increase in per-unit dollar profit per unit sold. In interviews, manufacturers stated the industry relies on competitive pricing, so they would likely not increase their manufacturer markups that would allow them to recover their full investments. The preservation-of-gross-margin-scenario reflects an upper bound of industry profitability in which manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. Applying the approach used in the August 2022 SNOPR (*i.e.,* a conversion-cost-recovery scenario) would result in the MREF industry increasing manufacturer markups under amended standards. Based on information gathered during confidential interviews in support of the March 2023 NOPR, DOE does not expect that the MREF industry would increase manufacturer markups under an amended standard. Furthermore, in response to the March 2023 NOPR, DOE did not receive any public or confidential data indicating that industry would increase manufacturer markups in response to more stringent standards. Therefore, DOE used the same manufacturer markup scenarios from the March 2023 NOPR for this direct final rule analysis.

In response to the March 2023 NOPR, AHAM commented the cumulative regulatory burden is significant for home appliance manufacturers when needing to redesign products and product lines for the proposed levels for MREFs, for consumer clothes dryers, residential clothes washers, consumer conventional cooking products, dishwashers, RF, and the finalized levels for room air conditioners and microwave ovens. (*Id.* at p. 13). AHAM asserted that engineers will therefore need to spend all their time redesigning products to meet more stringent energy efficiency standards, pulling resources from other development efforts and business priorities. AHAM suggested that DOE could reduce cumulative regulatory burden by spacing out the timing of final rules, allowing more lead time by delaying the publication of final rules in the **Federal Register** after they have been issued, and reducing the stringency of standards such that fewer products would require redesign. (*Id.* at p. 14)

DOE analyzes cumulative regulatory burden in accordance with section 13(g) of the Process Rule. DOE details the rulemakings and expected conversion expenses of Federal energy conservation standards that could impact MREF original equipment manufacturers (''OEMs'') that take effect approximately 3 years before and after the 2029 compliance date in section V.B.2.e of this document. As shown in Table V.23 in section V.B.2.e of this document, DOE considers the potential cumulative regulatory burden from other DOE energy conservation standard rulemakings for consumer clothes dryers, residential clothes washers, consumer conventional cooking products, dishwashers, RF, room air conditioners, and microwave ovens in this direct final rule analysis.

Regarding AHAM's suggestion about spacing out the timing of final rules for home appliance rulemakings, DOE has statutory requirements under EPCA on the timing of rulemakings. For consumer clothes dryers, residential clothes washers, consumer conventional cooking products, dishwashers, RF, room air conditioners, and microwave ovens, amended standards apply to covered products manufactured 3 years after the date on which any new or amended standards are published. (42 U.S.C. 6295(m)(4)(A)(i)) For MREFs, amended standards apply 5 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(l)(2)) And the multi-product Joint Agreement, where stakeholders can recommend different compliance dates under DOE's direct final rule authority, stated ''jointly recommended compliance dates will achieve the overall energy and economic benefits of this agreement while allowing necessary lead-times for manufacturers to redesign products and retool manufacturing plants to meet the recommended standards across product categories.'' (Joint Agreement, No. 34 at p. 2) The staggered compliance dates between the statutorily-required dates and the dates recommended in the Joint Agreement help mitigate manufacturers' concerns resource allocation and concurrent amended standards. See section II.B.4 of this document for compliance dates of rulemakings recommended in the Joint Agreement.

In response to the March 2023 NOPR, the Appliance Standards Awareness Project (''ASAP'') *et al.*[61] commented that DOE may have overestimated the decrease in INPV, and described some perceived inconsistencies. ASAP *et al.* pointed out that although DOE estimated a 10 percent reduction in shipments based on a 10 percent increase in production cost, ignoring the efficiency elasticity, the shipments decline should be no more than 4.5 percent at the compliance year. (ASAP *et al.,* No. 32 at pp. 1–2) In response to this comment, DOE re-evaluated its base assumptions and corrected its shipments estimates. The reduction in shipments in the projected compliance year for the Recommended TSL (*i.e.,* TSL 4) is now estimated to be 3.4 percent. For more details, see chapter 9 of the direct final rule TSD.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO_2, NO_X, SO_2, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH_4 and N_2O, as well as the reductions in emissions of other gases due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion.

The analysis of electric power sector emissions of CO_2, NO_X, SO_2, and Hg uses emissions intended to represent the marginal impacts of the change in electricity consumption associated with amended or new standards. The methodology is based on results published for the *AEO,* including a set of side cases that implement a variety of efficiency-related policies. The methodology is described in appendix 13A in the direct final rule TSD. The analysis presented in this document uses projections from *AEO2023.* Power sector emissions of CH_4 and N_2O from fuel combustion are estimated using Emission Factors for Greenhouse Gas Inventories published by the EPA.[62]

FFC upstream emissions, which include emissions from fuel combustion during extraction, processing, and transportation of fuels, and ''fugitive''

[61] ''ASAP *et al.*'' refers to a joint comment from Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, National Consumer Law Center, New York State Energy Research and Development Authority, and Northwest Energy Efficiency Alliance.

[62] Available at *www.epa.gov/sites/production/files/2021-04/documents/emission-factors_apr2021.pdf* (last accessed November 12, 2023).

emissions (direct leakage to the atmosphere) of CH_4 and CO_2, are estimated based on the methodology described in chapter 15 of the direct final rule TSD.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. For power sector emissions, specific emissions intensity factors are calculated by sector and end use. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

1. Air Quality Regulations Incorporated in DOE's Analysis

DOE's no-new-standards case for the electric power sector reflects the *AEO,* which incorporates the projected impacts of existing air quality regulations on emissions. *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the emissions control programs discussed in the following paragraphs, and the Inflation Reduction Act.[63] SO_2 emissions from affected electric generating units (''EGUs'') are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (''DC''). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from numerous States in the eastern half of the United States are also limited under the Cross-State Air Pollution Rule (''CSAPR''). 76 FR 48208 (Aug. 8, 2011). CSAPR requires these States to reduce certain emissions, including annual SO_2 emissions, and went into effect as of January 1, 2015.[64] The *AEO* incorporates implementation of CSAPR, including the update to the CSAPR ozone season program emission budgets and target dates issued in 2016. 81 FR 74504 (Oct. 26, 2016). Compliance with CSAPR is flexible among EGUs and is enforced through the use of tradable emissions allowances. Under existing EPA regulations, for states subject to SO_2 emissions limits under CSAPR, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by another regulated EGU.

However, beginning in 2016, SO_2 emissions began to fall as a result of the Mercury and Air Toxics Standards (''MATS'') for power plants.[65] 77 FR 9304 (Feb. 16, 2012). The final rule establishes power plant emission standards for mercury, acid gases, and non-mercury metallic toxic pollutants. Because of the emissions reductions under the MATS, it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO_2 emissions by another regulated EGU. Therefore, energy conservation standards that decrease electricity generation will generally reduce SO_2 emissions. DOE estimated SO_2 emissions reduction using emissions factors based on *AEO2023.*

CSAPR also established limits on NO_X emissions for numerous States in the eastern half of the United States. Energy conservation standards would have little effect on NO_X emissions in those States covered by CSAPR emissions limits if excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions from other EGUs. In such case, NO_X emissions would remain near the limit even if electricity generation goes down. Depending on the configuration of the power sector in the different regions and the need for allowances, however, NO_X emissions might not remain at the limit in the case of lower electricity demand. That would mean that standards might reduce NO_X emissions in covered States. Despite this possibility, DOE has chosen to be conservative in its analysis and has maintained the assumption that standards will not reduce NO_X emissions in States covered by CSAPR. Standards would be expected to reduce NO_X emissions in the States not covered by CSAPR. DOE used *AEO2023* data to derive NO_X emissions factors for the group of States not covered by CSAPR.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would be expected to slightly reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO2023,* which incorporates the MATS.

L. Monetizing Emissions Impacts

As part of the development of this direct final rule, for the purpose of complying with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of CO_2, CH_4, N_2O, NO_X, and SO_2 that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this direct final rule.

To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG (''February 2021 SC–GHG TSD'').

1. Monetization of Greenhouse Gas Emissions

DOE estimates the monetized benefits of the reductions in emissions of CO_2, CH_4, and N_2O by using a measure of the SC of each pollutant (*e.g.,* SC–CO_2). These estimates represent the monetary value of the net harm to society associated with a marginal increase in emissions of these pollutants in a given year, or the benefit of avoiding that increase. These estimates are intended to include (but are not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.

DOE exercises its own judgment in presenting monetized climate benefits as recommended by applicable Executive orders, and DOE would reach the same conclusion presented in this proposed rulemaking in the absence of the estimated benefits from reductions in GHG emissions. That is, the social

[63] For further information, see the Assumptions to *AEO2023* report that sets forth the major assumptions used to generate the projections in the Annual Energy Outlook. Available at *www.eia.gov/outlooks/aeo/assumptions/* (last accessed Nov. 22, 2023).

[64] CSAPR requires states to address annual emissions of SO_2 and NO_X, precursors to the formation of fine particulate matter (''$PM_{2.5}$'') pollution, in order to address the interstate transport of pollution with respect to the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards (''NAAQS''). CSAPR also requires certain states to address the ozone season (May-September) emissions of NO_X, a precursor to the formation of ozone pollution, in order to address the interstate transport of ozone pollution with respect to the 1997 ozone NAAQS. 76 FR 48208 (Aug. 8, 2011). EPA subsequently issued a supplemental rule that included an additional five states in the CSAPR ozone season program; 76 FR 80760 (Dec. 27, 2011) (Supplemental Rule), and EPA issued the CSAPR Update for the 2008 ozone NAAQS. 81 FR 74504 (Oct. 26, 2016).

[65] In order to continue operating, coal power plants must have either flue gas desulfurization or dry sorbent injection systems installed. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions.

costs of greenhouse gases, whether measured using the February 2021 interim estimates presented by the Interagency Working Group on the Social Cost of Greenhouse Gases or by another means, did not affect the rule ultimately proposed by DOE.

DOE estimated the global social benefits of CO_2, CH_4, and N_2O reductions using SC–GHG values that were based on the interim values presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990,* published in February 2021 by the IWG (''February 2021 SC–GHG TSD''). The SC–GHG is the monetary value of the net harm to society associated with a marginal increase in emissions in a given year, or the benefit of avoiding that increase. In principle, the SC–GHG includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–GHG therefore, reflects the societal value of reducing emissions of the gas in question by one metric ton. The SC–GHG is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO_2, N_2O and CH_4 emissions. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agreed that the interim SC–GHG estimates represent the most appropriate estimate of the SC–GHG until revised estimates were developed reflecting the latest, peer-reviewed science. *See* 87 FR 78382, 78406–78408 for discussion of the development and details of the IWG SC–GHG estimates.

There are a number of limitations and uncertainties associated with the SC–GHG estimates. First, the current scientific and economic understanding of discounting approaches suggests discount rates appropriate for intergenerational analysis in the context of climate change are likely to be less than 3 percent, near 2 percent or lower.[66] Second, the IAMs used to produce these interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature and the science underlying their ''damage functions''—*i.e.,* the core parts of the IAMs that map global mean temperature changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research. For example, limitations include the incomplete treatment of catastrophic and non-catastrophic impacts in the integrated assessment models, their incomplete treatment of adaptation and technological change, the incomplete way in which inter-regional and intersectoral linkages are modeled, uncertainty in the extrapolation of damages to high temperatures, and inadequate representation of the relationship between the discount rate and uncertainty in economic growth over long time horizons. Likewise, the socioeconomic and emissions scenarios used as inputs to the models do not reflect new information from the last decade of scenario generation or the full range of projections. The modeling limitations do not all work in the same direction in terms of their influence on the SC–CO_2 estimates. However, as discussed in the February 2021 SC–GHG TSD, the IWG has recommended that, taken together, the limitations suggest that the interim SC–GHG estimates used in this final rule likely underestimate the damages from GHG emissions. DOE concurs with this assessment.

In the February 2021 SC–GHG TSD, the IWG stated that the models used to produce the interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. For these same impacts, the science underlying their ''damage functions'' lags behind the most recent research. In the judgment of the IWG, these and other limitations suggest that the range of four interim SC–GHG estimates presented in the TSD likely underestimate societal damages from GHG emissions. The IWG is in the process of assessing how best to incorporate the latest peer-reviewed science and the recommendations of the National Academies to develop an updated set of SC–GHG estimates, and DOE remains engaged in that process.

DOE is aware that in December 2023, EPA issued a new set of SC–GHG estimates in connection with a final rulemaking under the Clean Air Act.[67] As DOE had used the IWG interim values in proposing this rule and is currently reviewing the updated 2023 SC–GHG values, for this final rule, DOE used these updated 2023 SC–GHG values to conduct a sensitivity analysis of the value of GHG emissions reductions. DOE notes that because EPA's estimates are considerably higher than the IWG's interim SC–GHG values applied for this direct final rule, an analysis that uses the EPA's estimates results in significantly greater climate-related benefits. However, such results would not affect DOE's decision in this direct final rule. As stated elsewhere in this document, DOE would reach the same conclusion regarding the economic justification of the standards presented in this direct final rule without considering the IWG's interim SC–GHG values, which DOE agrees are conservative estimates. For the same reason, if DOE were to use EPA's higher SC–GHG estimates, they would not change DOE's conclusion that the standards are economically justified.

DOE's derivations of the SC–CO_2, SC–N_2O, and SC–CH_4 values used for this NOPR are discussed in the following sections, and the results of DOE's analyses estimating the benefits of the reductions in emissions of these GHGs are presented in section V.B.6 of this document.

a. Social Cost of Carbon

The SC–CO_2 values used for this final rule were based on the values developed for the February 2021 SC–GHG TSD, which are shown in Table IV.12 in 5-year increments from 2020 to 2050. The set of annual values that DOE used, which was adapted from estimates published by EPA,[68] is presented in appendix 14A of the direct final rule TSD. These estimates are based on methods, assumptions, and parameters identical to the estimates published by the IWG (which were based on EPA modeling), and include values for 2051 to 2070. DOE expects additional climate benefits to accrue for products still operating after 2070, but a lack of available SC–CO_2 estimates for emissions years beyond 2070 prevents DOE from monetizing these potential benefits in this analysis.

[66] Interagency Working Group on Social Cost of Greenhouse Gases. 2021. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. February. United States Government. Available at: *www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/.*

[67] See *www.epa.gov/environmental-economics/scghg.*

[68] *See* EPA, Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, Washington, DC, December 2021. Available at *nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013ORN.pdf* (last accessed November 21, 2023).

Table IV.12. Annual SC-CO_2 Values from 2021 Interagency Update, 2020–2050 (2020$ per Metric Ton CO_2)

Year	Discount Rate and Statistic			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
2020	14	51	76	152
2025	17	56	83	169
2030	19	62	89	187
2035	22	67	96	206
2040	25	73	103	225
2045	28	79	110	242
2050	32	85	116	260

DOE multiplied the CO_2 emissions reduction estimated for each year by the SC–CO_2 value for that year in each of the four cases. DOE adjusted the values to 2022$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC–CO_2 values in each case.

b. Social Cost of Methane and Nitrous Oxide

The SC–CH_4 and SC–N_2O values used for this direct final rule were based on the values developed for the February 2021 SC–GHG TSD. Table IV.13 shows the updated sets of SC–CH_4 and SC–N_2O estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in appendix 14–A of the direct final rule TSD. To capture the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate to include all four sets of SC–CH_4 and SC–N_2O values, as recommended by the IWG. DOE derived values after 2050 using the approach previously described for the SC–CO_2.

Table IV.13. Annual SC-CH_4 and SC-N_2O Values from 2021 Interagency Update, 2020–2050 (2020$ per Metric Ton)

Year	SC-CH_4				SC-N_2O			
	Discount Rate and Statistic				Discount Rate and Statistic			
	5%	3%	2.5%	3%	5%	3%	2.5 %	3%
	Average	Average	Average	95th percentile	Average	Average	Average	95th percentile
2020	670	1500	2000	3900	5800	18000	27000	48000
2025	800	1700	2200	4500	6800	21000	30000	54000
2030	940	2000	2500	5200	7800	23000	33000	60000
2035	1100	2200	2800	6000	9000	25000	36000	67000
2040	1300	2500	3100	6700	10000	28000	39000	74000
2045	1500	2800	3500	7500	12000	30000	42000	81000
2050	1700	3100	3800	8200	13000	33000	45000	88000

DOE multiplied the CH_4 and N_2O emissions reduction estimated for each year by the SC–CH_4 and SC–N_2O estimates for that year in each of the cases. DOE adjusted the values to 2022$ using the implicit price deflator for GDP from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the cases using the specific discount rate that had been used to obtain the SC–CH_4 and SC–N_2O estimates in each case.

c. Sensitivity Analysis Using Updated 2023 SC–GHG Estimates

In December 2023 EPA issued a new set of SC–GHG estimates (2023 SC–GHG) in connection with a final rulemaking under the Clean Air Act.[69] These estimates incorporate recent research and address recommendations of the National Academies (2017) and comments from a 2023 external peer review of the accompanying technical report. For this rulemaking, DOE used these updated 2023 SC–GHG values to conduct a sensitivity analysis of the value of GHG emissions reductions associated with alternative standards for circulator pumps. This sensitivity analysis provides an expanded range of potential climate benefits associated with amended standards. The final year of EPA's new 2023 SC–GHG estimates is 2080; therefore, DOE did not monetize the climate benefits of GHG emissions reductions occurring after 2080.

The overall climate benefits are greater when using the higher, updated SC–GHG 2023 estimates, compared to the climate benefits using the older IWG SC–GHG estimates. The results of the sensitivity analysis are presented in appendix 14C of the direct final rule TSD.

2. Monetization of Other Emissions Impacts

For this direct final rule, DOE estimated the monetized value of NO_X and SO_2 emissions reductions from electricity generation using benefit per ton estimates for that sector from the

[69] *See www.epa.gov/environmental-economics/scghg.*

EPA's Benefits Mapping and Analysis Program.[70] DOE used EPA's values for $PM_{2.5}$-related benefits associated with NO_X and SO_2 and for ozone-related benefits associated with NO_X for 2025 and 2030, and 2040, calculated with discount rates of 3 percent and 7 percent. DOE used linear interpolation to define values for the years not given in the 2025 to 2040 range; for years beyond 2040 the values are held constant. DOE combined the EPA regional benefit-per-ton estimates with regional information on electricity consumption and emissions from *AEO2023* to define weighted-average national values for NO_X and SO_2 (see appendix 14B of the direct final rule TSD).

DOE multiplied the site emissions reduction (in tons) in each year by the associated $/ton values and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

M. Utility Impact Analysis

The utility impact analysis estimates the changes in installed electrical capacity and generation projected to result for each considered TSL. The analysis is based on published output from the NEMS associated with *AEO2023.* NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO2023* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the direct final rule TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new or amended energy conservation standards.

N. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a standard. Employment impacts from new or amended energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by (1) reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's BLS. BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[71] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this direct final rule using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (''ImSET'').[72] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (''I–O'') model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer- based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and that the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this direct final rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2029–2033), where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the direct final rule TSD.

O. Other Comments

As discussed previously, DOE considered relevant comments, data, and information obtained through the 2023 NOPR public comment process in determining whether the recommended standards from the Joint Agreement are in accordance with 42 U.S.C. 6295(o). And while some of those comments were directed at specific aspects of DOE's analysis of the Joint Agreement under 42 U.S.C. 6295(o), others were more generally applicable to DOE's energy conservation standards rulemaking program as a whole. The ensuing discussion focuses on these general comments concerning energy conservation standards issued under EPCA.

The National Academies of Sciences, Engineering, and Medicine (''NAS'') periodically appoint a committee to peer review the assumptions, models, and methodologies that DOE uses in setting energy conservation standards

[70] U.S. Environmental Protection Agency. Estimating the Benefit per Ton of Reducing Directly-Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors. Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-directly-emitted-pm25-pm25-precursors-and-ozone-precursors* (last accessed December 4, 2023).

[71] *See* U.S. Department of Commerce–Bureau of Economic Analysis. *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (''RIMS II'').* 1997. U.S. Government Printing Office: Washington, DC. Available at *https://apps.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf* (last accessed November 29, 2023).

[72] Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz. *ImSET 4.0: Impact of Sector Energy Technologies Model Description and User's Guide.* 2015. Pacific Northwest National Laboratory: Richland, WA. PNNL–24563.

for covered products and equipment. The most recent such peer review was conducted in a series of meetings in 2020, and NAS issued the report[73] in 2021 detailing its findings and recommendations on how DOE can improve its analyses and align them with best practices for cost-benefit analysis.

In response to the March 2023 NOPR, AHAM stated that despite previous requests from AHAM and others, DOE has failed to review and incorporate the recommendations of the NAS report, instead indicating that it will conduct a separate rulemaking process without such a process having been initiated. (AHAM, No. 31 at p. 8) AHAM further stated that DOE seems to be ignoring the recommendations in the NAS Report and even conducting analysis that is opposite to the recommendations. AHAM commented that DOE cannot continue to perpetuate the errors in its analytical approach that have been pointed out by stakeholders and the NAS report as to do so will lead to arbitrary and capricious rules. (*Id.*)

As discussed, the rulemaking process for establishing new or amended standards for covered products and equipment are specified at appendix A to subpart C of 10 CFR part 430 (the Process Rule). DOE periodically examines and revises these provisions in separate rulemaking proceedings. The recommendations provided in the NAS Report, which pertain to the processes by which DOE analyzes energy conservation standards, will be considered by DOE in a separate, forthcoming rulemaking process.

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for MREFs. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for MREFs, and the standards levels that DOE is adopting in this direct final rule. Additional details regarding DOE's analyses are contained in the direct final rule TSD supporting this document.

A. Trial Standard Levels

In general, DOE typically evaluates potential new or amended standards for products and equipment by grouping individual efficiency levels for each class into TSLs. Use of TSLs allows DOE to identify and consider manufacturer cost interactions between the product classes, to the extent that there are such interactions, and price elasticity of consumer purchasing decisions that may change when different standard levels are set.

In the analysis conducted for this direct final rule, DOE analyzed the benefits and burdens of five TSLs for MREFs. DOE developed TSLs that combine efficiency levels for each analyzed product class. TSL 1 represents a 10 percent increase in efficiency, corresponding to the lowest analyzed efficiency level above the baseline for each analyzed product class. TSL 2 represents efficiency levels consistent with Energy Star requirements for coolers, which in most cases except freestanding coolers (''FC'') represent an increase compared to TSL 1, and a modest increase in efficiency for certain combination cooler product classes compared to TSL 1. TSL 3 increases the efficiency for FC by an additional 10 percent compared to TSLs 1 and 2 and built-in coolers (''BIC'') by an additional 10 percent compared to TSL 1[74], while maintaining the same efficiency levels as TSL 2 for combination coolers. TSL 4 (the recommended TSL) further increases the standard level adopted in this direct final rule for all product classes except built-in compact cooler (''BICC''), BIC, C–3A and C–3A–BI, which remain at the same level as in TSL 3. TSL 5 represents max-tech for each product class, which represents an increase from TSL 4 in all cases. DOE presents the results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the direct final rule TSD.

Table V.1 presents the TSLs and the corresponding efficiency levels that DOE has identified for potential amended energy conservation standards for MREFs.

Table V.1 Trial Standard Levels for MREFs

	FCC	FC	BICC	BIC	C-13A	C-13A-BI	C-3A	C-3A-BI
TSL 1	EL1 (10%)	EL 1 (10%)	EL 1 (10%)	EL 1 (10%)	EL 1 (10%)	EL 1 (10%)	EL 1 (10%)	EL 1 (10%)
TSL 2	EL 2 (20%)	EL 1 (10%)	EL 3 (30%)	EL 3 (30%)	EL 2 (16%)	EL 2 (16%)	EL 1 (10%)	EL 1 (10%)
TSL 3	EL 2 (20%)	EL 2 (20%)	EL 3 (30%)	EL 2 (20%)	EL 2 (16%)	EL 2 (16%)	EL 1 (10%)	EL 1 (10%)
TSL 4	EL 3 (30%)	EL 3 (30%)	EL 3 (30%)	EL 2 (20%)	EL 3 (20%)	EL 3 (20%)	EL 1 (10%)	EL 1 (10%)
TSL 5	EL 5 (59%, 50%)*	EL 5 (38%)	EL 5 (59%, 50%)*	EL 5 (38%)	EL 5 (28%)	EL 5 (28%)	EL 4 (24%)	EL 4 (24%)

* Corresponding to 3.1 cu. ft. and 5.1 cu. ft. representative units, respectively.

[73] National Academies of Sciences, Engineering, and Medicine. 2021. *Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards.* Washington, DC: The National Academies Press. Available at *doi.org/10.17226/25992* (last accessed August 2, 2023).

[74] For BIC, the considered EL is lower at TSL 3 than TSL 2 due to the relatively high Energy Star level included in TSL 2.

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on MREF consumers by looking at the effects that potential amended standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed in the following sections.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency products affect consumers in two ways: (1) purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* product price plus installation costs), and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 8 of the direct final rule TSD provides detailed information on the LCC and PBP analyses.

Tables V.2 through V.17 show the LCC and PBP results for the TSLs considered for each product class. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, the impacts are measured relative to the efficiency distribution in the no-new-standards case in the compliance year (see section IV.F.8 of this document). Because some consumers purchase products with higher efficiency in the no-new-standards case, the average savings are less than the difference between the average LCC of the baseline product and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase a product with efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

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Table V.2 Average LCC and PBP Results for BIC

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	1,877.84	39.78	469.37	2,347.21	-	14.5
1	1	1,905.01	35.86	423.09	2,328.10	6.9	14.5
3,4	2	1,911.08	32.27	380.67	2,291.75	4.4	14.5
2	3	1,980.25	28.39	334.88	2,315.12	9.0	14.5
--	4	2,261.59	26.58	313.49	2,575.08	29.1	14.5
5	5	2,325.00	25.68	302.80	2,627.79	31.7	14.5

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.3 Average LCC Savings Relative to the No-New-Standards Case for BIC

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	18.99	19.2
3,4	2	53.56	4.6
2	3	19.27	52.7
--	4	(240.68)	97.5
5	5	(293.40)	98.4

* The savings represent the average LCC for affected consumers.

Table V.4 Average LCC and PBP Results for BICC

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	749.12	26.35	239.64	988.76	-	10.6
1	1	754.97	23.88	217.17	972.14	2.4	10.6
--	2	778.61	21.30	193.67	972.27	5.8	10.6
2-4	3	808.77	18.95	172.20	980.97	8.1	10.6
--	4	857.81	16.47	149.60	1,007.41	11.0	10.6
5	5	969.53	12.06	109.45	1,078.98	15.4	10.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.5 Average LCC Savings Relative to the No-New-Standards Case for BICC

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	16.08	0.9
--	2	11.21	10.0
2-4	3	1.53	15.1
--	4	(25.46)	20.0
5	5	(97.38)	23.7

* The savings represent the average LCC for affected consumers.

Table V.6 Average LCC and PBP Results for C-13A

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *Years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	1,155.05	32.29	293.98	1,449.03	-	10.7
1	1	1,158.39	29.24	266.25	1,424.64	1.1	10.7
2,3	2	1,161.33	27.41	249.53	1,410.86	1.3	10.7
4	3	1,199.58	26.21	238.54	1,438.12	7.3	10.7
--	4	1,279.30	24.71	224.89	1,504.19	16.4	10.7
5	5	1,322.51	23.68	215.46	1,537.97	19.4	10.7

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.7 Average LCC Savings Relative to the No-New-Standards Case for C-13A

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	24.36	0.2
2,3	2	37.86	0.6
4	3	10.60	47.2
--	4	(55.47)	89.1
5	5	(89.25)	93.9

* The savings represent the average LCC for affected consumers.

Table V.8 Average LCC and PBP Results for C-13A-BI

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	1,372.62	35.48	321.01	1,693.63	-	10.6
1	1	1,376.17	32.14	290.75	1,666.92	1.1	10.6
2,3	2	1,379.30	30.13	272.51	1,651.81	1.2	10.6
4	3	1,420.01	28.81	260.52	1,680.53	7.1	10.6
--	4	1,504.85	27.17	245.63	1,750.48	15.9	10.6
5	5	1,550.84	26.03	235.34	1,786.18	18.9	10.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.9 Average LCC Savings Relative to the No-New-Standards Case for C-13A-BI

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	26.69	0.4
2,3	2	41.53	0.5
4	3	12.81	46.0
--	4	(57.14)	87.8
5	5	(92.83)	93.1

* The savings represent the average LCC for affected consumers.

Table V.10 Average LCC and PBP Results for C-3A

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	1,092.34	32.58	386.24	1,478.58	-	14.6
1-4	1	1,097.64	29.53	349.99	1,447.63	1.7	14.6
--	2	1,146.86	28.09	332.95	1,479.80	12.1	14.6
--	3	1,347.15	26.64	315.69	1,662.84	42.9	14.6
5	4	1,420.65	25.35	300.39	1,721.04	45.4	14.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.11 Average LCC Savings Relative to the No-New-Standards Case for C-3A

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1-4	1	30.95	0.0
--	2	(1.22)	64.0
--	3	(184.26)	99.4
5	4	(242.46)	99.6

* The savings represent the average LCC for affected consumers.

Table V.12 Average LCC and PBP Results for C-3A-BI

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	1,525.00	37.11	443.60	1,968.60	-	14.7
1-4	1	1,530.64	33.62	401.77	1,932.41	1.6	14.7
--	2	1,583.02	31.87	380.86	1,963.88	11.1	14.7
--	3	1,796.17	30.12	359.95	2,156.12	38.8	14.7
5	4	1,874.39	28.80	344.15	2,218.55	42.0	14.7

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.13 Average LCC Savings Relative to the No-New-Standards Case for C-3A-BI

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1-4	1	36.19	0.0
--	2	4.72	57.2
--	3	(187.52)	99.0
5	4	(249.95)	99.3

* The savings represent the average LCC for affected consumers.

Table V.14 Average LCC and PBP Results for FC

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	1,416.63	39.71	468.33	1,884.96	-	14.5
1,2	1	1,442.18	35.80	422.17	1,864.36	6.5	14.5
3	2	1,447.90	32.22	379.87	1,827.76	4.2	14.5
4	3	1,512.93	28.35	334.20	1,847.13	8.5	14.5
--	4	1,777.48	26.55	312.87	2,090.35	27.4	14.5
5	5	1,837.10	25.64	302.21	2,139.31	29.9	14.5

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.15 Average LCC Savings Relative to the No-New-Standards Case for FC

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1,2	1	21.06	10.0
3	2	45.59	1.8
4	3	26.22	44.0
--	4	(217.00)	97.5
5	5	(265.96)	98.2

* The savings represent the average LCC for affected consumers.

Table V.16 Average LCC and PBP Results for FCC

TSL	Efficiency Level	Average Costs *2022$*				Simple Payback *Years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	547.98	26.30	238.78	786.76	-	10.6
1	1	552.90	23.84	216.42	769.33	2.0	10.6
2,3	2	573.06	21.27	193.04	766.10	5.0	10.6
4	3	598.43	18.92	171.72	770.15	6.8	10.6
--	4	639.67	16.45	149.24	788.91	9.3	10.6
5	5	732.92	12.02	108.95	841.87	12.9	10.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

Table V.17 Average LCC Savings Relative to the No-New-Standards Case for FCC

TSL	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	17.53	1.9
2,3	2	17.55	30.6
4	3	12.97	46.8
--	4	(5.79)	65.5
5	5	(58.75)	81.6

* The savings represent the average LCC for affected consumers.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on senior-only households, which account for 8.7% of the total MREF household sample. DOE did not consider low-income consumers in this direct final rule because MREFs are not products generally used by this subgroup, as they typically cost more than comparable compact refrigerators, which are able to maintain lower temperatures compared to MREFs, and therefore serve a wider range of applications. Based on the TraQline wine chiller data, less than 4 percent of MREF owners are below the federal household income threshold for poverty. Table V.18 compares the average LCC savings and PBP at each efficiency level for the senior-only consumer subgroup with similar metrics for the entire consumer sample for all product classes. In most cases, the average LCC savings and PBP for senior-only households at the considered efficiency levels are improved (*i.e.,* higher LCC savings and equal or lesser payback periods) from the average for all households. Chapter 11 of the direct final rule TSD presents the complete LCC and PBP results for the subgroup.

Table V.18 Comparison of LCC Savings and PBP for Senior-Only Consumer Subgroup and All Consumers

TSL	Average LCC Savings* *2022$*		Simple Payback *years*	
	Senior-Only Households	All Households	Senior-Only Households	All Households
FCC				
1	18.26	17.53	1.9	2.0
2,3	18.81	17.55	4.9	5.0
4	14.87	12.97	6.6	6.8
5	(54.77)	(58.75)	12.6	13.0
FC				
1,2	23.08	21.06	6.3	6.5
3	48.17	45.59	4.0	4.2
4	30.69	26.22	8.2	8.5
5	(260.04)	(265.96)	28.9	29.9
BICC				
1	16.95	16.08	2.3	2.4
2-4	4.12	1.53	7.8	8.1
5	(92.37)	(97.38)	15.0	15.4
BIC				
1	21.14	18.99	6.7	6.9
3,4	57.44	53.56	4.3	4.4
2	24.36	19.27	8.7	9.0
5	(286.98)	(293.40)	30.7	31.7
C-13A				
1	25.22	24.36	1.1	1.1
2,3	39.23	37.86	1.3	1.3
4	12.30	10.60	7.1	7.3
5	(86.88)	(89.25)	19.0	19.5
C-13A-BI				
1	27.67	26.69	1.0	1.1
2,3	43.09	41.53	1.2	1.3
4	14.75	12.81	6.9	7.1
5	(90.13)	(92.83)	18.4	18.9
C-3A				
1-4	32.33	30.95	1.7	1.7
5	(239.10)	(242.46)	44.0	45.4
C-3A-BI				
1-4	37.91	36.19	1.6	1.6
5	(245.98)	(249.95)	40.6	42.0

* The savings represent the average LCC for affected consumers.

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c. Rebuttable Presumption Payback

As discussed in section IV.F.9 of this document, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. (42 U.S.C. 6295(o)(2)(B)(iii)) In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values and, as required by EPCA, based the energy use calculation on the DOE test procedure for MREFs. In contrast, the PBPs presented in section V.B.1.a of this document were calculated using distributions that reflect the range of energy use in the field.

Table V.19 presents the rebuttable-presumption payback periods for the considered TSLs for MREFs. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this rule are economically justified through a

more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

Table V.19 Rebuttable-Presumption Payback Periods

Efficiency Level	Rebuttable Payback Period *Years*							
	FCC	**FC**	**BICC**	**BIC**	**C-13A**	**C-13A-BI**	**C-3A**	**C-3A-BI**
1	1.8	5.9	2.1	6.2	1.0	1.0	1.6	1.5
2	4.5	3.7	5.3	4.0	1.2	1.1	11.0	10.0
3	6.2	7.6	7.3	8.1	6.6	6.4	38.7	35.2
4	8.4	24.6	9.9	26.2	14.9	14.4	41.0	38.1
5	11.7	26.8	13.9	28.5	17.6	17.1	--	--

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of amended energy conservation standards on manufacturers of MREFs. The next section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the direct final rule TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides GRIM results from the analysis, which examines changes in the industry that would result from a standard. The following tables summarize the estimated financial impacts (represented by changes in INPV) of potential amended energy conservation standards on manufacturers of MREFs, as well as the conversion costs that DOE estimates manufacturers of MREFs would incur at each TSL.

The impact of amended energy conservation standards was analyzed under two scenarios: (1) the preservation-of-gross-margin percentage; and (2) the preservation-of-operating-profit, as discussed in section IV.J.2.d of this document. The preservation-of-gross-margin percentages applies a ''gross margin percentage'' of 20 percent for FCC and 28 percent for all other product classes.[75] This scenario assumes that a manufacturer's per-unit dollar profit would increase as MPCs increase in the standards cases and represents the upper-bound to industry profitability under potential new or amended energy conservation standards.

The preservation-of-operating-profit scenario reflects manufacturers' concerns about their inability to maintain margins as MPCs increase to reach more stringent efficiency levels. In this scenario, while manufacturers make the necessary investments required to convert their facilities to produce compliant products, operating profit does not change in absolute dollars and decreases as a percentage of revenue. The preservation-of-operating-profit scenario results in the lower (or more severe) bound to impacts of potential amended standards on industry.

Each of the modeled scenarios results in a unique set of cash flows and corresponding INPV for each TSL. INPV is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period. The ''change in INPV'' refers to the difference in industry value between the no-new-standards case and standards case at each TSL. To provide perspective on the short-run cash flow impact, DOE includes a comparison of free cash flow between the no-new-standards case and the standards case at each TSL in the year before amended standards would take effect. This figure provides an understanding of the magnitude of the required conversion costs relative to the cash flow generated by the industry in the no-new-standards case.

Conversion costs are one-time investments for manufacturers to bring their manufacturing facilities and product designs into compliance with potential amended standards. As described in section IV.J.2.c of this document, conversion cost investments occur between the year of publication of the direct final rule and the year by which manufacturers must comply with the amended standards. The conversion costs can have a significant impact on the short-term cash flow of the industry and generally result in lower free cash flow in the period between the publication of the direct final rule and the compliance date of potential amended standards. Conversion costs are independent of the manufacturer markup scenarios and are not presented as a range in this analysis.

[75] The gross margin percentages of 20 percent and 28 percent are based on manufacturer markups of 1.25 and 1.38 percent, respectively.

Table V.20 Manufacturer Impact Analysis Results for Miscellaneous Refrigeration Products

	Unit	No-New-Standards Case	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
INPV	*2022$ Million*	807.7	773.7 to 777.2	758.7 to 770.6	761.9 to 772.1	715.6 to 747.4	386.7 to 524.5
Change in INPV*	*%*	-	(4.2) to (3.8)	(6.1) to (4.6)	(5.7) to (4.4)	(11.4) to (7.5)	(52.1) to (35.1)
Free Cash Flow (2028)	*2022$ Million*	60.4	41.5	34.3	35.8	13.2	(169.9)
Change in Free Cash Flow (2028)	*%*	-	(31.2)	(43.1)	(40.7)	(78.2)	(381.5)
Product Conversion Costs	*2022$ Million*	-	54.0	68.4	70.8	104.1	375.3
Capital Conversion Costs	*2022$ Million*	-	1.3	6.4	1.3	26.6	179.7
Total Conversion Costs	*2022$ Million*	-	55.3	74.8	72.1	130.7	555.1

*Parentheses denote negative (-) values.

The following cash flow discussion refers to product classes as defined in Table I.1 in section I of this document and the efficiency levels and design options as detailed in Table IV.4 in section IV.C.3 of this document.

At TSL 1, the standard represents a modest increase in efficiency, corresponding to the lowest analyzed efficiency level above baseline for all classes, except product classes C–9 and C–9–BI at baseline efficiency. The change in INPV is expected to range from –4.2 to –3.8 percent. At this level, the free cash flow is estimated to decrease by 41.5 percent compared to the no-new-standards case value of $60.4 million in the year 2028, the year before the standards year. Currently, 24.4 percent of MREF shipments meet the efficiencies required at TSL 1. See Table V.21 for the percentage of shipments that meet each TSL by product class.

DOE analyzed implementing various design options for the range of directly analyzed product classes. These design options could include implementing more efficient single-speed compressors, tube and fin evaporators and/or condensers, hot walls, and argon-filled glass. At TSL 1, capital conversion costs are minimal because most manufacturers can incorporate design options with component changes. Product conversion costs may be necessary for sourcing components, building prototypes, and testing new components. DOE estimates capital conversion costs of $1.3 million and product conversion costs of $54.0 million. Conversion costs total $55.3 million.

At TSL 1, the shipment-weighted average MPC for all MREFs is expected to increase by 0.7 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the relatively small increase in production costs, DOE does not project a notable drop in shipments in the year the standard takes effect. In the preservation-of-gross-margin percentage scenario, the minor increase in cashflow from the higher MSP is slightly outweighed by the $55.3 million in conversion costs, causing a small negative change in INPV at TSL 1 under this scenario. Under the preservation-of-operating-profit scenario, manufacturers earn the same per-unit operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. In this scenario, the manufacturer markup decreases in 2030, the year after the analyzed 2029 compliance year. This reduction in the manufacturer markup and the $55.3 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 1 under the preservation-of-operating-profit scenario. See section IV.J.2.d of this document for details on the manufacturer markup scenarios.

TSL 2 represents efficiency levels consistent with ENERGY STAR requirements for coolers and a modest increase in efficiency for certain combination cooler product classes. The change in INPV is expected to range from –6.1 to –4.6 percent. At this level, the free cash flow is estimated to decrease by 43.1 percent compared to the no-new-standards case value of $60.4 million in the year 2028, the year before the standards year. Currently, 12.6 percent of MREF shipments meet the efficiencies required at TSL 2.

The design options DOE analyzed for most product classes include implementing similar design options as TSL 1, such as more efficient single-speed compressors. For FCC, C–13A, and C–13A–BI, TSL 2 corresponds to EL 2. For BICC and BIC, TSL 2 corresponds to EL 3. For the remaining product classes, the efficiencies required at TSL 2 are the same as TSL 1. The increase in conversion costs compared to TSL 1 are largely driven by the higher efficiencies required for BICs, which account for 3.5 percent of MREF shipments. For BIC products that do not

meet this level, increasing insulation thickness would likely mean new cabinets, liners, and fixtures as well as new shelf designs. Implementing variable-speed compressors could require more advanced controls and electronics and new test stations. DOE estimates capital conversion costs of $6.4 million and product conversion costs of $68.4 million. Conversion costs total $74.8 million.

At TSL 2, the shipment-weighted average MPC for all MREFs is expected to increase by 3.4 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. In the preservation-of-gross-margin percentage scenario, the minor increase in cashflow from the higher MSP is slightly outweighed by the $74.8 million in conversion costs, causing a small negative change in INPV at TSL 2 under this scenario. Under the preservation-of-operating-profit scenario, manufacturers earn the same per-unit operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. In this scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup and the $74.8 million in conversion costs incurred by manufacturers cause a negative change in INPV at TSL 2 under the preservation-of-operating-profit scenario.

TSL 3 increases the efficiency for FCs by an additional 10 percent compared to TSL 2, and TSL 3 decreases the efficiency for BICs by 10 percent. Combination coolers are at the same efficiency levels as TSL 2. The change in INPV is expected to range from –5.7 to –4.4 percent. At this level, free cash flow is estimated to decrease by 40.7 percent compared to the no-new-standards case value of $60.4 million in the year 2028, the year before the standards year. Currently, approximately 5.8 percent of domestic MREF shipments meet the efficiencies required at TSL 3.

At this level, DOE analyzed similar design options as TSL 1 and TSL 2, such as implementing incrementally more efficient single-speed compressors. For all product classes except FC and BIC, the efficiencies required at TSL 3 are the same as TSL 2. For FC, TSL 3 corresponds to EL 2. For BIC, TSL 3 reflects a lower efficiency level (EL 2) as compared to TSL 2 (EL 3). Industry capital conversion costs decrease at TSL 3 as compared to TSL 2 due to the lower efficiency level required for BIC. As previously discussed, DOE expects manufacturers of BIC would likely need to increase insulation thickness at TSL 2 (EL 3) and incorporate variable-speed compressors. However, at TSL 3, DOE's engineering analysis and manufacturer feedback indicate that manufacturers could achieve EL 2 efficiencies for BIC with relatively straightforward component swaps versus a larger product redesign associated with increasing insulation. DOE estimates capital conversion costs of $1.3 million and product conversion costs of $70.8 million. Conversion costs total $72.1 million.

At TSL 3, the shipment-weighted average MPC for all MREFs is expected to increase by 3.2 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. In the preservation-of-gross-margin-percentage scenario, the slight increase in cashflow from the higher MSP is outweighed by the $72.1 million in conversion costs, causing a slightly negative change in INPV at TSL 3 under this scenario. Under the preservation-of-operating-profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup and the $72.1 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 3 under the preservation-of-operating-profit scenario.

At the Recommended TSL (*i.e.,* TSL 4), the standard reflects an increase in efficiency level for the product classes that make up the vast majority of MREF shipments (FCC, FC, C–13A). The Recommended TSL further increases the standard level adopted in this direct final rule for all product classes except BICC, BIC, C–3A, and C–3A–BI. The change in INPV is expected to range from –11.4 to –7.5 percent. At this level, free cash flow is estimated to decrease by 78.2 percent compared to the no-new-standards case value of $60.4 million in the year 2028, the year before the standards year. Currently, approximately 3.9 percent of domestic MREF shipments meet the efficiencies required at the Recommended TSL.

At the Recommended TSL, all product classes correspond to EL 3, except BIC, C–3A, C–3A–BI, C–9, and C–9–BI. For BIC, the Recommended TSL corresponds to EL 2. For C–3A, the efficiencies required at the Recommended TSL are the same as TSL 3 (EL 1). For C–3A–BI, the Recommended TSL corresponds to EL 1. Both C–9 and C–9–BI correspond to baseline efficiency. At this level, conversion costs are largely driven by the efficiencies required for FC, which accounts for approximately 11.8 percent of industry shipments. DOE's shipments analysis estimates that no FC shipments currently meet the efficiencies required at the Recommended TSL. All manufacturers would need to update their product platforms, which could include increasing insulation thickness and implementing variable-speed compressors. Increasing insulation thickness would likely result in the loss of interior volume or an increase in exterior product dimensions. A decrease of interior volume would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. DOE estimates capital conversion costs of $26.6 million and product conversion costs of $104.1 million. Conversion costs total $130.7 million.

At the Recommended TSL, the shipment-weighted average MPC for all MREFs is expected to increase by 8.1 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the projected increase in production costs, DOE expects an estimated 4 percent drop in shipments in the year the standard takes effect relative to the no-new-standards case. In the preservation-of-gross-margin-percentage scenario, the increase in cashflow from the higher MSP is outweighed by the $130.7 million in conversion costs and the drop in annual shipments, causing a negative change in INPV at the Recommended TSL under this scenario. Under the preservation-of-operating-profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup, the $130.7 million in conversion costs incurred by manufacturers, and the drop in annual shipments cause a negative change in INPV at the Recommended TSL under the preservation-of-operating-profit scenario.

TSL 5 represents max-tech efficiency levels for all product classes. The change in INPV is expected to range from –52.1 to –35.1 percent. At this level, free cash flow is estimated to decrease by 381.5 percent compared to the no-new-standards case value of $60.4 million in the year 2028, the year before the standards year. Currently, approximately 2.9 percent of domestic MREF shipments meet the efficiencies required at TSL 5.

DOE's shipments analysis estimates that no shipments meet the efficiencies required across all product classes except for BICC, which account for only 4 percent of industry shipments. A max-tech standard would necessitate significant investment to redesign

nearly all product platforms and incorporate design options such as the most efficient variable-speed compressors, triple-pane glass, increased foam insulation thickness, and VIP technology. Capital conversion costs may be necessary for new tooling for VIP placement as well as new testing stations for high-efficiency components. Increasing insulation thickness would likely result in the loss of interior volume or an increase in exterior product dimensions. Loss of interior volume would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. Product conversion costs at max-tech are significant as manufacturers work to completely redesign their product platforms. For products implementing VIPs, product conversion costs may be necessary for prototyping and testing for VIP placement, design, and sizing. Manufacturers implementing triple-pane glass may need to redesign the door frame and hinges to support the added thickness and weight. DOE estimates capital conversion costs of $179.7 million and product conversion costs of $375.3 million. Conversion costs total $555.1 million.

At TSL 5, the large conversion costs result in a free cash flow dropping below zero in the years before the standards year. The negative free cash flow calculation indicates manufacturers may need to access cash reserves or outside capital to finance conversion efforts.

At TSL 5, the shipment-weighted average MPC for all MREFs is expected to increase by 32.7 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the projected increase in production costs, DOE expects an estimated 13 percent drop in shipments in the year the standard takes effect relative to the no-new-standards case. In the preservation-of-gross-margin-percentage scenario, the increase in cashflow from the higher MSP is outweighed by the $555.1 million in conversion costs and drop in annual shipments, causing a significant negative change in INPV at TSL 5 under this scenario. Under the preservation-of-operating-profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup, the $555.1 million in conversion costs incurred by manufacturers, and the drop in annual shipments cause a significant decrease in INPV at TSL 5 under the preservation-of-operating-profit scenario.

Table V.21 Percentages of 2024 Shipments that Meet each TSL by Product Class

Product Class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
FCC	21.0%	3.0%	3.0%	0.0%	0.0%
FC	58.0%	58.0%	0.0%	0.0%	0.0%
BICC	82.0%	75.0%	76.0%	76.0%	74.0%
BIC	28.0%	28.0%	28.0%	28.0%	0.0%
C-3A	0.0%	0.0%	0.0%	0.0%	0.0%
C-3A-BI	100.0%	100.0%	100.0%	100.0%	100.0%
C-9	100.0%	100.0%	100.0%	100.0%	100.0%
C-9-BI	0.0%	0.0%	0.0%	0.0%	0.0%
C-13A	1.0%	0.0%	0.0%	0.0%	0.0%
C-13A-BI	0.0%	0.0%	0.0%	0.0%	0.0%
Total	24.4%	12.6%	5.8%	3.9%	2.9%

b. Direct Impacts on Employment

To quantitatively assess the potential impacts of amended energy conservation standards on direct employment in the MREF industry, DOE used the GRIM to estimate the domestic labor expenditures and number of direct employees in the no-new-standards case and in each of the standards cases during the analysis period. For this direct final rule, DOE used the most up-to-date information available. DOE calculated these values using statistical data from the 2021 *ASM*,[76] BLS employee compensation data,[77] results from the engineering analysis, and manufacturer interviews conducted in support of the March 2023 NOPR.

Labor expenditures related to product manufacturing depend on the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in each year are calculated by multiplying the total MPCs by the labor percentage of MPCs. The total labor expenditures in the GRIM were then converted to total production employment levels by dividing production labor expenditures by the average fully burdened wage multiplied by the average number of hours worked per year per production worker. To do this, DOE relied on the *ASM* inputs: Production Workers Annual Wages, Production Workers Annual Hours, Production Workers for Pay Period, and Number of Employees. DOE also relied on the BLS employee compensation data to determine the fully burdened wage ratio. The fully burdened wage ratio factors in paid leave, supplemental pay, insurance, retirement and savings, and legally required benefits.

The number of production employees is then multiplied by the U.S. labor Percentage to convert total production employment to total domestic production employment. The U.S. labor percentage represents the industry fraction of domestic manufacturing

[76] U.S. Census Bureau, *Annual Survey of Manufactures.* ''Summary Statistics for Industry Groups and Industries in the U.S (2021).'' Available at *www.census.gov/programs-surveys/asm/data.html* (last accessed July 5, 2023).

[77] U.S. Bureau of Labor Statistics. *Employer Costs for Employee Compensation—June 2023.* September 12, 2023. Available at *www.bls.gov/news.release/pdf/ecec.pdf* (last accessed October 30, 2023).

production capacity for the covered product. This value is derived from manufacturer interviews, product database analysis, and publicly available information. Consistent with the March 2023 NOPR, DOE estimates that 7.8 percent of MREFs are produced domestically.

The domestic production employees estimate covers production line workers, including line supervisors, who are directly involved in fabricating and assembling products within the OEM facility. Workers performing services that are closely associated with production operations, such as materials-handling tasks using forklifts, are also included as production labor. DOE's estimates only account for production workers who manufacture the specific products covered by this rulemaking.

Non-production workers account for the remainder of the direct employment figure. The non-production employees estimate covers domestic workers who are not directly involved in the production process, such as sales, engineering, human resources, and management.[78] Using the amount of domestic production workers calculated above, non-production domestic employees are extrapolated by multiplying the ratio of non-production workers in the industry compared to production employees. DOE assumes that this employee distribution ratio remains constant between the no-new-standards case and standards cases.

Using the GRIM, DOE estimates in the absence of amended energy conservation standards there would be 211 domestic production and non-production workers for MREFs in 2029. Table V.22 shows the range of the impacts of energy conservation standards on U.S. manufacturing employment in the MREF industry. The following discussion provides a qualitative evaluation of the range of potential impacts presented in Table V.22.

Table V.22 Domestic Direct Employment Impacts for MREF Manufacturers in 2029

	No-New-Standards Case	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Direct Employment in 2029 (Production Workers + Non-Production Workers)	211	210	207	207	204	201
Potential Changes in Direct Employment Workers *	-	(188) to (1)	(188) to (3)	(188) to (3)	(188) to (6)	(188) to (9)

*DOE presents a range of potential employment impacts. Numbers in parentheses denote negative values.

The direct employment impacts shown in Table V.22 represent the potential domestic employment changes that could result following the compliance date for the MREF product classes in this direct final rule. The upper bound estimate corresponds to a change in the number of domestic workers that would result from amended energy conservation standards if manufacturers continue to produce the same scope of covered products within the United States after compliance takes effect. The lower bound estimate represents the maximum decrease in production workers if manufacturing moved to lower labor-cost countries. At lower TSLs, DOE believes the likelihood of changes in production location due to amended standards are low due to the relatively minor production line updates required. However, as amended standards increase in stringency and both the complexity and cost of production facility updates increases, manufacturers may reevaluate domestic production siting options. Specifically, implementing VIPs could necessitate additional labor content and significant capital investment. However, at the Recommended TSL (*i.e.,* TSL 4), none of the analyzed product classes would likely require VIPs to meet the recommended efficiency levels. Furthermore, DOE notes that of the six manufacturers with U.S. manufacturing facilities producing MREFs, five manufacturers are AHAM members, a key signatory of the Joint Agreement.

Additional detail on the analysis of direct employment can be found in chapter 12 of the direct final rule TSD. Additionally, the employment impacts discussed in this section are independent of the employment impacts from the broader U.S. economy, which are documented in chapter 16 of the direct final rule TSD.

c. Impacts on Manufacturing Capacity

In interviews, manufacturers noted that the majority of MREFs—namely FCC—are manufactured in Asia and rebranded by home appliance manufacturers. Manufacturers had few concerns about manufacturing constraints below the max-tech level and the implementation of VIPs. However, at max-tech, some manufacturers expressed technical uncertainty about industry's ability to meet the efficiencies required as few OEMs offer products at max-tech today. For example, DOE is not aware of any OEMs that currently offer FCC that meet TSL 5 efficiencies. DOE's shipments analysis estimates that except for BICC, which only accounts for 4 percent of MREF shipments, no shipments of other product classes meet the max-tech efficiencies.

Some low-volume domestic and European-based OEMs offer niche or high-end MREFs (*i.e.,* built-ins, combination coolers, FCCs that can be integrated into kitchen cabinetry). In interviews, these manufacturers stated that, due to their low volume and wide range of product offerings, they could face engineering resource constraints

[78] The comprehensive description of production and non-production workers is available at ''Definitions and Instructions for the Annual Survey of Manufacturers, MA–10000'' (pp. 13–14) *www2.census.gov/programs-surveys/asm/technical-documentation/questionnaire/2021/instructions/MA_10000_Instructions.pdf* (last accessed September 9, 2023).

should amended standards necessitate a significant redesign, such as requiring insulation thickness changes for FCs at the Recommended TSL (*i.e.,* TSL 4) or requiring VIPs for all product classes at TSL 5. These manufacturers further stated that the extent of their resource constraints depend, in part, on the outcome of other ongoing DOE energy conservation standards rulemakings that impact related products, in particular, the energy conservation standards for RF. DOE notes that the January 2024 RF Direct Final Rule amending the energy conservation standards for RF was published in the **Federal Register** on January 17, 2024. 89 FR 3026. In that direct final rule, compliance with amended standards would be required in 2029 or 2030, depending on the product class, instead of 2027, as analyzed in the RF NOPR published in the **Federal Register** on February 27, 2023. *See* 88 FR 12452. Thus, manufacturers will have more time to redesign RF products to meet amended standards, compared to the EPCA-specified compliance period. Additionally, for OEMs that manufacture both MREFs and RFs, DOE expects that the alignment of the compliance dates for these covered products would help mitigate regulatory burden by reducing the number of times manufacturers would need to reorganize production lines.

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop industry cash-flow estimates may not capture the differential impacts among subgroups of manufacturers. Small manufacturers, niche players, or manufacturers exhibiting a cost structure that differs substantially from the industry average could be affected disproportionately. DOE investigated small businesses as a manufacturer subgroup that could be disproportionally impacted by energy conservation standards and could merit additional analysis.

DOE analyzes the impacts on small businesses in a separate analysis for the standards proposed in the NOPR published elsewhere in this issue of the **Federal Register** and in chapter 12 of the direct final rule TSD. In summary, the SBA defines a ‘‘small business’’ as having 1,500 employees or less for NAICS 335220, ‘‘Major Household Appliance Manufacturing’’ or as having 1,250 employees of less for the secondary NAICS code of 333415: ‘‘Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.’’ Using the more conservative (*i.e.,* more inclusive) threshold of 1,500 employees, DOE identified one domestic OEM that qualifies as small business and is not foreign-owned and operated. For a discussion of the impacts on the small business manufacturer group, see chapter 12 of the direct final rule TSD.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

For the cumulative regulatory burden analysis, DOE examines Federal, product-specific regulations that could affect MREF manufacturers that take effect approximately 3 years before and after 2029 the compliance date. This information is presented in Table V.23.

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Table V.23 Compliance Dates and Expected Conversion Expenses of Federal Energy Conservation Standards Affecting Miscellaneous Refrigeration Products Original Equipment Manufacturers

Federal Energy Conservation Standard	Number of OEMs*	Number of OEMs Affected by This Rule**	Approx. Standards Compliance Year	Industry Conversion Costs *(Millions)*	Industry Conversion Costs / Equipment Revenue***
Automatic Commercial Ice Makers† 88 FR 30508 (May 11, 2023)	23	5	2027	$15.9 (2022$)	0.6%
Dishwashers† 88 FR 32514 (May 19, 2023)	21	12	2027	$125.6 (2021$)	2.1%
Refrigerated Bottled or Canned Beverage Vending Machines† 88 FR 33968 (May 25, 2023)	5	1	2028	$1.5 (2022$)	0.2%
Room Air Conditioners 88 FR 34298 (May 26, 2023)	8	4	2026	$24.8 (2021$)	0.4%
Microwave Ovens 88 FR 39912 (June 20, 2023)	18	8	2026	$46.1 (2021$)	0.7%
Consumer Water Heaters† 88 FR 49058 (July 27, 2023)	22	3	2030	$228.1 (2022$)	1.1%
Consumer Boilers† 88 FR 55128 (August 14, 2023)	24	1	2030	$98.0 (2022$)	3.6%
Commercial Water Heating Equipment 88 FR 69686 (October 6, 2023)	15	1	2026	$42.7 (2022$)	3.8%
Commercial Refrigerators, Refrigerator-Freezers, and Freezers† 88 FR 70196 (October 10, 2023)	83	10	2028	$226.4 (2022$)	1.6%
Dehumidifiers† 88 FR 76510 (November 6, 2023)	20	4	2028	$6.9 (2022$)	0.4%
Consumer Furnaces 88 FR 87502 (December 18, 2023)	15	1	2029	$162.0 (2022$)	1.8%

Refrigerators, Refrigerator-Freezers, and Freezers 89 FR 3026 (January 17, 2024)	63	13	2029 and 2030‡	$830.3 (2022$)	1.3%
Consumer Conventional Cooking Products 89 FR 11548 (February 14, 2024)	35	9	2028	$66.7 (2022$)	0.3%
Consumer Clothes Dryers 89 FR 18164 (March 12, 2024)	19	8	2028	$180.7 (2022$)	1.4%
Residential Clothes Washers 89 FR 19026 (March 15, 2024)	22	7	2028	$320.0 (2022$)	1.8%

* This column presents the total number of OEMs identified in the energy conservation standard rule that is contributing to cumulative regulatory burden.
** This column presents the number of OEMs producing MREFs that are also listed as OEMs in the identified energy conservation standard that is contributing to cumulative regulatory burden.
*** This column presents industry conversion costs as a percentage of equipment revenue during the conversion period. Industry conversion costs are the upfront investments manufacturers must make to sell compliant products/equipment. The revenue used for this calculation is the revenue from just the covered product/equipment associated with each row. The conversion period is the time frame over which conversion costs are made and lasts from the publication year of a final rule to the compliance year of the energy conservation standard. The conversion period typically ranges from 3 to 5 years, depending on the rulemaking.
† These rulemakings are at the NOPR stage, and all values are subject to change until finalized through publication of a final rule.
‡ For the refrigerators, refrigerator-freezers, and freezers energy conservation standards direct final rule, the compliance year (2029 or 2030) varies by product class.

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As shown in Table V.23, most of the rulemakings with the largest overlap of MREF OEMs include RFs, consumer conventional cooking products, residential clothes washers, consumer clothes dryers, and MREFs, which are all part of the multi-product Joint Agreement submitted by interested parties.[79] The multi-product Joint Agreement states the ''jointly recommended compliance dates will achieve the overall energy and economic benefits of this agreement while allowing necessary lead-times for manufacturers to redesign products and retool manufacturing plants to meet the recommended standards across product categories.'' (Joint Agreement, No. 34 at p. 2) As discussed previously, the staggered compliance dates help mitigate manufacturers' concerns about their ability to allocate sufficient resources to comply with multiple concurrent amended standards and about the need to align compliance dates for products that are typically designed or sold as matched pairs. See section IV.J.3 of this document for stakeholder comments about cumulative regulatory burden. See Table V.24 for a comparison of the estimated compliance dates based on EPCA-specified timelines and the compliance dates detailed in the Joint Agreement.

[79] The microwave ovens energy conservation standards final rule (88 FR 39912), which has 8 overlapping OEMs, was published prior to the joint submission of the multi-product Joint Agreement.

Table V.24 Expected Compliance Dates for Multi-Product Joint Agreement

Rulemaking	Estimated Compliance Year based on EPCA Requirements	Compliance Year in the Joint Agreement
Consumer Clothes Dryers	2027	2028
Residential Clothes Washers	2027	2028
Consumer Conventional Cooking Products	2027	2028
Dishwashers	2027	2027*
Refrigerators, Refrigerator-Freezers, and Freezers	2027	2029 or 2030 depending on the product class
Miscellaneous Refrigeration Products	2029	2029

*Estimated compliance year. The Joint Agreement states, "3 years after the publication of a final rule in the *Federal Register.*" (Joint Agreement, No. 34 at p. 2)

3. National Impact Analysis

This section presents DOE's estimates of the national energy savings and the NPV of consumer benefits that would result from each of the TSLs considered as potential amended standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential amended standards for MREFs, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2029–2058). Table V.25 presents DOE's projections of the national energy savings for each TSL considered for MREFs. The savings were calculated using the approach described in section IV.H.2 of this document.

Table V.25 Cumulative National Energy Savings for MREFs; 30 Years of Shipments (2029–2058)

	Trial Standard Level				
	1	2	3	4	5
	Quads				
Primary energy	0.10	0.20	0.21	0.31	0.54
FFC energy	0.10	0.20	0.22	0.32	0.55

OMB Circular A–4 [80] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[81] The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to MREFs. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V.26. The impacts are counted over the lifetime of MREFs purchased in 2029–2037.

[80] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* Available at *www.whitehouse.gov/omb/information-for-agencies/circulars/* (last accessed January 5, 2024). DOE used the prior version of Circular A–4 (2003) as a result of the effective date of the new version.

[81] EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. (42 U.S.C. 6295(m)) While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6-year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

Table V.26 Cumulative National Energy Savings for MREFs; 9 Years of Shipments (2029–2037)

	Trial Standard Level				
	1	2	3	4	5
	quads				
Primary energy	0.03	0.05	0.06	0.09	0.15
FFC energy	0.03	0.06	0.06	0.09	0.15

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the TSLs considered for MREFs. In accordance with OMB's guidelines on regulatory analysis,[82] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V.27 shows the consumer NPV results with impacts counted over the lifetime of products purchased in 2029–2058.

Table V.27 Cumulative Net Present Value of Consumer Benefits for MREFs; 30 Years of Shipments (2029–2058)

	Trial Standard Level				
	1	2	3	4	5
	Billion 2022$				
3 percent	0.49	0.72	0.87	0.77	-1.68
7 percent	0.19	0.24	0.31	0.17	-1.36

The NPV results based on the aforementioned 9-year analytical period are presented in Table V.28. The impacts are counted over the lifetime of products purchased in 2029–2037. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

Table V.28 Cumulative Net Present Value of Consumer Benefits for MREFs; 9 Years of Shipments (2029–2037)

	Trial Standard Level				
	1	2	3	4	5
	Billion 2022$				
3 percent	0.17	0.23	0.29	0.20	-0.91
7 percent	0.09	0.10	0.14	0.04	-0.83

The previous results reflect the use of a default trend to estimate the change in price for MREFs over the analysis period (see section IV.H.3 of this document). DOE also conducted a sensitivity analysis that considered a low benefits scenario which combines a lower rate of price decline and AEO 2023 Low Economic Growth, as well as a high benefits scenario which combines a higher rate of price decline and AEO 2023 High Economic Growth. The results of these alternative cases are presented in appendix 10C of the direct final rule TSD. In the high benefits scenario where high-price-decline case is applied, the NPV of consumer benefits is higher than in the default case. In the low benefits scenario where low-price-decline case is applied, the NPV of consumer benefits is lower than in the default case.

c. Indirect Impacts on Employment

DOE estimates that amended energy conservation standards for MREFs will reduce energy expenditures for consumers of those products, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term timeframes (2029–2033), where these uncertainties are reduced.

The results suggest that the adopted standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the direct final rule TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As discussed in section III.E.1.d of this document, DOE has concluded that the standards adopted in this direct final rule will not lessen the utility or performance of the MREFs under consideration in this rulemaking. Manufacturers of these products

[82] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* Available at *www.whitehouse.gov/omb/information-for-agencies/circulars/* (last accessed January 5, 2024). DOE used the prior version of Circular A–4 (2003) as a result of the effective date of the new version.

currently offer units that meet or exceed the adopted standards.

5. Impact of Any Lessening of Competition

DOE considered any lessening of competition that would be likely to result from amended standards. As discussed in section III.E.1.e of this document, EPCA directs the Attorney General of the United States (''Attorney General'') to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination in writing to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. To assist the Attorney General in making this determination, DOE is providing DOJ with copies of this direct final rule and the direct final rule TSD for review.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. Chapter 15 in the direct final rule TSD presents the estimated impacts on electricity-generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from potential energy conservation standards for MREFs is expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V.29 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The emissions were calculated using the multipliers discussed in section IV.K of this document. DOE reports annual emissions reductions for each TSL in chapter 13 of the direct final rule TSD.

Table V.29 Cumulative Emissions Reduction for MREFs Shipped in 2029–2058

	Trial Standard Level				
	1	2	3	4	5
Electric Power Sector and Site Emissions					
CO_2 (*million metric tons*)	1.64	3.33	3.63	5.32	9.12
CH_4 (*thousand tons*)	0.12	0.25	0.27	0.40	0.68
N_2O (*thousand tons*)	0.02	0.03	0.04	0.06	0.10
NO_x (*thousand tons*)	0.77	1.57	1.70	2.50	4.28
SO_2 (*thousand tons*)	0.56	1.13	1.23	1.81	3.10
Hg (*tons*)	0.00	0.01	0.01	0.01	0.02
Upstream Emissions					
CO_2 (*million metric tons*)	0.16	0.33	0.36	0.53	0.91
CH_4 (*thousand tons*)	14.90	30.19	32.88	48.24	82.73
N_2O (*thousand tons*)	0.00	0.00	0.00	0.00	0.00
NO_x (*thousand tons*)	2.55	5.18	5.64	8.27	14.19
SO_2 (*thousand tons*)	0.01	0.02	0.02	0.03	0.05
Hg (*tons*)	0.00	0.00	0.00	0.00	0.00
Total FFC Emissions					
CO_2 (*million metric tons*)	1.81	3.66	3.99	5.85	10.03
CH_4 (*thousand tons*)	15.02	30.44	33.15	48.64	83.41
N_2O (*thousand tons*)	0.02	0.04	0.04	0.06	0.10
NO_x (*thousand tons*)	3.33	6.75	7.34	10.77	18.47
SO_2 (*thousand tons*)	0.57	1.15	1.25	1.84	3.15
Hg (*tons*)	0.00	0.01	0.01	0.01	0.02

As part of the analysis for this direct final rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 that DOE estimated for each of the considered TSLs for MREFs. Section IV.L of this document discusses the estimated SC–CO_2 values that DOE used. Table V.30 presents the value of CO_2 emissions reduction at each TSL for each of the SC–CO_2 cases. The time-series of annual values is presented for the selected TSL in chapter 14 of the direct final rule TSD.

Table V.30 Present Value of CO_2 Emissions Reduction for MREFs Shipped in 2029–2058

TSL	SC-CO_2 Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	million 2022$			
1	18.2	77.6	121.3	235.6
2	36.9	157.5	246.1	478.1
3	40.0	170.8	266.8	518.2
4	58.6	250.3	391.1	759.4
5	100.5	429.5	671.2	1,303.2

As discussed in section IV.L.2 of this document, DOE estimated the climate benefits likely to result from the reduced emissions of methane and N_2O that DOE estimated for each of the considered TSLs for MREFs. Table V.31 presents the value of the CH_4 emissions reduction at each TSL, and Table V.32 presents the value of the N_2O emissions reduction at each TSL. The time-series of annual values is presented for the selected TSL in chapter 14 of the direct final rule TSD.

Table V.31 Present Value of Methane Emissions Reduction for MREFs Shipped in 2029–2058

TSL	SC-CH_4 Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	million 2022$			
1	6.9	20.7	28.9	54.8
2	14.1	42.0	58.6	111.1
3	15.3	45.6	63.6	120.6
4	22.3	66.9	93.3	176.8
5	38.4	114.8	160.3	303.6

Table V.32 Present Value of Nitrous Oxide Emissions Reduction for MREFs Shipped in 2029–2058

TSL	SC-N_2O Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	million 2022$			
1	0.1	0.3	0.4	0.7
2	0.1	0.6	0.9	1.5
3	0.2	0.6	0.9	1.6
4	0.2	0.9	1.4	2.4
5	0.4	1.5	2.4	4.1

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the global and U.S. economy continues to evolve rapidly. DOE, together with other Federal agencies, will continue to review methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. DOE notes, however, that the adopted standards in this direct final rule would be economically justified even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the economic benefits associated with NO_X and SO_2 emissions reductions anticipated to result from the considered TSLs for MREFs. The dollar-per-ton values that DOE used are discussed in section IV.L of this document. Table V.33 presents the

present value for NO_X emissions reduction for each TSL calculated using 7-percent and 3-percent discount rates, and Table V.34 presents similar results for SO_2 emissions reductions. The results in these tables reflect application of EPA's low dollar-per-ton values, which DOE used to be conservative. The time-series of annual values is presented for the selected TSL in chapter 14 of the direct final rule TSD.

Table V.33 Present Value of NO_X Emissions Reduction for MREFs Shipped in 2029–2058

TSL	3% Discount Rate	7% Discount Rate
	million 2022$	
1	155.0	60.6
2	314.4	123.0
3	341.0	133.0
4	499.7	194.6
5	857.1	333.1

Table V.34 Present Value of SO_2 Emissions Reduction for MREFs Shipped in 2029–2058

TSL	3% Discount Rate	7% Discount Rate
	million 2022$	
1	37.1	14.7
2	75.3	29.9
3	81.6	32.3
4	119.6	47.2
5	205.1	80.8

Not all the public health and environmental benefits from the reduction of greenhouse gases, NO_X, and SO_2 are captured in the values above, and additional unquantified benefits from the reductions of those pollutants as well as from the reduction of direct PM and other co-pollutants may be significant. DOE has not included monetary benefits of the reduction of Hg emissions because the amount of reduction is very small.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) No other factors were considered in this analysis.

8. Summary of Economic Impacts

Table V.35 presents the NPV values that result from adding the estimates of the economic benefits resulting from reduced GHG and NO_X and SO_2 emissions to the NPV of consumer benefits calculated for each TSL considered in this rulemaking. The consumer benefits are domestic U.S. monetary savings that occur as a result of purchasing the covered MREFs and are measured for the lifetime of products shipped in 2029–2058. The climate benefits associated with reduced GHG emissions resulting from the adopted standards are global benefits and are also calculated based on the lifetime of MREFs shipped in 2029–2058.

Table V.35 Consumer NPV Combined with Present Value of Climate Benefits and Health Benefits

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Using 3% discount rate for Consumer NPV and Health Benefits (billion 2022$)					
5% Average SC-GHG case	0.7	1.1	1.3	1.3	-1.0
3% Average SC-GHG case	0.8	1.2	1.4	1.6	-0.6
2.5% Average SC-GHG case	0.8	1.4	1.6	1.7	-0.4
3% 95th percentile SC-GHG case	1.0	1.6	1.9	2.2	0.4
Using 7% discount rate for Consumer NPV and Health Benefits (billion 2022$)					
5% Average SC-GHG case	0.3	0.4	0.5	0.4	-1.1
3% Average SC-GHG case	0.4	0.6	0.7	0.7	-0.6
2.5% Average SC-GHG case	0.4	0.7	0.8	0.8	-0.4
3% 95th percentile SC-GHG case	0.6	1.0	1.1	1.3	0.4

C. Conclusion

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this direct final rule, DOE considered the impacts of amended standards for MREFs at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements, an issue known as the ''energy efficiency gap''. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers).[83] Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forgo the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the direct final rule TSD. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[84]

DOE continues to explore additional potential updates to the quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, and DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[85] DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for MREF Standards

Tables V.36 and V.37 summarize the quantitative impacts estimated for each TSL for MREFs. The national impacts are measured over the lifetime of MREFs purchased in the 30-year period that begins in the anticipated year of compliance with amended standards (2029–2058). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. DOE is presenting monetized benefits of GHG emissions reductions in accordance with the applicable Executive orders and DOE would reach the same conclusion presented in this document in the absence of the estimated benefits from reductions in GHG emissions, including the Interim Estimates presented by the Interagency Working Group. The efficiency levels contained in each TSL are described in section V.A of this document.

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[83] Gillingham and Palmer (2014), Gerarden et al. (2015) and Allcott and Greenstone (2012) discuss a wide range of potential factors contributing to the energy efficiency gap.

[84] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034–6527.00354.*

[85] Sanstad, A.H. *Notes on the Economics of Household Energy Consumption and Technology Choice.* 2010. Lawrence Berkeley National Laboratory. Available at *www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (last accessed November 29, 2023).

Table V.36 Summary of Analytical Results for MREFs TSLs Shipped in 2029-2058: National Impacts

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Cumulative FFC National Energy Savings					
Quads	0.10	0.20	0.22	0.32	0.55
Cumulative FFC Emissions Reduction					
CO_2 (*million metric tons*)	1.81	3.66	3.99	5.85	10.03
CH_4 (*thousand tons*)	15.02	30.44	33.15	48.64	83.41
N_2O (*thousand tons*)	0.02	0.04	0.04	0.06	0.10
NO_x (*thousand tons*)	3.33	6.75	7.34	10.77	18.47
SO_2 (*thousand tons*)	0.57	1.15	1.25	1.84	3.15
Hg (*tons*)	0.00	0.01	0.01	0.01	0.02
Present Value of Benefits and Costs (*3% discount rate, billion 2022$*)					
Consumer Operating Cost Savings	0.62	1.26	1.37	2.00	3.44
Climate Benefits*	0.10	0.20	0.22	0.32	0.55
Health Benefits**	0.19	0.39	0.42	0.62	1.06
Total Benefits†	0.91	1.85	2.01	2.94	5.04
Consumer Incremental Product Costs‡	0.13	0.54	0.50	1.23	5.12
Consumer Net Benefits	0.49	0.72	0.87	0.77	-1.68
Total Net Benefits	0.78	1.31	1.51	1.71	-0.07
Present Value of Benefits and Costs (*7% discount rate, billion 2022$*)					
Consumer Operating Cost Savings	0.27	0.54	0.59	0.86	1.47
Climate Benefits*	0.10	0.20	0.22	0.32	0.55
Health Benefits**	0.08	0.15	0.17	0.24	0.41
Total Benefits†	0.44	0.90	0.97	1.42	2.43
Consumer Incremental Product Costs‡	0.07	0.30	0.28	0.69	2.83
Consumer Net Benefits	0.19	0.24	0.31	0.17	-1.36
Total Net Benefits	0.37	0.60	0.69	0.73	-0.40

Note: This table presents the costs and benefits associated with MREFs shipped during the period 2029−2058. These results include benefits to consumers which accrue after 2058 from the products shipped in 2029−2058.

* Climate benefits are calculated using four different estimates of the SC-CO_2, SC-CH_4 and SC-N_2O. Together, these represent the global SC-GHG. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. See section IV.L of this document for more details.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs.

Table V.37 Summary of Analytical Results for MREF TSLs: Manufacturer and Consumer Impacts

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Manufacturer Impacts					
Industry NPV (million 2022$) (No-new-standards case INPV = 807.7)	773.7 to 777.2	758.7 to 770.6	761.9 to 772.1	715.6 to 747.4	386.7 to 524.5
Industry NPV (% change)	(4.2) to (3.8)	(6.1) to (4.6)	(5.7) to (4.4)	(11.4) to (7.5)	(52.1) to (35.1)
Consumer Average LCC Savings (2022$)					
FCC	17.53	17.55	17.55	12.97	(58.75)
BICC	16.08	1.53	1.53	1.53	(97.38)
FC	21.06	21.06	45.59	26.22	(265.96)
BIC	18.99	19.27	53.56	53.56	(293.40)
C-3A	30.95	30.95	30.95	30.95	(242.46)
C-3A-BI	36.19	36.19	36.19	36.19	(249.95)
C-13A	24.36	37.86	37.86	10.60	(89.25)
Shipment-Weighted Average*	37.52	21.11	25.23	15.24	(99.49)
Consumer Simple PBP (years)					
FCC	2.0	5.0	5.0	6.8	13.0
BICC	2.4	8.1	8.1	8.1	15.4
FC	6.5	6.5	4.2	8.5	29.9
BIC	6.9	9.0	4.4	4.4	31.7
C-3A	1.7	1.7	1.7	1.7	45.4
C-3A-BI	1.6	1.6	1.6	1.6	42.0
C-13A	1.1	1.3	1.3	7.3	19.5
Shipment-Weighted Average*	2.6	4.7	4.3	7.1	17.1
Percent of Consumers that Experience a Net Cost					
FCC	1.9	30.6	30.6	46.8	81.6
BICC	0.9	15.1	15.1	15.1	23.7
FC	10.0	10.0	1.8	44.0	98.2
BIC	19.2	52.7	4.6	4.6	98.4
C-3A	0.0	0.0	0.0	0.0	99.6
C-3A-BI	0.0	0.0	0.0	0.0	99.3
C-13A	0.3	0.6	0.6	47.2	93.9
Shipment-Weighted Average*	3.1	22.9	20.3	43.7	84.5

Parentheses indicate negative (-) values.
* Weighted by shares of each product class in total projected shipments in 2029.

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DOE first considered TSL 5, which represents the max-tech efficiency levels. For coolers (*i.e.,* FCC, FC, BICC, and BIC), which account for approximately 82 percent of MREF shipments, DOE expects that products would require use of VIPs, VSCs, and triple-glazed doors at this TSL. DOE expects that VIPs would be used in the products' side walls. In addition, the products would use the best-available-efficiency variable-speed compressors, forced-convection heat exchangers with multi-speed brushless-DC (''BLDC'') fans, and increase in cabinet wall thickness as compared to most baseline products. TSL 5 would save an estimated 0.55 quads of energy, an amount which DOE considers significant. Under TSL 5, the NPV of consumer benefit would be negative, *i.e.,* −$1.36 billion using a discount rate of 7 percent, and −$1.68 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 10.0 Mt of CO_2, 3.15 thousand tons of SO_2, 18.5 thousand tons of NO_X, 0.02 tons of Hg, 83.4 thousand tons of CH_4, and 0.10 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 5 is $0.6 billion. The estimated monetary value of the health benefits from

reduced SO_2 and NO_X emissions at TSL 5 is $0.4 billion using a 7-percent discount rate and $1.1 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 5 is −$0.4 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 5 is −$0.07 billion. The estimated total monetized NPV is provided for additional information, however, consistent with the statutory factors and framework for along with appropriate consideration of its full range of statutory factors when determining whether a proposed standard level is economically justified, DOE considers a range of quantitative and qualitative benefits and burdens, including the costs and cost savings for consumers, impacts to consumer subgroups, energy savings, emission reductions, and impacts on manufacturers.

At TSL 5, for the product classes with the largest market share, which are FCC, FC, and C–13A and together account for approximately 92 percent of annual shipments, the LCC savings are all negative (−$45.3, −$178.8, and −$73.4, respectively) and their payback periods are 13.0 years, 29.9 years, and 19.5 years, respectively, which are all longer than their corresponding average lifetimes. For these product classes, the fraction of consumers experiencing a net LCC cost is 81.6 percent, 98.2 percent, and 93.9 percent due to increases in first cost of $185.0, $420.5, and $167.5, respectively. Overall, a majority of MREF consumers (84.5 percent) would experience a net cost and the average LCC savings would be negative for all analyzed product classes.

At TSL 5, the projected change in INPV ranges from a decrease of $421.0 million to a decrease of $283.2 million, which corresponds to decreases of 51.2 percent and 35.1 percent, respectively. DOE estimates that industry must invest $555.1 million to comply with standards set at TSL 5.

DOE estimates that approximately 2.9 percent of current MREF shipments meet the max-tech levels. For FCC, FC, and C–13A, which together account for approximately 92 percent of annual shipments, DOE estimates that zero shipments currently meet max-tech efficiencies.

At TSL 5, manufacturers would likely need to implement all the most efficient design options analyzed in the engineering analysis. Manufacturers that do not currently offer products that meet TSL 5 efficiencies would need to develop new product platforms, which would require significant investment. Conversion costs are driven by the need for changes to cabinet construction, such as increasing foam insulation thickness and/or incorporating VIP technology. Increasing insulation thickness could result in a loss of interior volume or an increase in exterior volume. If manufacturers chose to maintain exterior dimensions, increasing insulation thickness would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. Incorporating VIPs into MREF designs could also require redesign of the cabinet to maximize the efficiency benefit of this technology. In addition to insulation changes, manufacturers may need to implement triple-pane glass, which could require implementing reinforced hinges and redesigning the door structure.

At this level, DOE estimates a 13-percent drop in shipments in the year the standard takes effect compared to the no-new-standards case, as some consumers may forgo purchasing a new MREF due to the increased upfront cost of baseline models.

At TSL 5 for MREFs, the Secretary concludes that the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on many consumers, negative NPV of consumer benefits, and the impacts on manufacturers, including the significant potential reduction in INPV. A majority of MREF consumers (84.5 percent) would experience a net cost and the average LCC savings would be negative. Additionally, manufacturers would need to make significant upfront investments to update product platforms. The potential reduction in INPV could be as high as 52.1 percent. Consequently, the Secretary has concluded that TSL 5 is not economically justified.

DOE then considered the Recommended TSL (*i.e.,* TSL 4), which represents EL 3 for all analyzed product classes except for C–3A and C–3A–BI, for which this TSL corresponds to EL 1 and BIC, for which this TSL corresponds to EL 2. At the Recommended TSL, products of most classes would use high-efficiency single-speed compressors with forced-convection evaporators and condensers using brushless DC fan motors. Doors would be double-glazed with low-conductivity gas fill (*e.g.,* argon) and a single low-emissivity glass layer. Products would not require use of VIPs, but the FC product class would require thicker walls than corresponding baseline products. The Recommended TSL would save an estimated 0.32 quads of energy, an amount DOE considers significant. Under the Recommended TSL, the NPV of consumer benefit would be $0.17 billion using a discount rate of 7 percent, and $0.77 billion using a discount rate of 3 percent.

The cumulative emissions reductions at the Recommended TSL are 5.9 Mt of CO_2, 1.8 thousand tons of SO_2, 10.8 thousand tons of NO_X, 0.01 tons of Hg, 48.6 thousand tons of CH_4, and 0.06 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at the Recommended TSL is $0.3 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at the Recommended TSL is $0.2 billion using a 7-percent discount rate and $0.6 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at the Recommended TSL is $0.7 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at the Recommended TSL is $1.7 billion. The estimated total monetized NPV is provided for additional information, however, consistent with the statutory factors and framework for determining whether a standard level is economically justified, DOE considers a range of quantitative and qualitative benefits and burdens, including the costs and cost savings for consumers, impacts to consumer subgroups, energy savings, emission reductions, and impacts on manufacturers.

At the Recommended TSL, for the product classes with the largest market share, which are FCC, FC, and C–13A, the LCC savings are $12.6, $28.0, and $12.0, respectively, and their payback periods are 6.8 years, 8.5 years, and 7.3 years, respectively, which are all shorter than their corresponding average lifetimes. For these product classes, the fraction of consumers experiencing a net LCC cost is 46.8 percent, 44.0 percent, and 47.2 percent, and increases in first cost for these classes are $91.7, $360.9, and $124.3, respectively. Overall, the LCC savings would be positive for all MREF product classes, and, while 43.7

percent of MREF consumers would experience a net cost, slightly more than half of MREF consumers would experience a net benefit (52.9 percent).

At the Recommended TSL (*i.e.,* TSL 4), the projected change in INPV ranges from a decrease of $92.1 million to a decrease of $60.3 million, which correspond to decreases of 11.4 percent and 7.5 percent, respectively. DOE estimates that industry must invest $130.7 million to comply with standards set at Recommended TSL.

DOE estimates that approximately 3.9 percent of shipments currently meet the required efficiencies at the Recommended TSL. For most product classes (*i.e.,* FCC, BICC, BIC, C–13A, C–13A–BI, C–3A, C–3A–BI), DOE expects manufacturers could reach the required efficiencies with relatively straightforward component swaps, such as implementing incrementally more efficient compressors, rather than the full platform redesigns required at max-tech. DOE expects that FC manufacturers would need to increase foam insulation thickness and incorporate variable-speed compressor systems at this level. At the Recommended TSL, DOE estimates a 4-percent drop in shipments in the year the standard takes effect compared to the no-new-standards case, as some consumers may forgo purchasing a new MREF due to the increased upfront cost of baseline models.

After considering the analysis and weighing the benefits and burdens, the Secretary has concluded that at a standard set at the recommended TSL for MREFs would be economically justified. At this TSL, the average LCC savings are positive for all product classes for which an amended standard is considered, with a shipment-weighted average of $15.2 savings. The FFC national energy savings are significant and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. The standard levels at TSL 4 are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $0.3 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $0.6 billion (using a 3-percent discount rate) or $0.2 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which would be contrary to the statute. See 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the adopted energy conservation standards, DOE notes that the Recommended TSL represents the option with positive LCC savings ($15.2) for all product classes compared to TSL 5 (−$99.5). Further, when comparing the cumulative NPV of consumer benefit using a 7% discount rate, TSL 4 ($0.7 billion) has a higher benefit value than TSL 5 (−$0.4 billion), while for a 3-percent discount rate, TSL 4 ($1.7 billion) is also higher than TSL 5 (−$0.07 billion), which yields negative NPV in both cases. These additional savings and benefits at the Recommended TSL are significant. DOE considers the impacts to be, as a whole, economically justified at the Recommended TSL.

Although DOE considered amended standard levels for MREFs by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. For all product classes, except for BIC and C–3A–BI, the amended standard level represents the maximum energy savings that does not result in negative LCC savings. DOE did not include efficiency levels with negative LCC savings in any TSLs with the exception of TSL 5, which represents the max-tech efficiency levels. Specifically, for FC, FCC, BICC, C–13 A, and C13–A–BI, DOE did not include EL4 in a TSL due to negative LCC savings, and for C–3A, DOE did not include EL 2 or 3, and for C–3A–BI, DOE did not include EL 3 for the same reason. For BIC and C–3A–BI, the standard level represents the maximum energy savings that is economically justified. For BIC, DOE did not include EL4 in any TSL due to negative LCC savings. TSL 4, the Recommended TSL and the one adopted here, includes an EL for BIC that is lower than the EL at TSL 2. That is because TSL 2 represents ENERGY STAR for all product classes for which an ENERGY STAR criterion exists, including EL 3 for BIC. As such, DOE analyzed TSL 2 with a higher efficiency level for BIC than TSL 4 because of the ENERGY STAR criterion. TSL 4 also includes an EL for C–3A–BI, EL1, that is lower than another EL, EL2, that has positive LCC savings. DOE has considered standards at those ELs for those products and found them not to be economically justified. Although these ELs have positive LCC savings, they would result in a majority of purchasers experiencing a net cost (53% and 57%, respectively). Further, for BIC products, DOE expects some manufacturers would likely need to increase insulation thickness to meet efficiency levels above EL 2, which could require new cabinet designs and fixtures. Due to the high percentage of consumers with a net cost and the extensive redesigns that would be needed to support EL3, DOE has concluded that this efficiency level for BIC is not economically justified. However, at the Recommended TSL (EL 2 for BIC), DOE expects manufacturers could likely meet the efficiency level required for BIC without significant redesign. The ELs at the amended standard level result in positive LCC savings for all product classes and reduce the decrease in INPV and conversion costs to the point where DOE has concluded they are economically justified, as discussed for the Recommended TSL in the preceding paragraphs.

Therefore, based on the previous considerations, DOE adopts the energy conservation standards for MREFs at the Recommended TSL.

While DOE considered each potential TSL under the criteria laid out in 42 U.S.C. 6295(o) as discussed in the preceding paragraphs, DOE notes that the Recommended TSL for MREFs in this direct final rule is part of a multi-product Joint Agreement covering six rulemakings (RFs; MREFs; conventional cooking products; residential clothes washers; consumer clothes dryers; and dishwashers). The signatories indicate that the Joint Agreement for the six rulemakings should be considered as a joint statement of recommended standards, to be adopted in its entirety. As discussed in section V.B.2.e of this document, many MREF OEMs also manufacture RFs, conventional cooking products, residential clothes washers, consumer clothes dryers, and dishwashers. Rather than requiring compliance with five amended standards in a single year (2027),[86] the negotiated multi-product Joint Agreement staggers the compliance dates for the five amended standards

[86] The refrigerators, refrigerator-freezers, and freezers rulemaking (88 FR 12452); consumer conventional cooking products rulemaking (88 FR 6818); residential clothes washers rulemaking (88 FR 13520); consumer clothes dryers rulemaking (87 FR 51734); and dishwashers rulemaking (88 FR 32514) utilized a 2027 compliance year for analysis at the proposed rule stage. The miscellaneous refrigeration products rulemaking (88 FR 12452) utilized a 2029 compliance year for the NOPR analysis.

over a 4-year period (2027–2030). In response to the March 2023 NOPR, AHAM expressed concerns about the timing of ongoing home appliance rulemakings. Specifically, AHAM commented that the combination of the stringency of DOE's proposals, the short lead-in time required under EPCA to comply with standards, and the overlapping timeframe of multiple standards affecting the same manufacturers represents significant cumulative regulatory burden for the home appliance industry. (AHAM, No. 31 at p. 13) AHAM has submitted similar comments to other ongoing consumer product rulemakings.[87] However, as AHAM is a key signatory of the Joint Agreement, DOE understands that the compliance dates recommended in the Joint Agreement would help reduce cumulative regulatory burden. These compliance dates help relieve concern on the part of some manufacturers about their ability to allocate sufficient resources to comply with multiple concurrent amended standards, about the need to align compliance dates for products that are typically designed or sold as matched pairs, and about the ability of their suppliers to ramp up production of key components. The Joint Agreement also provides additional years of regulatory certainty for manufacturers and their suppliers while still achieving the maximum improvement in energy efficiency that is technologically feasible and economically justified.

The amended energy conservation standards for MREFs, which are expressed in kWh/yr, are shown in Table V.38.

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Table V.38 Amended Energy Conservation Standards for MREFs

Product class	Equations for maximum energy use (kWh/yr)
1. Freestanding compact coolers ("FCC")	5.52AV + 109.1
2. Freestanding coolers ("FC")	5.52AV + 109.1
3. Built-in compact coolers ("BICC")	5.52AV + 109.1
4. Built-in coolers ("BIC")	6.30AV + 124.6
C-3A. Cooler with all-refrigerator—automatic defrost	4.11AV + 117.4
C-3A-BI. Built-in cooler with all-refrigerator—automatic defrost	4.67AV + 133.0
C-5-BI. Built-in cooler with refrigerator-freezer -automatic defrost with bottom-mounted freezer	5.47AV + 196.2 + 28I
C-9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C-13A. Compact cooler with all-refrigerator—automatic defrost	4.74AV + 155.0
C-13A-BI. Built-in compact cooler with all-refrigerator—automatic defrost	5.22AV + 170.5
AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of 10 CFR part 430. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.	

[87] AHAM has submitted written comments regarding cumulative regulatory burden for the other five rulemakings included in the multi-product Joint Agreement. AHAM's written comments on cumulative regulatory burden are available at: *www.regulations.gov/document/EERE-2017-BT-STD-0003-0069* (pp. 19–22) for refrigerators, refrigerator-freezers, and freezers; *www.regulations.gov/comment/EERE-2014-BT-STD-0005-2285* (pp. 44–47) for consumer conventional cooking products; *www.regulations.gov/comment/EERE-2017-BT-STD-0014-0464* (pp. 40–44) for residential clothes washers; *www.regulations.gov/comment/EERE-2014-BT-STD-0058-0046* (pp. 12–13) for consumer clothes dryers; and *www.regulations.gov/comment/EERE-2019-BT-STD-0039-0051* (pp. 21–24) for dishwashers.

2. Annualized Benefits and Costs of the Adopted Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2022$) of the benefits from operating products that meet the adopted standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits.

Table V.39 shows the annualized values for MREFs under the Recommended TSL, expressed in 2022$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the standards for MREFs is $72.7 million per year in increased product costs, while the estimated annual benefits are $90.6 million in reduced product operating costs, $18.3 million in climate benefits, and $25.6 million in health benefits. The net benefit amounts to $61.7 million per year. Using a 3-percent discount rate for all benefits and costs, the estimated cost of the adopted standards for MREFs is $70.8 million per year in increased equipment costs, while the estimated annual benefits are $115 million in reduced operating costs, $18.3 million in climate benefits, and $35.6 million in health benefits. The net benefit amounts to $98 million per year.

Table V.39 Annualized Benefits and Costs of Adopted Standards Shipped in 2029-2058 (TSL 4, the Recommended TSL) for MREFs

	Million 2022$/year		
	Primary Estimate	Low-Net-Benefits Estimate	High-Net-Benefits Estimate
3% discount rate			
Consumer Operating Cost Savings	115.0	111.5	116.3
Climate Benefits*	18.3	17.7	18.5
Health Benefits**	35.6	34.5	36.0
Total Monetized Benefits†	168.9	163.7	170.7
Consumer Incremental Product Costs‡	70.8	74.9	68.7
Net Benefits	98.0	88.8	102.0
Change in Producer Cashflow (INPV)‡‡	(7.7) - (5.0)		
7% discount rate			
Consumer Operating Cost Savings	90.6	88.1	91.5
Climate Benefits* (3% discount rate)	18.3	17.7	18.5
Health Benefits**	25.6	24.9	25.8
Total Benefits†	134.4	130.7	135.7
Consumer Incremental Product Costs‡	72.7	75.8	70.9
Net Benefits	61.7	54.9	64.8
Change in Producer Cashflow (INPV)‡‡	(7.7) - (5.0)		

Note: This table presents the costs and benefits associated with MREFs shipped during the period 2029−2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped in 2029−2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low Net Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.H.3 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC-GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown, but DOE does not have a single central SC-GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate.
‡ Costs include incremental equipment costs.
‡‡Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. See sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). See section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the direct final rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 7.7 percent that is estimated in the manufacturer impact analysis (see chapter 12 of the direct final rule TSD for a complete description of the industry weighted average cost of capital). For MREFs, the annualized change in INPV ranges from $7.7 million to $5.0 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. See section V.C of this document. DOE is presenting the range of impacts to the INPV under two manufacturer markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annual change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this direct final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this direct final rule, the annualized net benefits would range from $90.3 million to $93.0 million at 3-percent discount rate and would range from $54.0 million to $56.7 million at 7-percent discount rate. Parentheses indicate negative (-) values.

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VI. Procedural Issues and Regulatory Review

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

Executive Order ("E.O.") 12866, "Regulatory Planning and Review," as supplemented and reaffirmed by E.O. 13563, "Improving Regulation and Regulatory Review," 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, "Modernizing Regulatory Review," 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB") has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in this preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit "significant regulatory actions" to OIRA for review. OIRA has determined that this final regulatory action constitutes a "significant regulatory action" within the scope of section 3(f)(1) of E.O. 12866. DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the final regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments are summarized in this preamble and further detail can be found in the technical support document for this rulemaking.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis ("IRFA") and a final regulatory flexibility analysis ("FRFA") for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272,

''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*).

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 under the Administrative Procedure Act. *See* 5 U.S.C. 601(2), 603(a). As discussed previously, DOE has determined that the Joint Agreement meets the necessary requirements under EPCA to issue this direct final rule for energy conservation standards for MREFs under the procedures in 42 U.S.C. 6295(p)(4). DOE notes that the NOPR for energy conservation standards for MREFs published elsewhere in this **Federal Register** contains an IRFA.

C. Review Under the Paperwork Reduction Act

Manufacturers of MREFs must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for MREFs, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including MREFs. (*See generally* 10 CFR part 429). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''), DOE has analyzed this proposed action rule in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this direct 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.

E. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this direct final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this direct final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a

''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

DOE has concluded that this direct final rule may require expenditures of $100 million or more in any one year by the private sector. Such expenditures may include (1) investment in research and development and in capital expenditures by MREF manufacturers in the years between the direct final rule and the compliance date for the new standards and (2) incremental additional expenditures by consumers to purchase higher-efficiency MREFs, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the direct final rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. This **SUPPLEMENTARY INFORMATION** section and the TSD for this direct final rule respond to those requirements.

Under section 205 of UMRA, DOE is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(m), this direct final rule establishes amended energy conservation standards for MREFs that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified, as required by 6295(o)(2)(A) and 6295(o)(3)(B). A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for this direct final rule.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Although this direct final rule would not have any impact on the autonomy or integrity of the family as an institution as defined, this rule could impact a family's well-being. When developing a Family Policymaking Assessment, agencies must assess whether: (1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

DOE has considered how the proposed benefits of this direct final rule compare to the possible financial impact on a family (the only factor listed that is relevant to this rule). As part of its rulemaking process, DOE must determine whether the energy conservation standards contained in this direct final rule are economically justified. As discussed in section V.C.1 of this document, DOE has determined that the standards are economically justified because the benefits to consumers far outweigh the costs to manufacturers. Families will also see LCC savings as a result of this direct final rule. Further, the standards will also result in climate and health benefits for families.

I. 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 rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

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

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this direct final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth amended energy conservation standards for MREFs, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this direct final rule.

L. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.[88] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve DOE's analyses. DOE is in the process of evaluating the resulting report.[89]

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this direct final rule prior to its effective date. The report will state that the Office of Information and Regulatory Affairs has determined that this action meets the criteria set forth in 5 U.S.C. 804(2).

VII. 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 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

Signing Authority

This document of the Department of Energy was signed on April 10, 2024, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 11, 2024.

Treena V. Garrett,

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

For the reasons set forth in the preamble, DOE amends part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.32 by revising paragraph (aa) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(aa) *Miscellaneous refrigeration products.* The energy standards as determined by the equations of the following table(s) shall be rounded off to the nearest kWh per year. If the equation calculation is halfway between the nearest two kWh per year values, the standard shall be rounded up to the higher of these values.

(1) *Coolers.* (i) Coolers manufactured on or after October 28, 2019, and before January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) Freestanding compact.	7.88AV + 155.8
(B) Freestanding.	7.88AV + 155.8
(C) Built-in compact.	7.88AV + 155.8
(D) Built-in.	7.88AV + 155.8

Note: AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.

(ii) Coolers manufactured on or after January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) Freestanding compact.	5.52AV + 109.1
(B) Freestanding.	5.52AV + 109.1
(C) Built-in compact.	5.52AV + 109.1
(D) Built-in.	6.30AV + 124.6

Note: AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.

(2) *Combination cooler refrigeration products.* (i) Combination cooler refrigeration products manufactured on or after October 28, 2019, and before January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) C–3A. Cooler with all-refrigerator—automatic defrost	4.57AV + 130.4
(B) C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	5.19AV + 147.8
(C) C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7
(D) C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8
(E) C–9I. Cooler with upright freezer with automatic defrost with an automatic icemaker	5.58AV + 231.7

[88] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at the following website: *energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed November 29, 2023).

[89] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards* (last accessed November 29, 2023).

Product class	AEU (kWh/yr)
(F) C–9I–BI. Built-in cooler with upright freezer with automatic defrost with an automatic icemaker	6.38AV + 252.8
(G) C–13A. Compact cooler with all-refrigerator—automatic defrost	5.93AV + 193.7
(H) C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	6.52AV + 213.1

Note: AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part.

(ii) Combination cooler refrigeration products manufactured on or after January 31, 2029, shall have an Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
(A) C–3A. Cooler with all-refrigerator—automatic defrost	4.11AV + 117.4
(B) C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	4.67AV + 133.0
(C) C–5–BI. Built-in cooler with refrigerator-freezer with automatic defrost with bottom-mounted freezer	5.47AV + 196.2 + 28I
(D) C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
(E) C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
(F) C–13A. Compact cooler with all-refrigerator—automatic defrost	4.74AV + 155.0
(G) C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	5.22AV + 170.5

Note: AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of this part. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.

* * * * *

[FR Doc. 2024–08001 Filed 5–6–24; 8:45 am]

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